

BUILDING ADJUDICATION IN VICTORIA
THE *BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF*
PAYMENT ACT 2002

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This paper has two interwoven themes. First, it intends to locate adjudication under the Victorian *Building and Construction Industry Security of Payment Act 2002* as a specific formulation of statutory adjudication that is one branch of ADR. Its role not just in securing a payment but also of achieving a resolution of the underlying dispute will be discussed. Secondly, the specific operation of the Victorian Statutory formulation of adjudication and the factors that would encourage a party to make use of the procedure will be discussed. For that part of this paper the device of pretending a client is being advised on whether or not to commence an adjudication will be used. When the enforceability of a determination might be challenged, claimable variations and excluded amounts will be touched on, but not covered in detail. The recent case of *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*,¹ a series of decisions by Justice Vickery made between 24 April and 25 September of this year will be referred to. That case is a signpost to how the new Technology Engineering Construction List, which commenced operation on 19 June 2009 in the Victorian Supreme Court, will treat challenges to determinations by adjudicators.

The Context of Adjudication, its origins and its place as an ADR process

When we speak of an adjudication in Victoria in a construction context, it is now taken for granted that we are speaking of the process of adjudication under the *Building and Construction Industry Security of Payment Act 2002*. The purpose of that Act is to provide a means by which a contractor can obtain payment of a progress claim. The vice it was directed to was recalcitrant principals or builders who failed to pay those further down the contractual line. The Act can be used by subcontractors

¹ *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156, [2009] VSC 339 and [2009] VSC 426

against builders, and by builders against owners. Only the party making a claim up the contractual line can start an adjudication under the Act.

Historically, however, adjudication had a much broader meaning, a meaning that put it more clearly as part of a range of processes that led to the resolution of disputes between parties.

Alternative Dispute Resolution is very much under focus at the moment both at the Federal Level and state level. ADR is now being consistently defined to include any determinative process outside of court proceedings.²

On 15 April 2009 the Deputy Premier and State Attorney General, the Honorable Rob Hulls, presented a paper to the Victorian Bar entitled *State Government Initiatives: Judge-led Mediation, the ADR Pledge and a new Courts Act*. His clearly stated intention is to ensure legal practitioners provide disputants with early advice on ADR alternatives. In fact, barristers and solicitors already have the obligation to advise clients on ADR under their respective practice rules; and the existence of the *Building and Construction Industry Security of Payment Act 2002* therefore creates a specific obligation to advise on the entitlement that Act provides, if applicable.

In the Attorney's speech he spoke of his experiences in Canada and Hong Kong and how impressed he was with the drop in litigation that has occurred in those jurisdictions as a result of ADR. As I listened to him, I recalled that the published UK experience of adjudication of construction disputes has been that it has resulted in a dramatic 80 % drop in litigation. In NSW, construction litigation of the final rights of the parties has also decreased dramatically, albeit at the cost of increased litigation concerning the adjudication process. Here in Victoria, on the other hand, adjudication remains relatively unused. Undoubtedly that is the natural consequence of our complex and difficult Act.

² See *Inquiry into Alternative Dispute Resolution and Restorative Justice*, Victorian Law Reform, May 2009 and *Alternative Dispute Resolution in the Civil Justice System*, National Alternative Dispute Resolution Advisory Council, March 2009

To understand adjudication as an ADR process we have to understand how it works in an overall sense. In a moment we will imagine a client who has come in for advice about whether to start the process or not. He won't be interested in UK legislation, but we have to recognise that what we have in Victoria is a very poor cousin to the UK Adjudication ADR process. As the Editor of the prestigious Australian Building and Construction Law Journal said in an editorial "This journal is neither the first nor the last to point out the manifold and manifest shortcomings of the legislation. ... The construction law community has, for some years, pointed to the English model as being better. With due respect to those responsible for the New South Wales legislation, there is room for improvement – a lot of room"³.

He was speaking about the significantly better NSW Act. There are currently ten times more adjudications in NSW than there are in Victoria.

In England prior to 1996 adjudication was a procedure that was included in a number of standard form contracts. It was a creature of contract and there was no legislation that required it or prescribed how it was to be performed. It was a contractually agreed means of obtaining a decision on a dispute between parties to a contract on an interim basis. Parties to contracts would subject themselves to the decision of an independent umpire that would stand as a binding decision but only until a later decision by a court or arbitrator replaced it. The Victorian Act is true to that concept. Section 47 provides that the Adjudicator's determination does not affect any rights the parties have under the contract. The Act is appropriately called stakeholder legislation. To the final arbiter of the parties' rights, be it in litigation, arbitration, or VCAT, the determination of the adjudicator has no binding effect. But money paid pursuant to the adjudicator's determination is taken into account in the final determination.

In Australia we are starting to see similar a similar trend in contracts that provide for expert determinations to stand as interim decisions pending a final resolution. But there is no reason such a decision needs to be made by an expert. A number of prominent building solicitors advocate including private adjudication clauses into

³ Editorial, BCL October 2005

major Australian building contracts. How contractual provisions that provide for adjudication might operate in parallel with the legislative regime which provides that parties can not contract out of that scheme and can not be modified⁴ remains to be seen.

Adjudication in a statutory framework commenced in the United Kingdom. In 1996 the English *Housing Grants, Construction and Regeneration Act* was passed and made it a requirement that all construction contracts contain a compliant adjudication procedure. If a construction contract in the UK does not contain a compliant adjudication provision, then the Act implies one into the contract.

Section 109 of the *Housing Grants, Construction and Regeneration Act* requires construction contracts to provide for adjudication of any dispute or difference between the parties. What can be adjudicated is **any** dispute, and the Adjudicator has to make a decision within 28 days. The parties can agree the Adjudicator, either party can start the adjudication, the parties can agree the procedures to be adopted and the Adjudicator determines the contractual position of the parties. All this is very different from the statutory process in Victoria. The NSW and Queensland Acts are similar to Victoria in structure and are therefore similarly different from the UK model. The model adopted in WA is closer to the UK model.⁵ Ordinarily in the UK a determination stands until litigation or arbitration, but the parties can, by prior agreement, agree that the determination is final.

In the UK the entire procedure is defined in a single section of the *Housing Grants, Construction and Regeneration Act*, s. 109. The actual procedure to be followed in the adjudication can either be prescribed in the contract, usually by incorporation by reference to a set of rules promulgated by an adjudication body, or the default rules referred by the Act apply. In Victoria our Act sets out the procedure which then references a set of regulations. The procedure is entirely imposed by legislation.

As an entirely separate matter, the *Housing Grants, Construction and Regeneration Act* provides that a party to a construction contract is entitled to periodic payments.

⁴ See s. 48 of the Act

⁵ Tasmania, South Australia and ACT have yet to introduce adjudication legislation

Like the Victorian Act, the parties can agree both the method of calculation of the amount, and timing of it.

So in the highly successful UK Act there are two elements. First there is an entitlement to have disputes or differences resolved on a quick and fast basis by a statutorily mandated or implied process of adjudication, and second there is an entitlement to progress payments.

Victoria has not followed that path. The *Victorian Building and Construction Industry Security of Payment Act 2002* commenced on 31 January 2003 and was based on the NSW Security of Payment Act of 1999. Even before the Victorian Act was introduced, the NSW Act had been substantially amended, and when the Victorian Act was later amended it introduced a variety of features that have made it considerably more complex and less attractive than its NSW sibling.

The second Victorian amendment, the *Building and Construction Industry Security of Payment (Amendment Act)* of 2006 commenced operation on 30 March 2007 and applies to contracts made after 30 March 2007. The transitional provisions are in s.53 of the Act.

This paper concerns the Act as it applies as amended to contracts made after 30 March 2007. If we are dealing with a contract made before then, we must be aware there are very significant differences with the Act as it now is.

The Victorian Act does not imply terms into the construction contract as the UK Act does. It provides an entirely separate mechanism of getting paid that sits apart from the contract. It picks up terms from the contract, but the Act does not operate in a contractual way. The Act does not modify the contract other than by rendering paid when paid provisions in a construction contract void. That provision is s. 13. No longer can a respondent to a claim rely on a contractual defense that it has not been paid by the party next up the contractual line.

So the starting point of the Victorian Act is not about providing an interim determination of a dispute under the contract. Its ambition is much less. It sets out

just to be a cash flow mechanism; to enable recovery of just that part of a progress claim made by a claimant that the Act gives an entitlement to. In practice, however, my experience is that it often leads to settlement, just as the UK experience has been.

The limited object of the Act is explained in s.3:

“to ensure that any person who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services”

Advising a client on whether to commence an Adjudication or not

Does the Act Apply?

So let us now imagine we are consulted by a claimant who wants to be paid more for a project than the respondent has been certifying. The claimant wants to understand the adjudication process because it understands it will have to make a significant time commitment to the process; albeit for a short period. It wants to secure cashflow, but its main objective is to settle the entire dispute.

The lawyer’s starting point is to assess whether the Act applies. Section 7 is headed “Application of the Act” and subsection (1) says the Act applies to a construction contract –it doesn’t matter if it is oral or in writing. However, there are exclusions as set out in ss.(2) and the Act does not apply to contracts that forms part of a loan agreement (ss.(2) (a)). It does not apply to domestic building contracts, as defined in the *Domestic Building Contracts Act 1995*, but it only doesn’t apply to some such contracts between an owner and a builder. Domestic Building Contracts not covered by the Act are where: “the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with that business”. Thus contracts between owners and builders for large domestic developments and any contract between a subcontractor and a builder, even if relating to a single house, are covered by the Security of Payment Act. The effect of this is that the ultimate resolution of the dispute might take place at VCAT after an adjudication.

We should note in passing subsection (c) of s.7. This provides that the Act does not apply to construction contracts where the consideration paid is calculated other than by reference to the value of the work carried out. If there is a complex payment arrangement we would need to consider this exclusion.

Section 7 is not the only hurdle a contract must jump for the Act to apply. It must be a construction contract, a term defined in s.4. Such a contract is defined by the work performed which must be “construction work”. If it is a supply contract, it must be for the supply of goods and services that relate to construction work.

Construction work is similarly a defined term. Section 5 defines construction work broadly. There are some explicit exclusions in section 5 (2) which have been copied from the UK Act. They include the drilling and extraction of oil or natural gas and underground tunneling or mining work.

If the Act applies, the lawyer’s next step should be to consider what other options there might be for securing fast payment. If the contract contains a certification process, an application for summary judgment might be a viable alternative process. The contract might contain an escalating negotiation process leading to expert determination or arbitration that might be activated. Adjudication is only one possibility. Further, just because an adjudication is commenced, the final determination process need not be put on hold. A client might be advised to commence the process for a final resolution of the dispute at the same time.

The overview of getting a determination:

In overview, the adjudication process starts with a payment claim that complies with the Act and which has been delivered under the Act. A large volume of the litigation in NSW and Queensland concern this aspect of the legislative regime. Whereas in the UK any dispute can be referred to adjudication, here the first gateway test is that there must be a document that correctly fits the statutory description of a payment claim.

In response the claimant can expect the respondent to deliver a payment schedule within 10 days or less if the contract so provides. Again, the Australian experience has

been of considerable court time spent deciding whether a document answering the statutory description of a payment schedule has or has not been delivered.

If the scheduled amount, that is the amount the respondent proposes to pay, is less than the claimed amount, that is the amount claimed in the payment claim, the claimant then has a statutory entitlement to make an adjudication application. However, the adjudication application can only be for the sums within the payment claim that the Act provides an entitlement to. It can not claim for what are defined as excluded amounts.

The adjudication application is made to an authorized nominating authority, known as an ANA, under the Act, who then selects and refers the matter to an individual Adjudicator. The parties can not agree an Adjudicator in advance or even when the dispute arises; a clear defect in the process if viewed as an ADR process. It is the claimant that always chooses the ANA when the dispute arises⁶ and some ANAs have built the reputation of being more claimant friendly than others and are selected on this basis. Perhaps other ANAs are preferred for the reputation of the reasoning ability of the panel adjudicators. The Adjudicator will advise the parties when he accepts the adjudication application and time runs from this event. Some ANAs interpose themselves between the parties and the Adjudicator for correspondence purposes, but in doing so, they act as the agent of the Adjudicator.

An Adjudicator must complete the adjudication determination within 10 business days of the communication of the acceptance of the adjudication application to the parties.⁷ Within that time the respondent will deliver the adjudication response, the Adjudicator will assess it to see if it contains new reason that were not in the payment schedule, and if there are, the claimant will be given a chance to respond to those new reasons. Also during the 10 days the Adjudicator might ask the parties to respond to questions he asks, or conduct a view or conduct a hearing. The whole process is very quick. In a major adjudication the Adjudicator should not accept the adjudication

⁶ If the Contract lists 3 or more ANAs the Claimant must choose one of them, otherwise it is free to choose any ANA. See s. 18 (4). In setting such a regime the Act seems to implicitly recognise specific ANAs may develop a reputation as pro respondents and be named in contracts for that reason.

⁷ See s.22(4). Subject to a possible extension of time by the Claimant (s.(22(4)(b))), or withholding the adjudication determination pending payment of fees (s.45(6)).

application unless he is able to devote virtually all of the 14 calendar days following acceptance to the development of a reasoned determination.

The Payment Claim:

So how do we advise the client? If the claimant is only concerned with cashflow, then the economics of obtaining the cashflow by an adjudication, together with a consideration of prospects, will be the framework for consideration. A commercial party might well come to the view it is cheaper and more certain to increase its borrowings and recover the cost of that borrowing, together with its other claims, in an expedited arbitration or in litigation at the end of the job. However, that might not be an option available or the claimant might see adjudication as a means to compel a recalcitrant principal to negotiate settlement of claims and avoiding a more fulsome determination process altogether.

The best way to start an adjudication where there is a growing dispute between the parties is to start to prepare the submission that will go with the adjudication application at the same time as the payment claim is written. That is, anticipate the payment schedule will substantially reject the claim made in the payment claim. There is no crystal ball gazing involved in making this prediction; typically a claim referred to adjudication will have been preceded by a number of payment claims responded to by the respondent with increasingly larger amounts in dispute.

Once the payment schedule is served in response to the payment claim, the claimant will only have 10 business days to make an adjudication application (s.18(3) (C)) and only what has been claimed in the payment claim can be claimed in the adjudication. Therefore it makes sense to start to prepare the submission that will go with the adjudication application at the same time as preparing the payment claim just as it makes sense to prepare a statement of claim with a writ in a court proceeding.

Section 9 of the Act provides the right to a progress payment. As I have already explained, in the UK Act this entitlement and the entitlement to adjudicate any dispute are two separate rights, but in Victoria the two concepts are merged. A claimant in Victoria has a right to adjudicate the claims that form part of its payment claim that

the Act provides can be adjudicated. A claimant can not claim in an adjudication all it might be entitled to claim under the contract in a progress claim.

Under the Act, on and after each reference date, a claimant can deliver a payment claim referable to that reference date. A reference date under the Act involves two concepts (s.9(2)). Firstly, it is a date on which a progress claim can be made under the Act. Secondly, it is the date on which the work is assessed for the purpose of determining the entitlement under the Act. Typically, but not always, they will be the same date, and the Act works on that assumption. If the contract specifies the reference date, that date applies. The Act contains a default position (s. 9(2) (b)) that applies if the contract does not contain an express provision providing for reference dates at described intervals. The Act also provides for the case when the work on site has been completed or has stopped (s. 9 (d)).

A payment claim can include any claim under the contract, and they typically do. The formal requirements for a payment claim are set out in s. 14 of the Act. As referred to above, there is a long line of cases concerning challenges to adjudicators' jurisdiction on the basis the payment claim was invalid, didn't relate to a particular reference date or that two payment claims were delivered in respect of the same reference date.⁸ The requirements in s. 14 must be satisfied. Most importantly, a payment claim must identify the construction work to which it relates (s.14(2)(c)), be endorsed as a payment claim under the Act (s.14(2) (e)) and there must be only one payment claim in respect of one reference date (s.14(8)). Later payment claims can include all amounts claimed in the previous claims, to the extent they have not been paid, but it is wise to ensure there is some difference between a later payment claim and an earlier one to avoid the argument that two payment claims have been delivered in respect of the same reference date.

A payment claim must be served (s.14(1)). Section 50 deals with how service is effected. Practitioners involved in adjudications should be very familiar with s.50 because the Act contains such strict time limits. However, not all provisions in the Act

⁸ Challenges to the Adjudicator's jurisdiction make up the bulk of the 230 superior court decisions so far in Australia. This can be compared to the adjudication process in the UK or the typical arbitration process in Australia where *any dispute or difference* can be referred and challenges to jurisdiction are therefore rare.

speak of service as being required; others speak of delivery or receipt of documents. Most importantly email is not service, but it is delivery.⁹ Faxes received after 4.00 pm are taken to have been received the following day.

The Payment Schedule

A payment schedule can and should address all claims made in the payment claim. A payment schedule must comply with the requirements in s. 15 or arguments that no payment schedule has been delivered can be made and the consequences of s. 16 will apply. The payment schedule should raise any allegation the payment claim is invalid under the Act that might later be made (notwithstanding that does not affect its validity under the contract), for example because it relates to a reference date to which an earlier claim has been delivered, or the entitlement to raise the argument later may be lost.¹⁰

The Adjudication Application

The adjudication application should include a submission and be drafted by lawyers. What can or should be put into the adjudication application informs the assessment of whether the adjudication process is useful in a particular case or not. For example, if there is significant dispute about whether or not work of very significant cost is or is not a change in the scope of the work under the contract, that is whether or not it is a variation, that is not something that can be adjudicated under the Victorian Act. Whether the work is or is not a variation, the claim is for an “excluded amount” and can not be pursued in the adjudication. Excluded amounts are discussed a little further below, but for now the point is that in deciding whether or not to commence the adjudication process at all, consideration has to be given to whether or not the substantial claims made can actually be decided by the Adjudicator.

A much better ADR process would have enabled had all claims to have been made and adjudicated.

⁹ See *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*, *ibid*

¹⁰ See *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1 – followed in the County Court, in *Age Old Builders v Arvanitis* [2006] VCC 1827.

Timing and the Adjudication Process

But let us return to the conference room with our fictitious client. He wants to know whether to start the adjudication process or not. He can be told that in addition to the value of the speed of the process to both parties, one very significant advantage to the claimant is the particular way time runs under the Act.

Under the Act, the respondent only has 2 business days from receiving the Adjudicator's acceptance of the adjudication application or 5 days from receiving a copy of the adjudication application from the claimant, whichever expires last, in which to lodge its adjudication response (s. 21).

Let us consider this in the way we might discuss it in conference. Say, for example, we intend to deliver a payment claim, and we anticipate we will receive a payment schedule. We, as claimant, then have 10 days to deliver the adjudication application and can deliver it any time within those ten days. Say we deliver it to the ANA at 3pm on a Friday, and, at the same time we deliver a copy to the respondent. The adjudication application will include a significant and carefully prepared submission. As referred to above, the best practice is to at least start the preparation of the adjudication application at the time of preparing the payment claim if it is anticipated an adjudication will eventuate. The best submissions are signed both by legal counsel and by a representative of the client with knowledge of the facts as a statutory declaration so that the adjudicator has some evidence of weight of the factual matters contained.¹¹ Submissions of between 20 to 40 pages are not uncommon, and are often supported by folders of spreadsheets, plans and supporting documents prepared on a claim by claim basis.¹²

Having received the adjudication application (preferably with the submission and all supporting documents) late on a Friday afternoon we might expect the respondent to make an appointment to see its solicitor first thing Monday. Work might start in

¹¹ The significance and accuracy of the statutory declaration in a binding determination in litigation that might follow should be carefully considered. Also note that it appears in *Hickory Developments* [2009] VSC 426 His Honour considered a submission made to an adjudicator was itself evidence. See [228], [233], [235].

¹² See *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*, *ibid*, for a discussion concerning whether it is strictly necessary to deliver all document with the adjudication application.

earnest on the adjudication response on Tuesday by taking instructions, briefing counsel and so on. The adjudication response will almost certainly have to be delivered on Friday, five business days after the adjudication application was delivered.

In the meantime, the ANA who received the adjudication application will have contacted a number of Adjudicators to find out who has the time to accept the application. This work is likely to start on the Friday afternoon it received the application, and almost certainly by the close of business Monday an Adjudicator should have been selected and the documents delivered to him. The ANA has the obligation to refer the adjudication application as soon as practicable s.18(7). In all likelihood the Adjudicator will accept the nomination on Tuesday or Wednesday by sending a letter to the parties setting out his fees and so on. The adjudication response must be delivered by the later of 2 business days from the Adjudicator's acceptance or 5 business days of delivery of the adjudication application; so it is likely that it must be delivered by the Friday.

We can see by this example a well prepared adjudication application is an ambush encouraged by the legislation. The logic of such a harsh time line against the respondent is that the respondent should always be ready to, and be able to, defend its decision not to pay an amount claimed in a payment claim whenever it is put to the test.

The respondent must get the adjudication response to the Adjudicator within the time the Act prescribed. If it does not, the adjudication response is not properly an adjudication response within the Act and it will probably not be considered by the adjudicator.¹³ It should respond to all of the material delivered with the adjudication application and raise any jurisdictional issues.

The Claimant's Reply

¹³ The Adjudicator might, however, ask for further submissions under s.22(5), and receive the out of time adjudication response as such a submission and give time to the claimant to deliver a reply.

What happens next? Before the Act was amended there was a line of cases that stood for the proposition that an adjudication response could not include a reason for refusing a payment claim a reason that was not in the payment schedule. That defect in the old Act has been addressed in Victoria by s 21 (2B). What that section says is that the Adjudicator has to review the adjudication response and compare the reasons in it with the payment schedule:

“If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant:

- (a) setting out those reasons; and
- (b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.”

So going back to the sort of advice that might be given to a claimant considering embarking on the process of adjudication, the time line might work out like this: We (the claimant) deliver the adjudication application on a Friday, say it is the first of the month. The respondent will probably have to respond by the following Friday – the 8th.

The Adjudicator will work over the next weekend. He only has 10 business days from accepting an adjudication application to prepare the reasoned determination. Say he accepts the application on Wednesday the 6th, then he has to deliver his determination on Thursday the 21st. He will be determined to meet that time line – because if he doesn’t, he is not entitled to his fee (s. 45 (5)). The claimant, can unilaterally extend the time for the determination, but the respondent can’t (s. 22 (4) (b)). So the Adjudicator is highly likely to work over the weekend and what he will do is to compare the adjudication response with the payment schedule. By Monday or at least the Tuesday we can expect the Adjudicator will have given the claimant a Notice under s. 21 (2B) advising what the new reasons are and giving 2 days to respond.

However, we, the claimant, will have had the adjudication response since the Friday, so we will work on a reply over the weekend. By the time the claimant has to deliver the reply, expected to be the Wednesday or Thursday following, we will have

prepared a detailed response to whatever the adjudication response throws up as new reasons for refusing amount claimed in the payment claim that are pressed in the adjudication application. Further, although Section 21 (2B) suggests the claimant is only entitled to respond to what the adjudicator identifies as new reasons, claimants commonly treat the section as giving a general right of reply. There is no apparent risk in a claimant replying generally, and it is a matter for the adjudicator to sort out what he will and will not have regard to in a general reply.

The Act does not then provide a right of reply to the respondent. It does not require the respondent to even be given a copy of the claimant's reply; although in my view natural justice requires this.

Submissions at any time? Adjudicator's questions, views and conferences?

Let us pause there for a moment and consider whether parties can make submissions at any time as part of the adjudication process. s.23 (2) of the Act seems to contain a serious limit on what the adjudicator can consider in making his determination. The adjudicator can not inform himself as he sees fit. He can only determine the application on what is before him, and in respect of submissions, they must be "duly made". However, His Honour's reasons in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* suggest that a party can make submissions at any time to the Adjudicator in an appropriate case, which the Adjudicator can consider.¹⁴ This might well change the landscape of how adjudications are performed in the future in Victoria.

In any event, our fictitious claimant client can be told that there is the real possibility that the Adjudicator will ask questions (s. 22 (5)) that require further submissions. In my experience neither a conference nor a view has been held in Victoria, but the Act entitles the Adjudicator to conduct them. Recently there has been more encouragement for a limited time conference to be convened than there has been in the past. A conference can permit an Adjudicator to delve a little more deeply into the merits in a way the procedure in s.22(5) can not, and in a shorter time.

¹⁴ See *Hickory Developments, ibid, at paragraphs 141 and 142*

Costs of the Adjudication:

Some adjudicators require fees to be paid into trust before commencing any substantial work, others do not. All Adjudicators require payment to be made before the adjudication determination is released. An Adjudicator is entitled to withhold the adjudication determination until paid (s. 45 (6)). The presumption in the Act is that each party will pay half the Adjudicator's fees, but that is a matter the Adjudicator will determine. Each party must pay its own costs of the adjudication. One party can pay the all of the fee of the Adjudicator and then recover the share paid on behalf of the other party.

The amount an Adjudicator charges ordinarily depends on the number of hours worked. The fee might be less than a thousand dollars in a simple case or around \$35,000 in a complex case. The 10 business days time line between acceptance and determination has the effect of limiting the fee. My experience is claims around the \$200,000 mark incur Adjudicator's fees around the \$12,000 mark, typically split equally between the parties. The cost of the adjudication process to a party is mainly the cost of preparing the submissions. That is work that can largely be done by the parties themselves and will mostly be needed for any dispute resolution process adopted.

Under the Act what the parties get from the process is an adjudication determination that includes an adjudicated amount, the date on which that amount was (or will be) payable and the rate of interest payable (s. 23). The parties will get reasons, which if the Adjudicator has done his job well, will be detailed and deal with each element of the claim and response. It will be an independent evaluation provisionally binding on the parties until it is replaced with a final determination.

Enforcement:

Enforcement is the next step and practitioners need to have in mind where their claimant client is aiming to end up if it starts the adjudication process.

Once an adjudication determination has been made, either the claimant or the respondent can make an application for review by a review Adjudicator (s. 28B and 28 C). The review can only be based on the issue of whether an amount is an excluded amount or not and can only be made if the adjudication determination is for more than \$100,000 (s.28B and C).

More usefully, the Act provides payment of an adjudicated amount has to be made within 5 days (s.28M) and, if it is not paid, the claimant can suspend work. It can also ask for an adjudication certificate from the ANA which can then be used in a court to obtain the amount on the certificate as a debt due (s. 28R). At the same time the claimant can jump up the contractual chain and attempt to recover the adjudicated amount from the next party up the contractual chain (see Division 4 starting at s 29A).

Prior to the case of *Brodyn Pty Limited t/as Time and Cost Quality v Philip Davenport*¹⁵, it had been thought that determinations could be reviewed on an application for certiorari for non jurisdictional error on the face of the award. But in that case the NSW Supreme Court held that as long as the basic and essential requirements laid down by the Act had been complied with, the determination was not open to challenge if there had been no denial of natural justice (within the fairly limited requirement of the Act). The Court of Appeal in that case identified a number of essential requirements for an adjudication determination to valid that have been added to and reviewed over the years in the NSW courts.¹⁶

However, the Victorian Act has diverged from the NSW Act and Victoria is not NSW. In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*,¹⁷ the Victorian Supreme Court has held *Brodyn* is not good law in Victoria. Nevertheless, the reasoning contained in the judgment suggests the new Victorian Supreme Technology Engineering Construction List (the TEC List)¹⁸ will not be easily persuaded to strike down adjudicator's determinations. Justice Vickery's judgment is both a useful review of the Act and a welcome statement of the tough approach the Victorian

¹⁵ [2004]NSWCA 394

¹⁶ See the Judgement of Hodgson JA with whom Mason P and Giles JA agreed at [51] – [59]

¹⁷ [2009] VSC 426 at [102]

¹⁸ The successor to the Building List as of 19 June 2009

Supreme Court will take to challenges based on overly technical points.¹⁹ His Honour considered grounds of review of Jurisdictional Error,²⁰ Error on the Face of the Record,²¹ Duty of the Adjudicator to Provide Procedural Fairness,²² and the approach the Court will take on Judicial review.²³ It remains the case in Victoria that an Adjudicator is entitled to make wrong findings of fact that nevertheless bind the parties in the interim way the Act provides.²⁴ In the Federal Court, Finkelstein J has indicated a similar tough approach and supported adjudication²⁵ and in the County Court, Judge Shelton, the Judge in charge of the Building List, has taken a similarly robust approach for a long time now.

So in summary, but for the specific minefield of excluded amounts and non claimable variations that we will come to in a moment, the chances of being able to obtain a judgment enforcing an Adjudicator's determination in Victoria seem good.

Excluded Amounts, Class 1 and Class 2 Variations:

The adjudication determination won't be the end of litigation unless the underlying dispute is settled. Only a provisionally binding determination is obtained. The adjudication determination should improve cashflow,²⁶ and a decision on one payment claim is ordinarily binding in later adjudications on following payment claims (s.23 (4)), but the underlying dispute will, if not settled, have to go to a dispute resolution process that is finally binding (s.47).

However, my experience echoes both the UK and the NSW experience. Once a party gets to the position where it has an adjudication determination in its favor and a current entitlement to be paid, serious discussion about settling the entire case commonly occur and are successful. (It should come as no surprise that after His

¹⁹ *ibid*, [112]

²⁰ *ibid*, [103] to [117]

²¹ *ibid*, [118] to [126]

²² *ibid*, [127] to [144]

²³ *ibid*, [145] to [149]

²⁴ *ibid*, [236], [283]

²⁵ See *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [10] – [11]

²⁶ Note, however, that the ability to challenge a statutory demand made on the basis of a judgment given on an adjudication determination by counterclaim is not settled law.

Honour's three decisions in the *Grocon v Planit Cocciardi* case concerning the *interim* rights of the parties, they made a commercial settlement of their *final* rights.)

If the Adjudicator has performed properly, the parties should have a well reasoned assessment, albeit with little factual evidence, no discovery having occurred, and usually the briefest expert reports in the form of letters having been put before him. How well the rough justice of the adjudication process measures up and compares with the cost and expected result of the more fulsome Arbitration or Litigation processes will be assessed and discussed by the parties as part of the settlement discussion.

It is here, at this stage of the adjudication process, that the fundamental defect in the Victorian *Building and Construction Industry Security of Payment Act 2002* as an ADR process is clearest. What the parties need at this point is a provisionally binding decision on the dispute between them that informs their settlement discussion. That is what you get in the UK, but it is not what you get Victoria.

Firstly, this is not what the parties get because the Act contains complex gateways for what is and is not a valid claim under the Act that establishes the Adjudicator's jurisdiction. The complexity of the jurisdictional issues is reflected not just in the high volume of court litigation concerning jurisdiction, but also in the considerable proportion of the adjudicator's reasons which commonly address the issue. That reasoning provides no help to the parties to understand their respective contractual positions.

Secondly, and even more fundamentally, the contractual entitlement to a progress claim and the statutory entitlement to be paid parts of payment claim are two different things.

To understand this last point we need to go back and look at what the Adjudicator has to decide when presented with a payment claim. Section 10 provides that if the contract defines how a payment claim is to be assessed, then that is how the claim is to be assessed. If not, the Adjudicator's assessment will be his assessment of the value

of the construction work carried out. So far so good – the contractual position and the statutory entitlement look similar.

However, the choke on the assessment is that only *claimable variations* can be included in the assessment (s.10 (2) and (3)) and the assessment can not include *excluded amounts*. *Claimable variations* can either be Class 1 or Class 2 variations and are defined in s.10A of the Act. It is these sections that add immensely to the complexity of the Victorian Act.

The key to understanding the way the Act works is to look at s.10B(2) first. The Act says an Adjudicator can not take into account in his assessment variations that are not claimable. Putting it in better English, the Adjudicator can consider *claimable variations*. The Adjudicator can not consider claims for latent conditions, time related or cost of changes in regulatory requirements **unless** they are *claimable variations*. If they are *claimable variations*, then they can be considered.

A *variation* is defined in the Act as a change in the scope of the work. It must be a Class 1 or a Class 2 variation to be a *claimable variation*.

Class 1 variations are always claimable, so it is, of course, preferable to categorize all variations claimed as Class 1 if possible.

Class 2 variations can be very roughly described as variations which are either disputed as to whether or not the work is a variation, or variations for which there is a dispute about the method of calculating the cost of the variation. That rough description describes variations that comply with ss.10A (3) (a) to (c). However, variations that comply with ss.10A (3)(a) to (c) are not Class 2 variations and claimable unless they **also** comply with s.10A(3)(d).

Section 10A(3)(d), read with s.10A (4), is a most bizarre piece of legislative drafting. For a variation to comply with s.10A(3)(d) it must either be within s.10A(3)(d)(i) or (ii). However, the figure of \$5,000,000 that appears in both s.10A(3)(d)(i) and (ii) reduces to \$150,000 if more than 10% of the original contract sum is claimed as a Class 2 variation.

It is convenient to look at s.10A(3)(d) (ii) first. If the original contract sum exceeds \$5,000,000 and does not contain a “method of resolving disputes”, a phrase yet to be the subject of judicial comment, then any variation that complies with ss.10A(3)(a) to (c) will also comply with s.10A(3)(d) (ii) and be a Class 2 variation and so be claimable in the adjudication.

Further, if the contract does not contain a “method of resolving disputes” and more than 10% of the original contract sum is claimed for variations that comply with ss.10A(3)(a) to (c), then as long as the original contract sum exceeds \$150,000, the variation will comply with s.10A(3)(d) (ii) and be a Class 2 variation and be claimable in the adjudication.

Then, turn to s.10A(3)(d) (i). If the contract does contain a method of resolving disputes then if the original contract sum is \$150,000 or less, variations that comply ss.10A(3)(a) to (c) will always comply with 10A(3)(d)(i) and be Class 2 variation and be claimable in the adjudication.

However, if the contract does contain a method of resolving disputes, and the original contract sum is more than \$150,000, then variations that comply ss.10A(3)(a) to (c) will only comply with s.10A(3)(d) (i) and be Class 2 variation if the total amount claimed for Class 2 variations is less than 10% of the original contract sum. Once the 10% limit has been reached, it seems no further Class 2 variations can be claimed.²⁷

Class 1 variations are sometimes described by commentators as agreed variations and Class 2 as disputed variations. These descriptions are not accurate and can lead a practitioner into error. Most disputes about variations are, in my experience, about their valuation, not whether they are or are not changes to the scope of the works. One specific possibility of a Class 1 variation, found in ss.10A(2) (e), is where the parties agree there has been a change in scope of the work, and have agreed a method of valuation of the variation, but they do not agree on the valuation that method

²⁷ This interpretation is consistent with the worked example provided under s.10A(4) and the preferable reading of s10A(4), however, alternative interpretations have been suggested that see *all* claims for Class 2 Variations rejected once the 10% limit is reached.

produces. Typical construction contracts always contain an agreed method for valuing variations therefore many variations that would, in common language, be referred to as *disputed* variations are under the Act, Class 1 variations.

The bottom line is this: s.10A of the Act is not actually as limiting as it first looks, but it has to be understood and dealt with in the submission that accompanies the adjudication application. The wise claimant identifies which of the variations it claims in the payment claim fall within which class of claimable variation the Act permits, and provides reasons for that in its submission. A variations previously certified in an earlier payment schedule is always a Class 1 variations, unless challenged in an arbitration.

For all building contracts the dispute resolution clause has to be carefully examined to assess the way the Act will apply to Class 2 variations. For building contracts over \$150,000 that do contain a method of resolving disputes, careful regard must be had to the quantum of Class 2 variations claimed in an adjudication. Class 2 variation claims once the 10% limit is reached are unlikely to be accepted by an Adjudicator. One possibility is it to identify such claims and make it clear they are claimed before the Adjudicator only as Class 1 Variations, but abandoned (for the purpose of the Adjudication) if unsuccessful on this basis. There is no reason claims made in a payment claim have to be pressed in the adjudication; the Act implicitly accepts that the entitlement to be paid claims in an adjudication will be a lesser subset of the claims validly pursued under the terms of the contract. Claims made in the payment claim might simply be identified, the contractual entitlement asserted, and the claim clearly identified as not being pressed in the adjudication.

Similarly, in respect of claims for latent conditions, time related costs or changes to regulatory requirements that can not be characterised as claimable variations, these claims should be identified in the adjudication application, the contractual right asserted, but the claim not pressed in the adjudication.

Conclusion

On the one hand adjudication is a fast, efficient means of getting a decision that will secure cashflow and should, like it does in the UK lead to a resolution of the whole dispute. There litigation of building disputes has fallen by a remarkable 80 %, replaced by an equal number of adjudications. There adjudication is the key that unlocks the dispute. In Victoria we are bedeviled with trying to fit the real dispute between the parties into the narrow gateway the legislature had provided in the statutory entitlement. But it's not all bad. The gateway is not as narrow as it might appear at first and there are real procedural advantages in the Act for the claimant. Adjudication under the Victorian Act both secures cashflow and commonly leads to a resolution of the entire dispute.

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