

The recent case of *Oasis Newman Operations Pty Ltd v Hockley* [2023] WASC 79 provides some important takeaways regarding the preconditions of an adjudicator's jurisdiction and the repercussions of avoiding service.

This was a case of judicial review by the Supreme Court of Western Australia of a decision of an adjudicator under the Construction Contracts (Former Provisions) Act 2004 (WA) (the Act) that highlights:

- The difficulties faced in an adjudication where there is no formal, signed contract
- The significance of an error by the adjudicator in determining the date of the payment dispute
- The dim view a court will take where, at the adjudication stage, a party is seeking to avoid the operation of the Act

The adjudication applicant, Oasis Newman Operations Pty Ltd (Oasis) had engaged a contractor (Mr van der Merwe) to do construction work on a motel Oasis owned and operated in the Pilbara town of Newman.

The engagement with Mr van der Merwe was largely through verbal agreement and exchanges of emails (Agreement). There was no signed, formal written contract.

Mr van der Merwe performed electrical work under the Agreement and a payment dispute arose over various invoices that were unpaid. Mr van der Merwe, who was unrepresented, made an adjudication application (Application) to recover payment for the invoices.

The adjudicator found there was a construction contract and made a determination in favour of Mr van der Merwe in respect of part of the payment dispute (Determination).

Oasis applied to the court to set aside the Determination on the basis that the adjudicator acted beyond jurisdiction because:

- The Application did not set out the details or attach the construction contract that was the subject of the Application, or the details of the construction contract in the Application were inaccurate
- The Application was not served on Oasis and the adjudicator within the required timeframe

All of Oasis' grounds for review in their judicial review application were dismissed by the court (Solomon J).

## Requirement to Provide the Contract With the Adjudication Application

Due to the lack of a signed, written contract, Oasis asserted to the court that the materials provided to the adjudicator in the Application did not include any construction contract or relevant extracts from it as required by the Act (section 26(2)(b)(i)).

Solomon J held that an adjudicator is to determine their jurisdiction pursuant to s26(2)(b)(i) of the Act "as a matter of form" by objectively determining whether there are sufficient materials that encompass a construction contract or relevant extracts of it. The initial assessment of this precondition to a valid Application was held to be distinct from the merits review of the substance of the Application.

The result is that even if the adjudicator later forms a different view as to what constitutes the construction contract during their substantive assessment of the Application, the adjudicator is not then deprived of their jurisdiction to make the Determination.

But where, upon a substantive review of the materials, the adjudicator decides there is, in fact, no construction contract at all, the adjudicator would be deprived of jurisdiction and must dismiss the adjudication application.

After much argument before the court (and originally before the adjudicator) as to whether the materials Mr van der Merwe included in the Application constituted a construction contract or extracts of it, Solomon J held, on an objective basis, that those materials did constitute the construction contract, and found the adjudicator did not err in exercising jurisdiction.

## Time of Service of Adjudication Application

A major issue before the court was whether the Application was served within the required 90 business day period after the payment dispute arose (pursuant to s 26(1) of the Act). If the answer to this issue was negative, the adjudicator should have dismissed the Application.

Solomon J observed that if the Application contained materials that objectively proved the Application was made within 90 business days of the payment dispute, then the adjudicator will not have erred in exercising jurisdiction.

The learned judge held that the adjudicator was plainly wrong as to the date of the payment dispute. But, despite that obvious error, there were materials before the adjudicator and the court allowing for an objective, alternative determination of the date of the payment dispute. On that objective determination, the Application was served within time.

## Avoidance of Service and Discretionary Relief

Although eventually conceding the point during the hearing in court, in the Adjudication (and in its earlier submissions to the court), Oasis denied having been served with the Application.

This denial was made, despite Mr van der Merwe demonstrating that he had served the Application by post to three Oasis addresses, including the main business office and the registered office, and had hand-delivered it to an employee of Oasis at its business address.

Oasis further claimed, in affidavit evidence, that it could not respond to the Application because, in fact, "the documents were never seen by anyone with any authority to do anything about them at all."

However, the adjudicator and the court concluded that Oasis had taken conscious measures to avoid service of the Application.

Mr van der Merwe argued in court that, even if the court found merit in Oasis' grounds for review, the court should exercise its discretion to decline to set aside the Determination due to Oasis' avoidance behaviour.

On an application for judicial review, the court retains a discretion to deny an applicant relief where the applicant lacks "clean hands" (that is, has acted in bad faith).

Solomon J decided that he would have exercised his discretion to deny Oasis relief, even if their judicial review application had any merit.

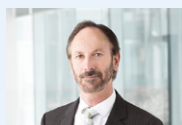
In particular, Solomon J described Oasis' behaviour as "high handed, if not contemptuous" of the adjudication process in tactically attempting to escape the operation of the Act by avoiding service, not engaging in the adjudication process by providing its own version of events, and arguing that its ignorance of the content of the Application caused it prejudice.

His Honour was clearly bemused by the actions of Oasis in seeking the protection of the court pursuant to the very same legislation it had earlier sought to avoid.

In the words of Solomon J, the Oasis contention that the adjudicator lacked jurisdiction because the correct documents were not provided to the adjudicator was "the embodiment of chutzpah".

Thus, the court's overriding discretion should be kept in mind by applicants for judicial review, especially where the applicant may not be coming to court "with clean hands" by reason of having taken earlier steps to avoid the adjudication process or the operation of the Act.

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