

Introduction

Two recent decisions of the Supreme Court of Western Australia could significantly alter the process of adjudication under the *Construction Contracts Act 2004* (WA) (Act).

The decisions are those of Hon. Justice Archer in *Salini-Impregilo S.P.A. v Francis* [2020] WASC 72 (*Salini*) and *Sandvik Mining and Construction Australia Pty Ltd v Fisher [No 2]* [2020] WASC 123 (*Sandvik*).

The Court in *Salini*, clarified the meaning of “simultaneous adjudication”, narrowed the definition of an adjudicator’s “determination” and applied a limited form of issue estoppel in adjudications in Western Australia.

Subsequently, Her Honour in *Sandvik* confirmed that it is possible to bring two or more applications for adjudication for different line items within the same progress claim.

What Constitutes Simultaneous Adjudication?

In *Salini*, the Court held that simultaneous adjudication occurs where an adjudicator adjudicates a dispute during a period that overlaps the adjudication of another dispute. Significantly, the Court confined the meaning of “adjudicating” to “evaluating and determining the merits of a dispute.”¹

For the purposes of the Act, administrative tasks are not considered to be evaluative work and include:

- Seeking an extension of time
- Enquiring as to whether parties would consent to simultaneous adjudications
- Contemplating an exercise of discretion
- Seeking a deposit for his or her anticipated costs of the adjudication
- Making a decision as to whether the application must be dismissed pursuant to section 31(2)(a) of the Act, such as on certain jurisdictional grounds or because of complexity or insufficient time

An adjudication will cease when the adjudicator stops evaluating the merits, which may occur:

- When the adjudicator makes a determination
- Where the evaluator stops evaluating before the prescribed time ends
- If the prescribed time for making a determination elapses

While any evaluation will be entirely fact dependent, an adjudicator is considered to be “adjudicating” a dispute from the time at which he or she commences an evaluation of the merits of a dispute, up until the point they make a decision on the merits.² Accordingly, an adjudicator will be “adjudicating” two disputes simultaneously in circumstances where there is an overlap in the periods of merit evaluation.

The Definition of Determination

Pursuant to section 31(2)(b) of the Act, the appointed adjudicator must determine whether any party to the dispute is liable to make payment, or to return any security.

To that end, the Hon. Justice Archer found that a determination does not include determining liability to pay the adjudicator’s fees under sections 34(2) and 44(10) of the Act, and that the written record required under section 36 of the Act is not the “determination”. The written record is to be considered merely a document that evidences or records the adjudicator’s determination and other information required by section 36.³ On that basis, any alterations to the written reasons will not constitute a change to the “determination”. Therefore, it is possible that an adjudicator could alter the reasons for their determination after the time in which they have notified the parties of the result of the determination.

Introduction of Adjudication Estoppel

The Court also held that a limited form of adjudication estoppel applies in circumstances where there are two or more adjudications between the same parties.⁴

The estoppel operates to prevent the re-agitation of an issue that was fundamental to the assessment of the liability to pay and the quantum of the amount found to be payable under section 32(2)(b) in a previous adjudication.⁵ Therefore, an adjudication determination is conclusive in the sense that, once a payment dispute has been determined, it cannot be the subject of further adjudication. However, this estoppel does not extend to subsequent civil proceedings.

This development aligns the West Coast Model more closely with the approach taken by the Eastern States where a party to adjudications can be estopped from disputing in a later adjudication, a fact that has been determined in an earlier adjudication.⁶ Notably, this only applies to a fact that is fundamental to the decision arrived at or was “legally indispensable to the conclusion”⁷

² *Ibid.*, [106].

³ *Ibid.*, [177].

⁴ *Ibid.*, [388].

⁵ *Ibid.*, [389].

⁶ *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69, [67]-[72].

⁷ *Modscape Pty Ltd v Francis* [2017] TASSC 55, [4]-[5].

¹ *Salini* at [88].

Multiple Payment Claims

In *Sandvik*, Her Honour found that the Act does not prevent a payment dispute being brought to adjudication where one or more items in dispute under the same payment claim have already been the subject of adjudication. While the Act prevents multiple determinations of the same payment dispute, it does not prevent multiple determinations of different payment disputes in relation to different progress claims or of different payment disputes arising from the same progress claim, where the principal seeks an adjudication of the merits of a counterclaim.⁸

A single progress claim may include multiple items, which, in theory, could be the subject of dispute.⁹ Each disputed item will be a “payment claim” for the purposes of any “payment dispute”. Additionally, disputed items in a progress claim, which are related, can be grouped into a single application. Each of these separate groups will be the “payment claim” that may give rise to a “payment dispute”.¹⁰

However, any such application must still comply with requirements in the Act. For example, each application must be made within the time limit provided and if multiple applications are to be adjudicated simultaneously by the same adjudicator, the preconditions to simultaneous adjudication must be met.

Key Takeaways

Firstly, *Salini* has limited the meaning of “adjudication” to evaluating and determining the merits of a dispute. This definition does not include administrative tasks. As a result, an adjudicator may begin adjudicating another dispute or amend their reasoning for a determination in circumstances where they have stopped evaluating the merits but are still engaged in administrative activities.

Secondly, *Salini* has also narrowed the definition of what constitutes a “determination”, which may give an adjudicator scope to provide reasons after the prescribed time limit. The adjudicator need only inform the parties of his or her determination and they do not need to provide the parties with the reasons or decide who is liable to pay the adjudicator’s fees, within the prescribed time period.

Thirdly, *Salini* has applied “adjudication estoppel” to adjudications in Western Australia. Parties to adjudications should be mindful of the impact an adjudicator’s prior determination of a fundamental fact may have on subsequent adjudications.

Fourthly, the *Sandvik* decision is to the effect that multiple adjudication applications under the same progress claim may be brought where they involve distinct and previously un-adjudicated items. Therefore, an adjudicator has the power to make a decision about items in a progress claim where another adjudicator has already made a decision relating to separately disputed items under the same progress claim.

The decision in *Salini* is currently subject to appeal.

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⁸ *Sandvik* at [124].

⁹ *Ibid*, [126].

¹⁰ *Ibid*, [126].