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Bulletin – Recent Developments in the Law – Possibility of Adjudicator Eligibility in NSW being Challenged - Dealing with the legal challenges to adjudicator eligibility.

The spectre of the possibility of an adjudicator's eligibility in NSW being challenged in court is now a reality. This paper discusses some basic issues associated with dealing with the legal challenges to adjudicator eligibility.

The Legislation

Section 18 of the Building and Construction Industry Security of Payment Act 1999 (**Act**) foresaw the eventuality of eligibility criteria for adjudicators being legislated by way of regulations.

18 ELIGIBILITY CRITERIA FOR ADJUDICATORS

(1) A person is eligible to be an adjudicator in relation to a construction contract--
(a) if the person is a natural person, and
(b) if the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract--
(a) if the person is a party to the contract, or
(b) in such circumstances as may be prescribed by the regulations for the purposes of this section.

Clause 19 of the Building and Construction Industry Security of Payment Regulation 2020 (**Regulations**) commenced on 1 September 2020, which relevantly provides:

19 ADJUDICATOR ELIGIBILITY

(1) For the purposes of section 18(1)(b) of the Act, a person is eligible to be an adjudicator in relation to a construction contract if the person has—

> *(a) a degree or diploma in architecture, building surveying, quantity surveying, building and construction, construction management, project management, engineering or law conferred by an Australian or foreign university or tertiary institution and at least 5 years of relevant experience, or*
>
> *(b) at least 10 years of relevant experience.*

(2) For the purposes of section 18(2)(b) of the Act, a person is not eligible to be an adjudicator in relation to a particular construction contract if--

> *(a) the person has not completed the required continuing professional development, or*
>
> *(b) a reasonable person would conclude the person has an actual or perceived conflict or would not adjudicate impartially.*

(3) Subclause (2)(a) does not apply until 1 September 2021.

(4) In this clause--

"relevant experience" means experience in--

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(a) the management and administration of construction contracts, or

(b) the resolution of disputes in connection with construction contracts.

"required continuing professional development" means the continuing professional development required to be completed each year as specified by the Secretary in the CPD Guidelines for Adjudicators published on the Department of Customer Service's website on 13 August 2020.

Initial Points to Note

The first point to note, is that, these eligibility criteria as set out above (**Eligibility Criteria or Criteria**) are new for NSW.

Historically, the responsibility to choose an appropriately qualified person to act as an adjudicator for a matter was left to the authorised nominating authority (**ANA**). ANA's had incentives and obligations to select appropriate adjudicators for a matter referred to it (including selecting appropriately qualified persons to be on a particular ANA's panel, and selecting appropriate panel member for a particular matter), including:

(1) Its vested interest in the Act working successfully in the quick resolution of construction payment disputes;

(2) Its reporting obligations to the regulator, including with respect to adjudication challenges and other adjudicator 'performance' issues; and

(3) Its commercial imperatives, similar to (1) above.

Anyway that is history, the legislature has decided it prudent to reduce to writing the Eligibility Criteria as now fund in the Regulations.

The second point to note

The aim of the Criteria is presumably to protect the public from adjudicator misadventure by providing written guidelines. Will that provide certainty and 'improved performance/compliance to a minimum standard of adjudicator'?

Well that depends, firstly are the Criteria unambiguous?

One may have considered the SA Regulations to be unambiguous, and readily applicable with regard Adjudicator Eligibility Criteria.

However the judgment of *Kennett Pty Ltd v Janssen* (31 July 2013 unreported Supreme Court of SA judgment Blue J) could be cited to say otherwise.

At least the NSW Regulation has a second limb (in clause 19 (1) (b)), which is absent from the equivalent SA Regulation, where by absent a degree, at least 10 years of relevant experience, will get you through the door, and hopefully save an experienced adjudicator the ignominy of being found ineligible by a court's strict application of the Criteria as happened in the above cited case.

Other potential Ambiguities in the Criteria

Davenport notes the following other potential sources of ambiguity and other problems in the Criteria[i], namely:

(1) Ambiguities in the meaning of 'relevant experience' – noting that there is no logical reason to require experience with construction contracts – such requirement could encourage jurisdictional error by encouraging the going outside of the section 22 (2) guideline 'flags'.

(2) Overseas experience may not be relevant (as a result of the Act's definition of construction contract).

(3) The Regulations provide no definition of 'resolution of disputes in connection with construction contracts' – meaning an adjudicator may have to provide and affidavit of experience to the court to defend a challenge. I do think a court will likely give a broad interpretation to the meaning of this, but I cannot be certain of this.

(4) How will an adjudicator or ANA respond to a party's request for information as to the adjudicator's relevant experience[ii].

(5) What if an adjudicator has to decide if a previous adjudicator was eligible to adjudicate?! *Parrwood Pty Ltd v Trinity Constructions (Aust)* Pty Ltd [2020] NSWCA 172 turned on one adjudicator's view of the validity of an earlier adjudicators determination – though in a different context to the Criteria – the principle (that a previous adjudicator's determination must be 'valid' before it will bind a subsequent adjudicator) is however equally applicable.

Court Challenges to Determinations Post the Regulation's Eligibility Criterion

The result of the above is, arguably that adjudicators are no longer on the safe ground they were on pre the enactment of the Criteria, when it was a simple matter of filing a submitting appearance save as to costs, and then just awaiting the court's publication of final judgment.

There are further issues too. For example, would the s30 (1) statutory immunity apply if one did not satisfy the Criteria?

Section 30 provides:

Protection from liability for adjudicators and authorised nominating authorities

(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith--

> *(a) in exercising the adjudicator's functions under this Act, or*
>
> *(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.*

A court may say that how can a person have a *reasonable belief*, if one does not satisfy the Criteria, not to mention the Act's section 4 definition of adjudicator is now dependent upon satisfying the Criteria.[iii]

[i] Page 1114 – 117 of Adjudication in the Building Industry, fourth edition Philip Davenport, Federation Press 2021
[ii] See Davenport's caveat at page 117
[iii] It is hard to disagree with Davenport's conclusion at p112 that the statutory immunity will not apply to an 'adjudicator' who did not satisfy the Criteria

An ANA is on safer grounds in that Regulation clause 20 does not introduce a new criteria for ANA's to satisfy as does clause 19 with regard to Criteria for adjudicators.

Further, what if the adjudicator's eligibility is directly challenged (by way of summons or other originating process), why can't a submitting appearance save as to costs be filed and then leave it at that?

One problem with that approach is that should the court determine that the adjudicator is not eligible, then the court may also find that the challenged adjudicator has put the plaintiff challenger (which may now possibly be a claimant), to legal costs expense by not consenting to judgment that s/he is ineligible.

The Court of Appeal judgment of *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd (No 2)* [2014] NSWCA 317 may be cited as authority to effect that the filing of a submitting appearance save as to costs does not automatically result in a 'costs free' outcome for that party as follows:

[10] No rule of court or other provision deals with the costs consequences of the filing of a submitting appearance (whether or not expressed to be "save as to costs"). This contrasts with the position formerly prevailing. Part 52A rule 12(1) of the Supreme Court Rules 1970 (NSW), now no longer operative, provided that, where a respondent in the Court of Appeal added the "save as to costs" qualification to a submitting appearance and took no active part in the proceedings, the appellant or claimant was to pay the costs of that respondent or claimant as a submitting party, unless the court otherwise ordered.

[11] Since no corresponding provision is now in force, rule 42.1 of the Uniform Civil Procedure Rules requires that costs follow the event unless it appears to the court that some other order should be made. The making of some other order lies within the discretion conferred on the Court by s 98 of the Civil Procedure Act 2005 (NSW).

[12] Since the prima facie position under rule 42.1 is that the respondent should pay the appellant's costs in this Court, the issue is whether, in the principled exercise of the s 98 discretion, the Court should make an order that deprives the appellant of that prima facie entitlement.

[14] The true position is that the question should be approached not by reference to prima facie expectations but according to an appraisal of the circumstances of the case. In particular, attention must be paid to the context in which the submitting appearance was filed.

(**the *Kisimul* Principle**)

[14] (cont.) … The procedure provided by the submitting appearance is a means of facilitating notice to the Court that the party does not propose to put any argument to the court.

An application of the *Kisimul* Principle is found in *Reulie Land Co Pty Limited v Lee Environmental Planning Pty Limited and Ors (No 2)* [2020] NSWLEC 49 (***Reulie Land Co* Judgment**):

[15] The fact that each Respondent (including a *decision making* council) filed a submitting appearance, save as to costs, would not alter the Applicant's entitlement to the order in accordance with the general rule (that costs follow the event) as:

(1) There is no prima facie rule that a submitting party will never be ordered to pay costs: *Lou v IAG Limited t/as NRMA Insurance* [2019] NSWCA 319 at [43] per Payne JA (Gleeson JA agreeing). There is no rule or legislative provision dealing with the costs consequences of filing a submitting appearance. The only applicable rule relating to costs is the general rule in UCPR 42.1;

(2) Where a submitting appearance has been filed, a principled exercise of the s 98 CP Act costs discretion having regard to all of the circumstances of the case is required: see *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd (No 2)* (2014) 86 NSWLR 645; Seller v Jones [2014] NSWCA 19; Lou v IAG. Whilst such

(3) circumstances may include the fact of the filing of a submitting appearance, such a fact does not dictate an outcome; and

(4) As such, a principled exercise of the s 98 costs discretion would lead to a finding that in the circumstances such of this case, where all of the Respondents filed a submitting appearance, the submission usually made that no order for costs should be made against a submitting party has less applicability: Platford v van Veenendaal and Shoalhaven City Council (No 2) [2018] NSWLEC 86.

[46] The Council and Lee and Lasovase, by their actions, ***ensured that the proceedings were inevitable***[iv]. Lasovase, by refusing to surrender the development consent, ensured that a hearing was required as a declaration was needed to render the consent invalid. However, even though I consider that the rejection of the offer significantly contributed to the costs incurred by the Applicant, the position taken was in part influenced by the advice communicated by the Council.

[47] Whilst the Respondents urge that the Court apportion the costs liability between them, where there are identified contributions to conduct on both sides, absent some clear and defining evidence that would permit a clear delineation of proportionate fault, it would be inappropriate in this case to attempt to draw a clear line and designate the relative fault of individual Respondents on individual issues. There is no such evidence available, accordingly, I decline to attempt to allocate such proportions.

[48] The circumstances of this case as outlined above lead to the conclusion that the entering of a submitting appearance by all Respondents, whilst a relevant matter, is insufficient, when taken with all of the circumstances of the case to warrant making an order otherwise than in accordance with the general rule.

[49] For those reasons, I find that the Applicant is entitled to an order that its costs of the proceedings be paid for by the Respondents in accordance with the general rule provided in UCPR 42.1.

See also the following judgment where the Kisimul Principal held sway – this example in respect of a court review of a costs assessment (which is similar function to an adjudicator, in that legal work is being valued by an extra-judicial quasi judicial officer). Refer the judgment of Neilson DCJ in *SD Commercial Lawyers Pty Limited v Lecos Corporate Pty Limited & Anor (No. 2)* [2022] NSWDC 94 as follows:

[12] Re an application to quash a panel's decision and an order seeking to remit the matter to the Review Panel for a determination according to law

[13] The second and third defendants had filed submitting appearances her Honour said (N Adams J in *Midson v Workers Compensation Commission & Ors (No 2)* [2017] NSWSC 147): …

[20] Basten JA (Giles and Bell JJA agreeing) observed that the examples given by McHugh J all focus upon the circumstances of the successful party.

[21] … ***it is not the case that a submitting party will never be ordered to pay costs.***[v] That such an order may be made is contemplated by the wording of r 6.11, which provides:

"(1) A defendant who intends to take no active part in proceedings may include in the defendant's notice of appearance a statement to the effect that the defendant submits to the making of all orders sought and the giving or entry of judgment in respect of all claims made, to which may be added the words, "save as to costs".

(2) Except by leave of the court, a defendant who has filed a notice of appearance containing a statement referred to in subrule (1) may not file a defence or affidavit or take any other step in the proceedings." [24]. Although it is plain that *Mahenthirarasa v State Rail Authority of New South Wales (No 2)* turns on its own facts, it serves as

[iv] My emphasis
[v] ibid

authority for the proposition that it may, in certain exceptional circumstances, be just and reasonable to make a costs order against a submitting party: see Rothman J in *Buzrio Pty Limited v Consumer, Trade and Tenancy Tribunal (No 4)* [2010] NSWSC 41 at [11].

[25]. In Kisimul Holdings Pty Ltd v Clear Position Pty Ltd (No 2) [2014] NSWCA 317 the Court (Beazley P, Barrett and Gleeson JJA) observed at [14] that the question of whether a costs order should be made against a submitting party is to be approached according to "an appraisal of the circumstances of the case" and that, in particular, attention must be paid to the context in which the submitting appearance was filed. Their Honours went on to cite the observations of Beazley JA (as her Honour then was) in Nyman v Valmas [1997] NSWCCA 235 as follows:

"In my opinion, the filing of a submitting appearance does not denote consent to the orders sought. A submitting appearance (both at first instance and in this Court) may be filed for a variety of reasons. The typical situation is where a party has no vested interest in the outcome of proceedings. This typically occurs in statutory appeals where a necessary respondent is the Court or Tribunal from which the appeal is brought. Another is where a party holds funds as a stakeholder or on trust. However, the occasions where a submitting appearance is filed are by no means limited to such obvious circumstances. A party might submit where the costs of appeal outweigh the amount in dispute so that it was too prohibitive or simply not worth the while of a party to contest the matter. The procedure provided by the submitting appearance is a means of facilitating notice to the Court that the party does not propose to put any argument to the court."

[18] The assessment process and the review process were marred, if I may use that word, by the submissions made to the costs assessor and the Review Panel by the current defendants. Only when the matter came to this Court did the defendants submit. Nevertheless, they did not agree that the relief sought by the plaintiff ought be granted. They were in a position to consent to the relief sought by the plaintiff from the Review Panel and to consent to the relief claimed by the plaintiff in these proceedings, but did not.

[19] To vindicate its legal position, the plaintiff had to prosecute the costs matter in this Court in order to obtain justice. It was only necessary to do so because of the behaviour of the defendants. … [23] For those reasons I order the defendants to pay the plaintiff's costs of these proceedings.

I note – the *SD Commercial Lawyers Pty Limited v Lecos* judgment is not with respect to a *decision maker's* submitting appearance but is provide to reinforce the *Kisimul Principle.* The *Reulie Land Co* Judgment is more directly on point given it relates to a decision making council authorised by legislation and therefore in a similar position to an adjudicator under the Act, in the context of submitting appearances.

Challenged Adjudicator's Options

The s18 of the Act - clause 19 Regulation challenged adjudicator has three options[vi] with regard to role to take in the proceedings, namely:

(1) Defend the matter by way of filing a defence and Technology and Construction List Response;

(2) Acquiesce to the plaintiff/challengers claim by way of filing an appearance admitting that the adjudicator was not eligible to adjudicate and consenting to a declaration to that effect; or

(3) File a submitting appearance save as to costs (UCPR Form 6B).

The above discussion shows that, as Davenport says[vii], if the adjudicator is joined in proceedings challenging his or her eligibility the adjudicator will almost certainly need legal representation. The adjudicator will have to decide which of the possible three approaches to take. If the adjudicator has

[vi] Adjudication in the Building Industry, fourth edition Philip Davenport, Federation Press 2021 – page 111
[vii] ibid page 112.9

professional indemnity insurance the adjudicator should notify his or her insurer and see if the insurer will indemnify him or her and provide legal representation.

Even taking option (2) above, (the acquiesce to the plaintiff/challengers claim and consent to a declaration) may not be the end of the matter, with possible costs implications for costs incurred prior to the filing thereof, and with implications in respect of the individuals PII Insurance claims notifications requirements.

The new eligibility criteria creates serious risks for adjudicators that did not previously exist – meaning the previous 'panacea' of filing a submitting appearance save as to costs is no longer a default step that can be taken without legal advice, which must now be obtained on the circumstances of each challenge.

This bulletin is <u>not</u> intended as legal advice. We must review the particular facts of any matter you may have and then provide you with specific advice.

Yours faithfully,
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