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Adjudicator Discretion and Legal Error: Builtcom Constructions v VSD

Whilst not fatal to a determination, it is wrong as a matter of law to strictly apply the *Cardno* test when determining whether additional material has been duly made. Adjudicators are afforded considerable leeway for mistakes of law in the adjudication process.

Background

When determining an adjudication application under the *Building and Construction Industry Security of Payment Act* (**SoP Act**), section 22(2)(c) of the SoP Act ostensibly limits the scope of material provided by the claimant which an adjudicator can use to determine the application.

Per this provision, the adjudicator is to consider only "the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim".

So when Builtcom Constructions Pty Ltd (**Builtcom**) relied on additional material which was provided only with the application for adjudication and not with the payment claim, the adjudicator was compelled to consider whether the additional material was 'duly made' by Builtcom. If it was not duly made, then it would not fall within the scope of s 22(2)(c) and the adjudicator would not be able to have regard to that additional material.

To determine whether the additional material was duly made, the adjudicator relied on a test which was referred to throughout proceedings as the *Cardno* test.[1] Per this test, if the presence of the additional material would have changed the valuation or reasoning in the payment schedule, the additional material is to be ignored.

At first glance, this is a test grounded in procedural fairness, as it asks whether the respondent was ambushed by a claimant's additional material provided only at a later stage. The test does so by enquiring whether the respondent was deprived of an opportunity to respond to that additional material through the respondent's payment schedule.

The relevance of the payment schedule is brought about by section 20(2B) of the SoP Act which bars a respondent from providing new reasons in the respondent's adjudication response to the claimant's adjudication application – the only reasons allowed in the respondent's adjudication response are those raised in the respondent's payment schedule. Thus, if the respondent only sees the additional material for the first time upon receipt of the adjudication application, the respondent will have no opportunity to present its case on that additional material.

The adjudicator determined that he did not have to consider the additional material and he refused to determine a large part of Builtcom's claim.

Issue

The adjudicator should not have bound himself to the *Cardno* test. As accepted unanimously by the bench on appeal, to do so was a mistake of law.

The key question on appeal was then**: Does this material error of law amount to jurisdictional error or is it merely a non-jurisdictional error of law?** Only the former is judicially reviewable.[2]

As to why the strict application of the *Cardno* test was a clear mistake of law, Leeming JA pointed out that the *Cardno* test does not actually find much support from the adjudication determination from which it was derived. Further, it is a poor counterfactual test with a somewhat absurd outcome if applied strictly, as all new documents provided in an adjudication application have the potential to affect a respondent's initial response to a payment claim.

Additionally, there is no place for a strict test within the statutory framework provided by the SoP Act for two reasons.

> Firstly, in light of section 21(4) of the SoP Act – which allows for an adjudicator to request further submissions on a particular point – the adjudicator could have considered the additional material if the adjudicator had requested further submissions on that material.
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> Secondly, section 17(3)(h) of the SoP Act allows a claimant to include "such submissions relevant to the application as the claimant chooses to include" whereby those submissions extend to include "relevant documentation".

Outcome

Leeming JA (with Free JA agreeing) held that the adjudicator's error of law was not jurisdictional. Thus, the adjudicator's determination was upheld. The reason why there was no jurisdictional error is that:

> *it is for an adjudicator to determine whether a submission is duly made. That obligation is imposed upon the adjudicator by s 22. … Generally speaking, if the adjudicator is wrong in determining whether a submission is duly made, that will not without more invalidate the determination for jurisdictional error.*[3]

Dissenting, Adamson JA found that there was jurisdictional error as the adjudicator, having misconstrued the Act, misapprehended his task.

Key Takeways

Whilst not fatal to a determination, it is wrong as a matter of law to strictly apply the *Cardno* test when determining whether additional material has been duly made. Adjudicators are afforded considerable leeway for mistakes of law in the adjudication process.

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[1] Derived from *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258.

[2] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1.

[3] [96].