

## Article Information

Authors: Tim Coleman, Emer Sheridan

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## Groundhog Day: When will the court remit an adjudication application?

**So, you have successfully argued that an adjudicator acting under Security of Payment legislation failed to undertake the task required and, therefore, their determination has been quashed. But now what? Is the adjudication determination at an end or will it be remitted back to the adjudicator so they can correct errors in it and issue a determination?**

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### Orders for remitter

The party who has successfully made application to have the determination quashed will in most cases be the party who is the respondent to the adjudication application and who will be arguing that the adjudicator should have awarded a lesser amount than the amount determined by the adjudicator. In that case the party who was successful in quashing the determination will also have been successful in reducing the amount payable to Nil. Accordingly the party who was successful in quashing the determination would have a preference for not having the matter remitted.

Remitter is the most common outcome which follows the quashing of an adjudication determination. It has been described as *'the usual form of relief which may be granted on the quashing of the original decision on the grant of certiorari'*.<sup>[1]</sup> In the process of remittal, the court gives jurisdiction back to the adjudicator so that they can re-determine the matter in accordance with law.

However, despite its frequent use, the parties cannot assume that the matter will, or necessarily should, be remitted back to the adjudicator.

### When remitter cannot be granted

In circumstances where an adjudication determination is quashed on the basis that the adjudicator lacked jurisdiction to deal with the matter then it will not be possible to remit. As set out by McDougall J in *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd*,<sup>[2]</sup> there is no point in remitting such a matter because the issue of jurisdiction has *'necessarily been determined by the quashing order'*.

Additionally, if the entirety of a determination has been quashed such that a remittal would result in a *'full re-adjudication'* - as opposed to a review of discrete parts - the court similarly cannot remit. In *Shape Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd*,<sup>[3]</sup> Digby J found that such a remittal *'would be at odds with the strict timing requirements of the SOP Act'* including those which provide timing guidelines as to the submissions of the parties.<sup>[4]</sup>

### Court's discretion

Outside of the circumstances described above, the court has the discretionary power to determine whether a matter should be remitted back to the adjudicator.<sup>[5]</sup> This decision will be made on a case by case basis and *'the circumstances in and means by which a superior court might return a matter to an inferior court or tribunal after granting relief by way of certiorari are not entirely simple'*.<sup>[6]</sup>

There is firstly, uncertainty as to the precise point at which a remitted adjudication process should resume. In *Maxcon*

*Constructions Pty Ltd v Vadazx (No 2)*,<sup>[7]</sup> Blue J held that a remitter will usually be sent back for the ‘ultimate decision’ with all ‘existing materials and submissions’ remaining as they were. While this is a rule which may be applied in most cases, it cannot be satisfactory in situations where there has been a defect in the adjudicative process itself. For example, if a party has invalidly made further submissions which are then impermissibly considered by the adjudicator. In such a case, any re-determination would also be invalid if it simply recommences at the point of the ‘ultimate decision’.

Furthermore, the nature of the adjudicator’s error and the level of corrective instruction required may sway a court against granting a remitter. Where a determination has been quashed ‘it is appropriate to identify the error and then remit the matter to be dealt with in a way that corrects that specific error’.<sup>[8]</sup> However it may not always be possible to identify a ‘specific error’ made by the adjudicator. If the adjudicator has made multiple errors, given incomprehensible reasons or fundamentally misunderstood their task, it may not be appropriate or practically possible for the court to give directions which will ensure that the determination is re-made correctly. Granting remitter on the basis of complex instructions will run the very real risk that the determination will be made incorrectly a second time.

A further cause for concern in remitter will be the possibility of bias on the part of the adjudicator. An adjudicator who has been named in proceedings as a defendant in which his or her determination was subsequently quashed, is now arguably no longer a neutral decision-maker. Such potential bias threatens the provision of natural justice and the validity of the re-determination itself. Even if actual bias is not made out, the adjudication may still be threatened on the grounds of perceived bias. The latter is made out where ‘a fair-minded lay observer might reasonably apprehend that the [adjudicator] might not bring an impartial and unprejudiced mind to the resolution of the question the [adjudicator] is required to decide’.<sup>[9]</sup> It should be noted, however, that this argument was recently found unpersuasive by the Victorian Supreme Court.<sup>[10]</sup>

Additionally, the passage of a long period of time between the adjudication application and any remitter will also create practical difficulties that might dissuade a court from making such an order. In *Shape Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd*,<sup>[11]</sup> Digby J noted that the remittal of an application in such circumstances ‘will result in any Adjudication Determination produced ... being uninformed as to relevant works, their value, matters relating to progress and potentially material conduct of the parties to the Construction Contract’.<sup>[12]</sup>

In certain circumstances, where the issues above have been raised, a court will likely be minded to not exercise its discretion to remit.

## **Out of time**

Security of Payment legislation generally imposes strict time-limits within which an adjudicator must make a determination. Such time-limits cast doubt on the ability of the courts to remit a matter back to an adjudicator when the period within which they could make a determination has long since expired and arguably, so has the adjudicator’s jurisdiction.

In *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2)*,<sup>[13]</sup> Justice McDougall considered whether the strict time limits which Security of Payment legislation imposes on adjudicators may be an ‘essential preliminary’ to the exercise of the statutory power to make a determination. If it is, then an adjudicator will no longer have authority to make a determination once the time limits set by the Act have expired. This consideration would appear to be particularly pertinent for jurisdictions where late adjudication determinations have been quashed on the basis that they were made outside of the time limits of the Act.<sup>[14]</sup>

This matter was a deciding factor in the case before Justice Kelly in *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor (No 2)*.<sup>[15]</sup> In considering whether an extension of time could be made such that remitter would be possible Her Honour said:

*[7] Given the strict time frames in the Act, the availability of the remedy sought would depend upon the ability and willingness of the Adjudicator to extend time to make his decision under s 34(3)(a) and the willingness of the Registrar to consent to such an extension ...*

*[8] For reasons that are discussed more fully below, I do not think the Act permits the Adjudicator to extend time under s 34(3) after the time fixed for making a determination has expired ...*

*[9] Even if it is theoretically possible to extend time under s 34(3)(a) after an application has been deemed to be dismissed under s 33(2), the willingness of the Adjudicator to extend time and of the Registrar to consent to an extension of time cannot be taken for granted. This is particularly so given the time elapsed, the objectives of the Act to provide for the rapid resolution of payment disputes arising under construction contract, and the tight, fairly inflexible time frames specified in the Act to put this objective into effect.*

Although this judgment deals with a somewhat unique statutory mechanism whereby the time for making a determination can only be extended with the consent of the adjudicator and the Registrar, it also has broad implications for other jurisdictions. In making this judgment, Justice Kelly asserts that it is not possible to simply override statutory limitations of time in order to carry out a remittal process. Her Honour asserted this position strongly, despite the patent unfairness which it brings upon claimants:

*[32] It should be noted that the only circumstances in which the inflexible time limits in the Act could operate to shut a party to a construction contract out from having a payment dispute adjudicated through no fault of its own or the other party is one like the present in which a court has quashed an adjudicator's determination.*

It is notable, however, that the argument that an adjudicator no longer has the legal capacity to act once the time-limits of the Act have passed was recently rejected by the Victorian Supreme Court.[\[16\]](#)

It is clear that there is some conceptual difficulty in how the court, through the remittal process, can re-enliven the jurisdiction of an adjudicator long after the time in which the adjudicator was statutorily required to deliver a valid determination. Recent judicial comment has acknowledged this concern. However, it has not been dealt with consistently across jurisdictions and the success of such an argument will be heavily dependant on the particular statutory regime which applies.

### **Issue Estoppel**

The court will not remit an adjudication application where issue estoppel has been found with regards to a later adjudication application. In *Shape Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd*[\[17\]](#) Digby J identified that 'A final decision given by a competent tribunal creates an issue estoppel binding the parties and those claiming through them'.[\[18\]](#) In the same way that issue estoppel precludes a claimant from resubmitting previously adjudicated claims for re-adjudication, Digby J found that the same preclusion applies to attempts to remit claims which have been the subject of a quashed adjudication determination.[\[19\]](#)

In this case, the claimant had submitted two successive payment claims. The first was the subject of an adjudication determination which had been quashed. The second was the subject of an adjudication determination which was, in this matter, being challenged in court. Crucially, the parties agreed that the items claimed in the second payment claim were also claimed in the first payment claim.[\[20\]](#) As such, Digby J found that an issue estoppel arose and the first adjudication determination could not be remitted unless the second adjudication determination was quashed.[\[21\]](#) Furthermore, his Honour found that the issue estoppel preclusion arises regardless of whether the second adjudicator finds against the claimant on the basis of either jurisdictional fact or substantive law.[\[22\]](#) As Digby J affirmed the second adjudication determination, it was found that the first determination could not be remitted.

### **Other options for a claimant**

Notwithstanding the challenges which may arise, it is open to a claimant to ask the court for remittal back to the adjudicator. However, if the matter is not remitted back to the adjudicator for re-determination, then a claimant will need to consider the other options available to it in recovering the sum in the payment claim.

It seems unlikely that the court itself is able to make a revised or substituted adjudication determination[\[23\]](#) and so a claimant will need to pursue its options outside of the court.

It may be open to a claimant to bring a fresh payment claim. This option is preferable if a claimant wishes to claim for new work or remedy a defect which existed in the original payment claim. Generally, Security of Payment legislation will not prohibit a claimant from bringing such a claim merely on the basis that the items claimed have been included in a previous claim. However, a claimant must still ensure that the payment claim attaches to a valid reference date and that it is not made out of time under the Act. Claimants in Victoria, for example, should be mindful of the fact that they will still have only three months from the relevant reference date to bring a payment claim.[\[24\]](#)

In some jurisdictions, a claimant is also able to bring a fresh adjudication application with respect to the same payment claim if the adjudicator fails to make a determination within the time allowed for under the Act.[\[25\]](#) As the quashing of a determination means that, in law, it has never been made, it would appear that this is a possible route by which a claimant may re-enliven the adjudication process. However, this will rarely provide a valid alternative for claimants as these sections also impose a short time limit within which a fresh adjudication application can be commenced. In *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*[\[26\]](#) it was held that the claimant was out of time to bring a fresh adjudication application under this section, as the time limit of 5 days began to run from the time at which the adjudication *should* have been made and not from the time at which it was declared void.

If these options cannot be pursued by a claimant then the best course of action may be to commence final proceedings in

court or, if applicable, under contractual dispute resolution mechanisms. In any event, amounts awarded under Security of Payment legislation are interim only and a conclusive determination of the issues in dispute between the parties can only come about through settlement, litigation or a contractual dispute mechanism.

### **Conclusion**

Courts continue to frequently exercise their discretion to remit following the quashing of adjudication determinations. However, such a discretion also means that each matter must be determined on a case by case basis. Having regard to the whether the error made by the adjudicator was jurisdictional in nature, the time-limits imposed by the legislation and the possibility of issue estoppel, the court may be inclined to refrain from exercising its discretion. Parties seeking to challenge an adjudication determination should be mindful of the fact that a quashing will not necessarily lead to a remitter. Claimants, in particular, should be alive to their options for recouping the sum in their payment claim should the court decide not to remit. Conversely, respondents should not assume that a refusal by the court to remit a determination will signal the end of the dispute.

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[1] *Maxstra Constructions Pty Ltd v Joseph Gilbert & Ors* [2013] VSC 243 at [72].

[2] [2016] NSWSC 1229 at [73].

[3] [2018] VSC 808.

[4] [2018] VSC 808 at [105(b)].

[5] *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 680.

[6] *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2)* [2016] NSWSC 1229 at [74].

[7] [2017] SASCFC 2 at [219].

[8] *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor (No 2)* [2017] NTSC 61 at [14].

[9] *Johnson v Johnson* (2000) 201 CLR 488 at [11].

[10] *SHAPE Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd* [2018] VSC 808 at [106]-[107].

[11] [2018] VSC 808.

[12] *Ibid*, [105(a)].

[13] [2016] NSWSC 1229 at [80].

[14] *BGC Contracting Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88.

[15] [2017] NTSC 61.

[16] *SHAPE Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd* [2018] VSC 808 at [106].

[17] [2018] VSC 808.

[\[18\]](#) Ibid at [11].

[\[19\]](#) Ibid at [14].

[\[20\]](#) Ibid at [15].

[\[21\]](#) Ibid at [18].

[\[22\]](#) Ibid at [21].

[\[23\]](#) *Duro Felguera Australia Pty Ltd v Samsung C and T Corp* [2018] WASCA 28 at [75].

[\[24\]](#) *Building and Construction Industry Security of Payment Act 2002* (Vic), 14(4)(b).

[\[25\]](#) *Building and Construction Industry Security of Payment Act 1999* (NSW), s 26; *Building and Construction Industry Security of Payment Act 2002* (Vic), s 28; *Building and Construction Industry Payments Act 2004* (Qld), s 32.

[\[26\]](#) [2011] NSWCA 399.