

Article Information

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Late adjudication determination? No worries, it's still valid!

Parties to the adjudication process have long debated the effect of a late adjudication determination being provided by an adjudicator. In *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSCA 294 (*Ian Street*), the Supreme Court of Victoria Court of Appeal clarified the judicial position on the time limits that apply to adjudicators and what it means when an adjudicator gives a late determination.

Under s 22(4) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the **Act**), an adjudicator “is to determine an adjudication application as expeditiously as possible and, in any case –

1. within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or
2. within any further time, not exceeding 15 business days after that date, to which the claimant agrees.

Background

In *Ian Street*, the claimant had made an application for adjudication on 28 June 2017. RICS, being the authorised nominating authority, notified the parties of the appointment of the adjudicator on 30 June 2017 and the adjudicator issued his notice of acceptance pursuant to s 20 of the Act on that same date. On 7 July 2017, the adjudicator requested, pursuant to s 22(4)(b) that the claimant agree to an extension of time to determine the application to 31 July 2017. The adjudicator subsequently completed the determination on 28 July 2017 and, upon payment of the adjudicator’s fees by the claimant, released the determination on 1 August 2017.

The respondent had argued that the determination should be set aside on the grounds that the adjudicator fell into jurisdictional error by, amongst other things, making the determination outside of the time permitted by s 22(4) of the Act. At first instance, as the Act was silent as to the validity of the determination where it was determined outside of the stipulated time, Riordan J conducted an analysis of the principles of statutory interpretation. His Honour ultimately held that a failure to comply with the time limits for determining an adjudication application does not invalidate the adjudication determination.

The claimant subsequently appealed to the Court of Appeal.

Court of Appeal’s Decision

The Court of Appeal unanimously upheld Riordan J’s decision, with McLeish and Niall JJA agreeing with Maxwell P’s reasoning.

How long do adjudicators have to make a determination?

The Court’s decision on the interpretation of s 22(4)(b) provides much needed judicial guidance of the time limits for an adjudicator to complete their determination and the bounds of any extension of time they can seek. Prior to *Ian Street*, the common interpretation of s 22(4)(b) was that it allowed an adjudicator to request an additional 15 business days on top of the initial 10 business days that is afforded to them by s 22(4)(a).

Conversely, Maxwell P held that the reference to “that date” in s 22(4)(b) is a clear reference to “the date” referred to in s

22(4)(a), being the date of acceptance by the adjudicator. Maxwell P further considered the similarity in the drafting of s 28I(10), which referred to an “appointment” in s 28I(10)(a) and “that appointment” in s 28I(10)(b), where subparagraph (b) clearly referred to the same appointment in subparagraph (a).

Adjudicators may therefore only seek a maximum of 5 business days’ extension in order to determine an adjudication application, with a total time period of 15 business days from the date of the adjudicator’s acceptance.

Effect of late adjudication determinations

Maxwell P held that the starting point for interpreting the Act’s silence in relation to validity should be that Parliament must be taken not to have intended that consequence. From that position, his Honour made a number of observations which reinforced the view that the Act did not contemplate that a late determination is to be deemed invalid. Firstly, s 23(2B) identified two circumstances in which a determination would be void. Secondly, s 28 provides the consequences of a late determination, with s 28(2)(a) providing the claimant with an option to withdraw the application – this option, his Honour reasoned, meant that it is highly improbable that the legislature intended that the effect of a late determination was invalidity.

Ian Street provides clarification of the effect of an adjudicator’s non-compliance with the time limit to determine an adjudication application as well as the parameters of any extension of time that it seeks. The latter, in particular, will have a significant impact on the efficiency of adjudication applications made under the Act with determinations needing to be complete within a period of 15 business days from the date of the adjudicator’s acceptance.