

# Building & Construction Industry Security of Payment Act *Quashing the Adjudicator's Decision*

*Multiplex Constructions v Luikens & Another, 4 December 2003*

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## NSW ACT/QLD Bill

Queensland currently has a Building & Construction Industry Payments Bill before Parliament.

The broad thrust of the adjudication process under the Queensland bill is quite similar to the adjudication process under the NSW Act. For that reason, the decisions of the NSW courts on their legislation will provide a good guide as to how the courts will interpret our legislation.

## Basic Structure for Adjudication

Broadly, the objective of the Act is the prompt payment of progress claims for construction work and related work.

As one judge put it, the Act requires that a respondent 'pay now, argue later'" [Palmer J in *Multiplex*].

The Act provides for an adjudication process designed to produce a quick interim decision as to the amount payable which the respondent must pay. If the respondent does not pay, the decision can be registered as a judgment and enforced.

Broadly, the adjudication procedure is as follows:

1. The claimant makes a **payment claim** for payment of a progress claim.
2. The respondent may then either pay it or deliver a **payment schedule** (within 10 business days). That schedule must set out the reasons for withholding payment.
3. If the claimant is dissatisfied with the response in the payment schedule, the claimant may within 10 business days apply to a nominating authority [e.g. IAMA] for the adjudication of the payment claim.
4. The respondent then lodges a response to the adjudication application (within 5 business days of receipt of application or within 2 business days of receipt of adjudicator's notice of acceptance of adjudication, whichever is later).

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5. The adjudicator then determines the amount of the progress payment (if any) to be paid by the respondent (within 10 business days unless extended by agreement of the parties).
6. A party dissatisfied with the decision can pursue a final determination of their rights in the courts or arbitration (e.g. a dissatisfied principal might sue to recover a payment made pursuant to an adjudication decision).

### Challenges to Adjudication Decisions

In NSW there have been a series of challenges to adjudicator’s decisions. Some of the more recent ones are:

<b>Name</b>	<b>Date</b>	<b>Nature</b>	<b>Outcome</b>
<i>Musico v P Davenport &amp; Anor</i>	31/10/03	Principal dissatisfied with a decision requiring payment to a contractor	Adjudication decision set aside
<i>Brodyn v P Davenport &amp; Anor</i>	6 /11/03	Contractor dissatisfied with a decision requiring payment to a subcontractor	Application to set aside dismissed
<i>Abacus v P Davenport &amp; Anor</i>	14/11/03	Principal dissatisfied with a decision requiring payment to a contractor	Application to set aside dismissed
<i>Multiplex v Luikens &amp; Anor</i>	4/12/03	Contractor dissatisfied with a decision requiring payment to a subcontractor	Adjudication decision set aside

### When will an Adjudication decision be set aside?

The courts have recognised that adjudicators’ decisions are susceptible to being set aside where the adjudicator’s decision is the result of *jurisdictional error*.

Examples of jurisdictional error were usefully set out by Palmer J in *Multiplex*:

*“Jurisdictional error will arise where, for example, the adjudicator’s decision:*

- *was given in bad faith or was procured by fraud;*
- *was one which the adjudicator had no power under the Act to make;*
- *was made without complying with the limited requirements of natural justice provided by the Act;*
- *did not deal with the question remitted for adjudication;*
- *determined a question not remitted for adjudication;*

- *did not take into account something which the Act required to be taken into account; or*
- *was based upon something which the Act prohibited from being taken into account.”*

## **Error of Law may be Jurisdictional Error**

The judges acknowledge that mere error of law is not a basis for setting aside an adjudicator’s decision. However, an error of law can amount to jurisdictional error.

### **Case Study – Multiplex**

Multiplex is a good illustration of an error of law leading to jurisdictional error.

#### **Adjudication**

Lahey was a subcontractor who was performing window and joinery refurbishment for Multiplex on a large project. Lahey submitted a payment claim under the Act.

In a summary on the front page of its payment schedule, Multiplex dealt with one of the items in the subcontractor's payment claim by stating "*Back charges/contra charges/scope deletions (BC1-BC16)*". Attached to the summary was a document entitled "*Assessment of progress claim number 14*". Under a heading, "*Back charges/contra charges/ scope deletions*", appeared, relevantly, "*BC1 Deletion of southern tenancies wall panels (by others)*".

The subcontractor made an application for adjudication.

In the Adjudication Response, Multiplex asserted that the work for which the subcontractor claimed payment had been deleted from the contract and awarded to another.

Under the Act, a respondent cannot include in the Adjudication Response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant [s. 20(2B)].

The subcontractor argued that the adjudicator should not have regard to Multiplex’s Adjudication Response as the assertions in it were not in the Payment Schedule.

The adjudicator agreed with the subcontractor. As such, the adjudicator allowed the subcontractor’s claim without regard to Multiplex’s position as stated in the Adjudication Response.

#### **In the Court**

Multiplex made application to the court to set aside the adjudicator’s decision. One of Multiplex’s submissions was that the adjudicator “fell into jurisdictional error of law” in failing to take into account its reasons for nonpayment to the subcontractor.

The Judge considered that although done cryptically, the payment schedule did in fact indicate the basis for nonpayment expanded upon in the adjudication response. The judge

concluded as follows:

*“In my opinion, Mr Luikens erred in concluding that he was required to exclude from his considerations the submissions and evidence advanced by Multiplex in opposition to the claim ... Accordingly, he failed to take into account matters which s.22(2)(d) required him to take into account and he thereby fell into jurisdictional error...”*

### **Consequence of Jurisdictional Error**

The jurisdictional error identified in *Multiplex* related to only one item in the subcontractor's Payment Claim.

That value of that item was about \$100,000. The subcontractor's claims totalled about \$700,000 and the adjudicator had found that the subcontractor was entitled to a payment of \$582,000.

The judge noted that although the jurisdictional error affected only one disputed claim amongst 16 which the adjudicator considered, the court cannot quash just the decision which affects the particular item, leaving the rest of the determination intact.

However, the judge then proceeded to indicate that:

1. The claimant would become entitled to withdraw its adjudication application under the Act (because the adjudicator has failed to determine the application according to law within the time allowed by the Act);
2. The claimant may then make a new adjudication application under the Act;
3. The adjudication process did not start over again from the beginning (the dispute would be as defined by the original payment claim & original payment schedule);
4. The new adjudicator appointed by the nominating authority may or may not be the adjudicator who conducted the original adjudication; and
5. In conducting the new adjudication, the adjudicator would have regard to the reasons of the Supreme Court for quashing the original determination.

### **Conclusion**

The adjudication procedure cuts across well established principles of contract law and well entrenched payment (or nonpayment) practices in the construction industry.

It was to be expected that there would be challenges. The courts have sought to limit the grounds of review in order to underpin the effectiveness of adjudication.

Hopefully, when the Act comes into force in Queensland, the legal challenges will be limited because we have the benefit of the extensive judicial interpretation of the Act in NSW.