

The Complexity Test under the *Construction Contracts Act 2004 (WA)*

Resolution Institute Adjudicators' Masterclass – 21 October 2017

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Section 31(2)(a)(iv)

*“(2) An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a) –
(a) dismiss the application without making a determination of its merits if –*

...

(iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;”

Background to Complexity Test

- * No equivalent to the Complexity Test under the East Coast Model
- * No restrictions under the WA Act or NT Act on subject matter or quantum of a payment dispute (subject to falling within scope of “construction work” under a “construction contract”);
- * Compare to:
 - * Queensland *Building and Construction Industry Payments Act 2004* – dual model of payment claims – “standard” and “complex” (over \$750,000)
 - * Victoria *Building and Construction Industry Security of Payment Act 2002* – excludes “latent conditions”, “time-related costs”, and “changes in regulatory requirements”
- * Second Reading Speech for WA Bill, aim of adjudication
“keep the money flowing in the contractual chain” whilst “sidelining protracted and complex disputes”
- * Professor Evans’ Review
 - * noted some users consider adjudicators reluctant to find Complexity Test satisfied
 - * recommended no change to the Complexity Test

Large Value Adjudications

Financial Year	Total Number of Application	Number of Applications Above \$500,000	Mean Value of Applications Above \$500,000
2011-2012	178	34 (19.10%)	\$4,934,242
2012-2013	208	65 (31.25%)	\$3,240,929
2013-2014	175	63 (36%)	\$5,733,318
2014-2015	235	90 (38.6%)	\$6,254,077
2015-2016	225	59 (26.22%)	\$11,338,832

Adjudicator's Obligation to Provide Reasons for a Determination

- * Not obliged to express reasons with the same degree of precision and detail as the reasons of a court
- * *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, [88] (“Perrinepod”), McLure P
“... contractual and legal precision is required necessarily to yield, to a degree, to allow for the speedy resolution of disputes”
- * Courts will not review reasons “with an eye keenly attuned to the perception of error” (Martin CJ, *Laing O'Rourke v Samsung* [2016] WASCA 130, [98])
- * Adjudicator's Obligation
 - * to identify and consider all issues, submissions and materials; and
 - * provide sufficient explanation for his or her reasons for all legal, factual, and technical issues

Complexity Test Applies Only to Merits

- * Complexity Test - “to fairly make a determination” only to a determination made under Section 31(2)(b)
- * “Determination” defined in Section 3 as “a determination, made on an adjudication under Part 3, of the merits of a payment dispute”
- * Complexity Test does not apply to jurisdictional criteria under Section 31(2)(a) (*Moroney and Murray River North Pty Ltd* [2008] WASAT 36 (“*Moroney No 1*”))
- * *O’Donnell Griffin Pty Ltd v Davis* [2007] WASC 215, [31]- Templeton J
“... an adjudicator who is faced with a complex question of jurisdiction which he or she felt unable to resolve on the papers would be obliged to dismiss the application.”

Mechanisms to Deal with Complexity

- * Section 32(2) - *“In order to obtain sufficient information to make a determination, an appointed adjudicator may ---”*
 - (a) request submissions, information or documentation
 - (b) request the parties to attend a conference
 - (c) inspect work, test, or engage an expert
- * Tribunal in *Maroney No 1* and *BGC Contracting Pty Ltd and Ralmana Pty Ltd* (CC 800 of 2015) (*“BGC Contracting”*)
 - * An adjudicator can make use of the powers under Section 32(2) prior to deciding the Complexity Test (Query?)
- * Alternatively, apply:
 - * Section 33(6) – adjudicator can determine his or her procedure
 - * Section 30 - *“to determine the dispute fairly and as quickly, informally and inexpensively as possible”*

Complexity Test – A Subjective Test

- * Criteria in Section 31(2)(a)(i) to (iv) are “*jurisdictional facts*”
- * Enliven an adjudicator’s power to make a determination under Section 31(2)(b)
- * Section 31(2)(a)(i) to (iii) criteria – determined by an objective assessment of the facts
- * Section 31(2)(a)(iv) – adjudicator must be “*satisfied*” – a subjective element – *McLure P - Perrinepod*
- * Depends on the qualifications, experience, and knowledge of the actual adjudicator

Impression of Complexity

- * *Match Projects Pty Ltd and Arccon (WA) Pty Ltd* ([2009] WASAT 134, [52])

“It will not take much ingenuity to advance submissions, in many cases, that the complexity is such that the application should be dismissed and to create an impression of complexity by swamping the adjudicator with volumes of paper.”

- * *Silent Vector Pty Ltd and Squarcini* ([2009] WASAT 39, [72])

“This highlights the dangers of an adjudicator too readily concluding that it is not possible to fairly make a determination because of the complexity of a matter.”

Lack of Information/Evidence and the Complexity Test

- * *Moroney and Murray River North Pty Ltd [2008] WASAT 111* (“*Moroney No 2*”)
 - * Adjudicator confused complexity with lack of information
 - * If insufficient evidence, adjudicator should make a determination under Section 31(2)(b) “*on the balance of probabilities*”
- * *BGC Contracting*
 - * “*any other reason*” includes lack of explanation or submission by the applicant or respondent of the claim or defence
- * *Bocol Constructions Pty Ltd and Keslake Group Pty Ltd [2017] WASAT 15*
 - * Adjudicator should have dismissed the payment dispute for complexity
 - * Equated lack of evidence with complexity
- * *Moroney No 2* – the better view

Application of the Complexity Test

- * *Maroney No 2*
 - * Not a final and conclusive determination
 - * Complexity alone is insufficient – can use powers under section 32(2)
 - * Mathematical evaluation is not complexity
 - * If insufficient evidence – case not made on merits
 - * Lack of information not complexity
- * *BGC Contracting*
 - * Section 30 is the touchstone “to determine the dispute fairly and as quickly, informally and inexpensively as possible”
 - * Fairness in the context of the rapid adjudication process
 - * “... any other reason...” – given plenary meaning eg volume or density of material, lack of explanation or submissions, the need for expert opinion
 - * Referred to adjudicator’s powers under section 32(2)
 - * Legal, factual, and technical complexity
- * *K&J Burns Electrical Pty Ltd v GRD Group (NOT) Pty Ltd [2011] NTCA 1*
 - * Connection between Complexity Test and time period for respondent to respond – adjudicator required to consider the time period

Concluding Comments

- * Content of adjudicator's obligation to give reasons
- * Section 30 is the touchstone in the Complexity Test
- * Adjudicator should not "*too readily*" find the Complexity Test satisfied
- * Complexity Test applies only to the merits, not jurisdiction
- * Content and form of application to assist adjudicators
- * Volume of documents does not give rise to complexity
- * Time period of respondent to respond is relevant
- * "*Any other reason*" gives rise to uncertainty
- * Complexity Test gives rise to uncertainty – subjective test
- * Adjudicator's powers under section 32(2) applicable - but subject to inherent limitation of agreement to extend

Questions

