

Legal Maxims and Adjudication

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Section 22(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) [‘the *BCIP Act*] provides that in determining an adjudication application the adjudicator is to **consider the following matters only**, namely, the provisions of the Act and the construction contract, the payment claim and the payment schedule and submissions (including relevant documentation) that have been duly made by the parties in support of the payment claim or payment schedule and the results of any inspection carried out by the adjudicator.

In *Laing O’Rourke v H&M Engineering* [2010] NSWSC 818 McDougall J at [38] said:

As a matter of plain English, the obligation to “consider” something requires that it be given attention, or looked at on its merits (see, for example, the **Australian Oxford Dictionary**, Second Edition, 2004). [The emphasis is in the judgment].

It will be seen that he took into account what he considered to be ‘plain English’ and what a dictionary said. Can an adjudicator do the same or is the adjudicator barred by s 22(2) from having regard to what is in a dictionary or what he or she believes is plain English?

At [39] McDougall J said, “In my view, the obligation to consider various matters imposed by s 22(2) of the Act should be read ... as requiring an active process of intellectual engagement”.

There are many matters that an adjudicator must take into account over and above what is in the Act, the construction contract, the submissions of the parties, etc. But what are they and why can the adjudicator take them into consideration?

The answer is in the term ‘judicial notice’. A court can take into account matters that are so indisputably settled that evidence is not required to prove them. For example, two plus two equals four. An adjudicator can have regard to a calendar. If it says that 6th March 2012 is a Tuesday, the adjudicator can consider it to be a Tuesday without seeking submissions from the parties.

The *Interpretation Act 1987* (NSW) applies to the *BCIP Act*. It prescribes how many provisions of the *BCIP Act* are to be interpreted. For example, the singular includes the plural [s 8], regard must be had to the purpose and object of the *BCIP Act* [s 33], in counting a period of days from a date or event, time shall be reckoned exclusive of that day or the day of the event and if the last day of a prescribed period of time falls on a Saturday, Sunday, public holiday or bank holiday the thing may be done on the following business day [s 36], a power to extend of time may be exercised after the period of time has expired [s 36], if an Act confers a power of appointment on a

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person, the power includes a power to remove the person so appointed [s 47], unless doubt is adduced to the contrary a document served by post in Australia is taken to have been served on the fourth working day after posting [s 76].

Section 21 of the *Interpretation Act 1987* defines many terms used legislation, for example, document, calendar month, month, named month and person. These are simply a few of the many provisions in the *Interpretation Act 1987* that an adjudicator must take into consideration when considering the *BCIP Act*.

An adjudicator must also take into account that s 181 of the *Conveyancing Act 1919* (NSW) prescribes how all contracts are to be interpreted unless a contrary intention appears. For example, the singular includes the plural and month means a calendar month. The *BCIP Act* itself makes reference to some other Acts, for example, the *Home Building Act 1989* (NSW) and the *Industrial Relations Act 1996* (NSW) which the adjudicator may have to consider.

An adjudicator may also take into account legal maxims. *A Dictionary of Modern Legal Usage* 2nd edn B. Garner, Oxford University Press 1995, defines a maxim as follows:

A maxim is a traditional legal principle that has been frozen into a concise expression. There are a few legal and quasi-legal maxims that everyone knows, such as these:

- A man's home is his castle.
- Caveat emptor.
- Ignorance of the law is no excuse.
- Possession is nine-tenths of the law.

Then there are thousands of maxims dressed up in Latin, few of which most lawyers seems now days to know.

Garner cites some examples and says that *Broom's Legal Maxims*, 10th edn 1939 is the 'most nearly definitive work on maxims in Anglo-American law'. The first edition of *Broom's Legal Maxims* was in 1845.

In the preface to the first edition Broom said, 'In Legal Science, perhaps more frequently than in any other, reference must be made to first principles. ... In the ruder ages, without doubt, the great majority of questions respecting the rights, remedies, and liabilities of private individuals were determined by an immediate reference to such Maxims, many of which obtained in the Roman law, and are so manifestly founded in reason, public convenience, and necessity, as to find a place in the code of every civilized nation.'

Forget quasi-legal maxims, such as, 'A man's home is his castle'. There are only a handful of maxims that I have found useful in the course of determining adjudication applications but I have found them very useful and I have often applied them. These are maxims that are so well known that no authority needs to be cited for them. They are basic principles of law.

One which I find very useful is, *de minimis non curat lex* which translates as ‘**the law does not concern itself with trifles**’. The term is often abbreviated to *de minimis*. It is amazing how often parties argue over trifles. An adjudicator is only determining a progress payment on account. The object of the Act would not be served if the adjudicator deals with trifles. Dealing with trifles only increases the adjudication fees and may delay the time when the claimant receives a progress payment. I usually ignore cents.

A claim by the respondent for liquidated damages for the claimant’s failure to reach practical completion by the date for practical completion is frequently an issue. The claimant often refers to the ‘prevention principle’. That is not a legal maxim. Broom at 191 says:

It is a maxim of law, recognised and established, that **no man shall take advantage of his own wrong**; and this maxim, which is based on elementary principles, is fully recognised in Courts of law and equity, and, indeed, admits of illustration from every branch of legal procedure.

The so called ‘prevention principle’ is no more than an illustration of the application of that maxim.

I have frequently seen examples of the respondent delaying the claimant by not providing access and the respondent claims liquidated damages although the respondent has caused the claimant to be late in achieving practical completion. Assume that the claimant has not claimed an extension of time within the time allowed by the contract for claiming an extension of time. The argument of the respondent is that the cause of the claimant being late was the claimant’s failure to claim an extension of time within time.

Usually contracts include the power for the respondent to grant an extension of time. Where the respondent has not done so, the consequence is that the respondent is trying to take advantage of the respondent’s own wrong. The respondent may cite cases but will never find one where the Court says that the respondent may take advantage of his own wrong. The maxim is one which an adjudicator can take into account just as the adjudicator can take into account that two plus two equals four.

Arguments over variations occur very frequently in adjudication. Often the contract conditions provide that the respondent or the respondent’s superintendent can direct variations in writing but the conditions make no mention of an oral direction to carry out a variation. Assume that the respondent or the superintendent has given the claimant an oral direction to carry out some additional work. Assume that the contract provisions only provide the claimant with an entitlement to payment for variations directed in writing. When the claimant claims payment for the additional work the respondent often argues that the additional work is not a variation because there was no direction in writing.

There are several maxims that the adjudicator might find useful here. First there are *expressio unius est exclusio alterius* and *inclusio unius est exclusio alterius*. The maxims are interchangeable. They are maxims of interpretation. They mean that **to include one thing is to exclude another**. For example, if a contract says, ‘Build a wooden fence’, it is not necessary for the contract to also say, ‘You can’t build a steel fence’.

To say that the respondent can direct a variation in writing is, in effect, to say that the respondent cannot direct a variation orally. What then is an oral direction to carry out extra work? One possibility is that the respondent's failure to put the direction in writing is a wrong committed by the respondent. The maxim 'no man shall take advantage of his own wrong' would mean that the respondent cannot take advantage of the fact that the respondent did not direct the variation in writing.

Another possibility is that the oral direction is a request standing outside the contract and the claimant's compliance with the request is an arrangement for the carrying out of construction work that is outside the original construction contract. In s 4 of the *BCIP Act* a construction contract is defined to mean a contract or other arrangement under which one party undertakes to carry out construction work for another party. The singular includes the plural unless the context otherwise requires. I can see nothing in the context that would preclude the construction contract from including more than one arrangement.

Frequently there is a time bar provision in conditions of contract. For example, that a claimant will not be entitled to extra remuneration for a variation, delay or breach of contract by the respondent unless the claimant gives notice of a claim within a prescribed period. This is often combined with a 'no waiver provision' to the effect that the respondent will not be taken to have waived any provision of the contract unless the respondent does so in writing.

It is not uncommon for a claimant to fail to give notice of a claim within time but for the respondent to pay some of the late claims and then, when it comes to adjudication, to argue that those claims or other claims the claims are barred. The claimant frequently contends that by paying some late claims the respondent waived the time bar clause and cannot now rely upon it for other claims. The argument based on waiver misconceived.

Waiver is the voluntary relinquishment or abandonment of a legal right. Assume that I have a contract with the newsagent for delivery of a newspaper seven days a week. Assume that no newspaper is delivered on Monday and Tuesday. I may decide to make no complaint, ie to relinquish [waive] any right I have to claim reimbursement for Monday and Tuesday's newspapers but that does not mean that the newsagent can escape liability for not delivering Wednesday, Thursday or any other day's paper.

Merely paying some late claims does not mean that the respondent cannot rely upon the time bar clause for other late claims. Waiver of the time bar for some claims does not bar the respondent from relying upon the time bar for other claims. Raising 'waiver' as a defence to a time bar clause serves no purpose. Nevertheless, claimants and their lawyers do it time and time again.

However, *estoppel* is another matter. There are various categories of estoppel. They have their origin in several maxims now the subject of countless cases. Briefly, if the respondent so conducts himself that the claimant reasonably takes his conduct to mean that the respondent does not intend the time bar to apply to any claims and the claimant acts accordingly, the respondent is stopped from denying that he does not intend to rely upon the time bar.

Sometimes the claimant says that the respondent or an agent of the respondent said to the claimant, "Leave your claims for extra till the end of the contract". The respondent

then sometimes refers to a ‘no waiver provision’ and says that the parties agreed in the contract that no waiver by the respondent would be effective unless made in writing.

Such a ‘no waiver provision’ was considered [and found ineffective to bar a claim] by a very famous American judge, Cardozo J in *Beatty v Guggenheim Exploration Co* 122 NE 378 (1919). He said, ‘**Whenever two men contract, no limitation self imposed can destroy their power to contract again.**’

That is a maxim. It is common sense. No matter what the parties put in the construction contract, they can subsequently agree to vary the contract. Despite the ‘no waiver provision’ in the original contract, the parties can subsequently make an oral agreement that the ‘no waiver provision’ cannot bar.

This maxim is also very useful when it comes to variation claims. Assume that the original contract conditions provide that the claimant will only have an entitlement to be paid for a variation that is directed in writing. Assume that the respondent orally directs the claimant to carry out extra work [a variation] and the claimant carries out the work. There is an agreement evidenced by words and conduct. That agreement is inconsistent with the condition in the original contract that the claimant will only have an entitlement to be paid for a variation that is directed in writing. In the new agreement there is either a price agreed for the variation or the law implies that the claimant is entitled to as much as he or she has earned. That amount is a *quantum meruit*.

It is important to distinguish the two uses of the term *quantum meruit*. If the parties made a contract for the extra work then the claimant can claim a progress payment under the *BCIP Act* but if the parties did not make a contract for the extra work then the claimant’s entitlement might have to be based upon claim for a *quantum meruit* in restitution. That is a claim based upon unjust enrichment. The *BCIP Act* does not allow a claimant to make a claim for a progress payment for unjust enrichment.

Nevertheless, claimants often contend that unless they are paid for certain work outside the contract the respondent will be unjustly enriched and, therefore, they are entitled to a progress payment based upon the doctrine of unjust enrichment. If, in submissions in an adjudication, a claimant mentions the term *quantum meruit*, the claimant must be very careful to ensure that the *quantum meruit* is a claim under the contract and not a claim based upon unjust enrichment.

Ubi remedium, ibi ius is a maxim translated by Garner as **where there is a remedy there is a right**. The *BCIP Act* gives a claimant a right to a progress payment on and from each reference date. Sometimes a respondent will try to defeat the claimant’s entitlement to a progress payment by contending that there is no reference date for the payment claim. In s 3 the object of the *BCIP Act* is to ensure that any person who carries out construction work is entitled to receive and able to recover progress payments. Progress payments are defined in s 4 to include the final payment and under s 13(3) include any amount that is held under the construction contract by the respondent and that the claimant claims is due for release.

If there is an amount [that is held under the construction contract by the respondent] that the claimant claims is due for release, there must be a reference date on and from which the claimant can claim the amount. The reference date may not have arrived or

might not be available to the claimant because a payment claim under the Act has already been made for that reference date [s 13(5)] but the maxim ‘where there is a remedy there is a right’ means that the claimant’s entitlement cannot be defeated by an argument that there can be no reference date for the claim.

The maxim was not considered by Peter Lyons J in *Walton Construction (Qld) v Corrosion Control Technology* [2011] QSC 67 where he held that the contract provided for reference dates and, consequently, there could not be a reference date other than one provided by the contract.

Where the law uses a Latin term, it is not always a legal maxim but it can often be given effect as if a maxim. Garner cites David Pannick, *Judges*, who says *per incuriam* ‘is an acceptable legal euphemism for a judgment [that] was obviously wrong’. In my opinion, the judgment in *Walton Construction* is *per incuriam*. If it was good law then there could be a situation where, under a construction contract, the claimant is entitled to an amount but cannot make a progress payment because there are no more reference dates.

I had an example where after the final claim was paid the respondent called up the claimant’s bank guarantee. The respondent claimed, but I did not accept, that after the reference date for the final claim there could not be any more reference dates. I was satisfied that after the security had been called up there had to be a reference date from which the claimant could make a claim for release of that security.

The same applies to retention moneys and security. They usually do not become payable by the respondent to the claimant until after the reference date for the final payment claim. If the last reference date under the contract has passed before the claimant is entitled to claim retention or security, the maxim ‘where there is a remedy there is a right’ means that there must be a reference date on or from which the retention moneys can be claimed. In the absence of an available reference date under the contract, the reference date must be provided by s 8 of the Act. That is to say, when there is no longer a reference date under the contract, the last day of each named month is a reference date.

An agreement to agree is not a contract. That is a maxim that is often relevant in adjudication. A party in adjudication often claims that because the other party agreed to agree upon something, there was an agreement on the point.

A party cannot **approve and reprobate**. A party cannot accept and reject. Section 17(3)(c) of the Act provides that a claimant can lodge an adjudication application within 10 business days after being served with payment schedule if the scheduled amount is less than the claimed amount. Sometimes a claimant lodges an adjudication application under s 17(3)(c) and then submits that the payment schedule is void because it fails to provide reasons for withholding payment. The claimant cannot accept that the payment schedule is a payment schedule for the purpose of making the adjudication application and then contend that it is not a valid payment schedule.

A related maxim is *allegans contraria non est audiendus* translated by Broom as ‘He is not to be heard who alleges things contradictory to each other’. It is commonly said that **a person cannot blow hot and cold**.

Contra proferentem is the doctrine that in interpreting documents, ambiguities which cannot otherwise be construed are to be construed unfavourably to the drafter. In many standard form contracts there is a provision that the doctrine will not apply. Such a provision has no effect.

It is as ineffective as a clause in a contract that says, ‘The respondent can take advantage of his own wrong’ or ‘The respondent will be able to impose a penalty on the claimant’. Contracts can provide for damages but any penal provision is void. A penalty clause is void.

Ex dolo malo non oritur actio is translated by Broom as ‘**A right of action cannot arise out of fraud**’. Sometimes. This, like so many maxims, could be said to go without saying. One party sometimes accuses the other of fraud. Parties rarely refer to the maxim but an adjudicator should bear in mind the maxim. It is the maxim that prevents a party from relying upon fraudulent conduct. The maxim also applies where a party tries to enforce an illegal contract, for example, an agreement to illegally dump asbestos waste.

When an adjudicator applies a maxim, it is unnecessary to give the Latin name or even to say that the adjudicator is taking into consideration a legal maxim. Just as an adjudicator can say two and two equals four without explaining why, an adjudicator can say, ‘The respondent is not entitled to liquidated damages because the respondent can’t take advantage of the respondent’s own wrong’. Of course the adjudicator would have to identify the wrong but would not have to give reasons for the conclusion that the respondent is not entitled to benefit from the wrong. A mere statement of the maxim in plain English will suffice.

The importance of going beyond the mere words in the Act is illustrated in *Rothmere v Quasar* [2004] NSWSC 1151 and *John Goss Projects v Leighton Contractors* [2006] NSWSC 789. In those cases McDougall J considered the meaning of s 22(4) of the Act. That section provides that if a previous adjudicator has valued construction work a subsequent adjudicator is to give the work the same value unless satisfied that the value has changed since the previous adjudication.

McDougall J decided that if the previous adjudicator had not valued the work but determined that the claimant had no entitlement in respect of the work, for example, because the work was not a variation as claimed by the claimant, the second adjudicator could decide that the work was a variation and could value the work.

McDougall J failed to give effect to the doctrine of *issue estoppel*. Subsequently, in *Dualcorp v Remo* [2009] NSWCA 69 the Court of Appeal decided that the doctrine of *issue estoppel* applies to adjudication. An adjudicator must consider the doctrine, where applicable, even though s 22(2) of the Act says that the adjudicator is to consider certain matters only.

Merely considering the words of the Act or the construction contract or the submissions of the parties, without considering them in the context of basic principles of law, is a mistake.