

By its recent decision in *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Onor* [2017] NTSC 45, the Supreme Court of the Northern Territory has quashed an adjudication determination made in favour of JKC Australia LNG Pty Ltd on the basis of procedural unfairness.

Background

The plaintiffs (Inpex) are joint venturers in the Ichthys Gas Field Development Project (the "Project") which consists of offshore facilities and a pipeline off the coast of Western Australia to onshore processing facilities near Darwin.

By contract dated 9 February 2012 (the "EPC Contract"), Inpex engaged the first defendant (JKC) to provide engineering, procurement, supply, construction and commissioning of the onshore facilities for the Project for a contract price in the order of US\$13 billion.

This proceeding involves a dispute over payment claims in relation to module fabrication packages under the EPC Contract.

The key dates can be summarised as follows:

- On 3 November 2016, JKC issued two invoices to Inpex in respect of part of the re-measurable works – one for US\$205,825,452 and a separate invoice for GST on that amount.
- On 24 November 2016, Inpex issued a letter disputing US\$133,501,780 of the first invoice and US\$17,510,093 of the GST claimed.
- On 3 January 2017, JKC served on Inpex an application under section 28 of the *Construction Contracts (Security of Payments) Act 2004* (NT) (the "Act") for adjudication of the resulting dispute (the Application).

JKC subsequently sought a determination that the amount of US\$83.9 million was owing by Inpex to JKC on the ground that (even though it claimed an entitlement to the whole amount) the balance of the amounts claimed were not readily amenable to adjudication under the Act.

Conduct of the Adjudicator

Via emails to the parties on 25 and 27 January 2017, the adjudicator sought further submissions from the parties on the basis that he perceived there to be uncertainty in the payment terms of the EPC Contract. Specifically, the adjudicator formed the preliminary view that, due to the circular and repetitious nature of Articles 34.2(a) and 34.2(b) (which provide for the resubmission of revised payment claims in circumstances where a payment claim is disputed), Inpex could indefinitely delay payment.

The adjudicator then raised the question whether the provisions implied into deficient construction contracts by section 20 of the Act should or should not be imported into the EPC Contract to cure the uncertainty. Despite counsel for both parties submitting to the adjudicator that there was no basis for importing the implied terms, on the basis that there was no uncertainty about how and when payment must be made, the adjudicator delivered a determination on the basis that the implied terms set out in Division 5 of the Schedule of the Act were implied into the EPC Contract.

This meant that, because Inpex had issued its Notice of Dispute 21 days after the relevant invoice (as contemplated by clause 34.2), rather than within 14 days as required by the implied terms, Inpex was obliged to pay the full disputed amount regardless of the merits of the claim.

The Decision of the Court

Although JKC contended that it may be inferred that the adjudicator's request for further submissions was intended to convey a preliminary view that the provisions implied by section 20 *should* be imported into the Contract, Kelly J sided with Inpex's contention that this was insufficient.

Her Honour, at [30], held that, pursuant to the requirements of procedural fairness, the adjudicator was required to notify the parties of "proposed conclusions that were not put forward by the parties and could not be easily anticipated."¹

The adjudicator did not warn the parties that he was contemplating making his determination on the basis that Inpex had failed to give notice of any objection to a payment claim within 14 days and was therefore obliged to pay the whole of the claim within 28 days. Such a failure, it was held, deprived Inpex of the opportunity to put material before the adjudicator as to why that result should not follow.

¹ *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 40 [10]; *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20.

Kelly J found that the “questions raised” by the adjudicator in his email of 25 January 2017 (in which he invited further submissions) were limited to “whether the provisions implied into deficient construction contracts by section 20 of the Act should or should not be imported into the EPC Contract.” She held that the terms of the direction failed to put Inpex on notice of the basis upon which he was proposing to make his determination and (even if they had worked out what the adjudicator was proposing) barred Inpex from making submissions about what the consequences might be if the implied terms were imported. Accordingly, the adjudicator’s conduct was held to have amounted to a substantial denial of natural justice, which deprived Inpex of the opportunity of obtaining a successful outcome.

Relevantly, Her Honour stated that in order for there to be a valid determination within the meaning of the Act, one which is immune from review by reason of section 48(3), the adjudicator must make a bona fide attempt to comply with the essential requirements of the Act and there must be no substantial denial of procedural fairness.

Contrary to the arguments that were raised by counsel for JKC, including that the Act is intended to provide a fairly “rough and ready” means of facilitating progress payments in construction contracts and for the rapid resolution of payment disputes, Her Honour maintained that the procedures provided for under the Act would not normally involve an adjudicator deciding on his own initiative to ignore the issues defined by the parties and make a determination on a basis not raised by the parties. To this end, the adjudicator (a non-lawyer) was criticised for making his determination on a legal interpretation which the lawyers for both parties had advised him was incorrect, rather than enquiring into the technical merits of the claim for which he was well qualified.

Consequently, Inpex was successful in having the adjudication determination quashed.

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