

Introduction

The Supreme Court of Western Australia recently handed down the decision of *Clough Projects Australia Pty Ltd v Floreani* [2018] WASC 101 in a dispute between Clough Projects Australia Pty Ltd (Clough) and Oceanic Offshore Pty Ltd (Oceanic) arising out of works to upgrade the Mundaring Weir.

Clough applied to the Supreme Court of Western Australia for a writ of certiorari to quash a determination made by the adjudicator under the *Construction Contracts Act 2004 (CCA)* that Clough was to pay Oceanic the amount of AU\$465,658 for payment claims under the subcontract.

The Supreme Court granted Clough's application and quashed the adjudicator's determination, on the basis that the adjudicator failed to afford Clough procedural fairness and made a jurisdictional error by exceeding his jurisdiction by adjudicating payment disputes that had not arisen under the subcontract.

The Supreme Court held as follows:

- Section 32(3)(c) of the CCA gave the adjudicator the power to adjudicate more than one payment dispute between the parties simultaneously without Clough's consent
- The adjudicator determined the payment disputes on a basis not argued by the parties, and denied Clough procedural fairness by not inviting submissions
- The adjudicator exceeded his jurisdiction by determining the payment disputes on findings that one or more implied contracts had been formed between the parties

Decision

Firstly, the Supreme Court had to determine whether section 32(3)(c) allowed the adjudicator to determine one or more payment disputes simultaneously between the same parties. Clough submitted that section 32(3)(c) only allows an adjudicator to determine payment disputes simultaneously if they are between different parties. Oceanic submitted that there is nothing in the wording of the section which limits the discretion of an adjudicator in that way.

The Supreme Court agreed with Oceanic and held that section 32(3)(c) gives the adjudicator the discretion to adjudicate a payment dispute simultaneously with one or more other payment disputes between the same parties, if the adjudicator is satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the dispute in accordance with section 30. There are no words in section 32(3)(c) that limit its application to payment disputes between different parties.

The Supreme Court found that section 32(3)(b) would be the source of the adjudicator's jurisdiction when the parties consent, but section 32(3)(c) would apply where the consent of one party is not forthcoming. Further, the Supreme Court held that it is unlikely that the legislature intended to allow adjudicators to adjudicate simultaneous adjudications between different parties but not between the same parties, and that this interpretation is supported relevant extrinsic materials, including the explanatory memorandum to the Construction Contracts Amendment Bill 2016.

Accordingly, the Supreme Court held that the adjudicator acted within his jurisdiction in adjudicating more than one payment dispute between the parties simultaneously even without Clough's consent.

The second issue the Supreme Court had to consider was whether the adjudicator determined the payment disputes on a basis not argued by the parties, thereby denying Clough procedural fairness. The adjudicator's determination was based on findings of implied contracts, on which there had been no submissions from either party.

The Supreme Court held that the adjudicator denied Clough procedural fairness by failing to disclose that he proposed to find that implied contracts had been formed and that he proposed to allow Oceanic's claim on that basis. The Supreme Court found that Clough could not reasonably have anticipated that the adjudicator would determine seven (out of nine) of Oceanic's claims on that basis and was not given the opportunity to make submissions that may have affected the adjudicator's determination. Accordingly, the Supreme Court granted a writ of certiorari quashing the determination.

The third issue the Supreme Court considered was whether the adjudicator exceeded his jurisdiction by determining the payment disputes on the basis of findings of implied contracts between the parties. The Supreme Court agreed with Clough's submissions that the adjudicator's jurisdiction was limited to adjudicating payment disputes arising under the Subcontract. Accordingly, as the adjudicator was adjudicating payment disputes arising under implied contracts that he determined had been formed (which arose outside of the Subcontract) he had exceeded his jurisdiction.

The Supreme Court also noted for completeness that if instead the adjudicator was determining Oceanic's claims on restitutionary principles instead of concluding that a separate and genuine contract had been formed then he would still be exceeding his jurisdiction based on the principles in *Delmere Holdings Pty Ltd v Green* [2015] WASC 148.

The adjudicator made a jurisdictional error by exceeding his jurisdiction and the Supreme Court quashed the determination on that basis.

Implications

This is the first time that a court has considered the interpretation of section 32(3)(c) of the CCA since it was amended. The Supreme Court's decision gives adjudicators a broader discretion to determine disputes, as it confirms that adjudicators have the power to adjudicate one or more payment disputes between the same parties (as well as different parties), even where a party does not consent. The qualification is that the adjudicator must be satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the disputes fairly and as quickly, informally and inexpensively as possible.

The Supreme Court also confirmed that a failure to accord procedural fairness will arise if an adjudicator finds on a basis not advanced by the parties, without first giving the parties an opportunity to put forward submissions.

Finally, any party applying for adjudication must ensure that the relevant payment dispute has arisen under the terms of the construction contract, and not a separate implied contract, which will be outside an adjudicator's jurisdiction under the CCA.

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