

NT Decision Confirms Importance of Parties to Address all Potential Consequences in Adjudication

A recent case relating to the Ichthys LNG Project in the Northern Territory (NT) confirms that there are very narrow grounds that exist in finding that a party has been denied procedural fairness, as part of the adjudication process.

The tight timeframes the Construction Contracts (Security of Payments) Act 2004 (CCA) imposes on an adjudicator, coupled with the interim nature of adjudications, inform the standard of what is required to afford natural justice in this context.

The right of a party to commence legal proceedings for certain contentions in respect of a claim, despite a determination, is relevant. Submissions by the parties involved should contemplate any eventualities that are adverse to a party, particularly if foreshadowed by an adjudicator.

Even if the parties in dispute agree on a specific matter, this will not prevent an adjudicator from exercising independent thought and reaching an alternative conclusion.

Background

The Court of Appeal in the NT recently allowed an appeal from the Supreme Court in favour of JKC Australia LNG Pty Ltd in the decision *JKC Australia LNG Pty Ltd (JKC) v. INPEX Operations Australia Pty Ltd & Ors* (Inpex).¹

Inpex engaged JKC to provide engineering, procurement, supply, construction and commissioning of the onshore facilities for approximately US\$13 billion. The proceedings involved a dispute over payment claims.

The key dates are summarised as follows:

- (a) On 3 November 2016, JKC issued two invoices to Inpex for works performed – one for US\$205,825,452, and a separate invoice for GST on that amount
- (b) On 24 November 2016, Inpex issued a letter disputing US\$133,501,780 of the first invoice, and a portion of the GST claimed (Notice)
- (c) On 3 January 2017, JKC served Inpex with an application under section 28 of the CCA for adjudication of the disputed sum (Application)

On 25 January 2017, the adjudicator sought further submissions from the parties due to uncertainty he perceived in the payment terms of the contract. The adjudicator raised the question of whether the provisions implied into deficient construction contracts by section 20 of the CCA should be imported into the contract to cure the uncertainty.

Both parties submitted that there was no uncertainty about how and when payment must be made (and therefore no basis for importing the implied terms).

Despite this, the adjudicator determined that the CCA implied terms applied. Inpex was obliged to pay the full disputed amount regardless of the merits of the claim, as Inpex issued its Notice 21 days after the invoice (as contemplated by the contract), instead of the 14-day timeframe imposed by the implied terms.

Court at First Instance

JKC contended that the adjudicator's request for further submissions was intended to convey a preliminary view, being that the provisions implied by section 20 of the CCA should be imported into the contract. Inpex's contention that this was insufficient was supported by the court. Specifically, the court noted that the adjudicator was required to clearly notify the parties of "proposed conclusions that were not put forward by the parties and could not be easily anticipated".²

The adjudicator did not expressly state that he contemplated making his determination on the basis that Inpex had failed to notify JKC of any objection to payment within 14 days and, therefore, was obliged to pay the entire claim within 28 days. Such a failure deprived Inpex of natural justice, as it was not given a chance to respond.

Decision on Appeal

There were two issues considered on appeal, being whether:

- (a) The court erred in finding that the adjudicator failed to provide procedural fairness to Inpex
- (b) Inpex's contention by notice was correct, in that even if the court was in error on the procedural fairness afforded to it, the order quashing the adjudicator's determination should stand, as the obligation to determine the payment dispute under s 33(1)(b) of the CCA had not been properly discharged

¹ [2018] NTCA 6.

² At [30].

The first issue, that Inpex was not afforded natural justice, was found to be incorrect. Once the adjudicator sought submissions on implying terms into the contract, the possibility that the adjudicator would find that Inpex failed to issue a dispute notice within the period required by the CCA was flagged.

The court agreed with JKC's submission that, if the conditions implied by section 20 of the CCA were imported into the contract, the implied term requiring payment in the absence of a dispute notice should have been evident to Inpex.

The adjudicator did not elucidate on the result of importing the implied provisions; the consequences were "plain and obvious" from a reading of these terms, particularly clause 6(2) of the Schedule.³ In doing so, the court noted that the test of whether procedural fairness has been afforded is objective, and turned on whether the party "received express notice, or should have reasonably anticipated that either the adjudicator or the other party would rely upon the issue".⁴

It was also found that although section 34(2) of the CCA entitles an adjudicator to request parties to make further submissions, there is nothing in section 34 preventing a party from addressing any concerns or consequences of an adverse finding. Therefore, even if Inpex believed that it was prevented from making further submissions, it should have indicated an intention to make further submissions if the adjudicator found that provisions of the CCA may be implied into the contract.

Essentially, the adjudicator's determination "could not, or should not" have come as any surprise to Inpex.⁵ There was no obligation on the adjudicator to request further submissions from the parties before arriving at his determination.

On the second issue, it was found that a determination will only give rise to a jurisdictional defect if the adjudicator did not make a genuine attempt to exercise his authority in accordance with the CCA.

Accordingly, JKC was successful in its appeal. The court held that the adjudicator had undertaken the requisite steps in discharging his responsibility under section 33(1)(b) of the CCA, in making a determination that:

- (a) There was a valid payment claim
- (b) There was a valid payment dispute (whether by disputation of the claim or failure to pay)
- (c) Inpex was liable to pay the amount claimed by JKC, in the absence of providing a dispute notice within the time prescribed by the CCA

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³ At [44].

⁴ At [40].

⁵ At [50].