INPEX OPERATIONS AUSTRALIA PTY LTD v JKC AUSTRALIA LNG PTY LTD

DENIAL OF NATURAL JUSTICE IN ADJUDICATION PROCEEDINGS – A CASE NOTE

GORDON SMITH

*Barrister & Solicitor**
Chartered Arbitrator, and Adjudicator

I. INTRODUCTION

The Supreme Court of the Northern Territory, in *Inpex Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd and Anor* (*"Inpex v JKC"*),[1] quashed an adjudicator's determination under the *Construction Contracts (Security of Payments) Act* 2004 (NT) ("Act") on the grounds that there had been a substantial denial of natural justice. The Court's decision and reasoning provide further guidance to parties and adjudicators on the content of an adjudicator's obligation to comply with the principles of natural justice in making a decision or determination under the Act.

II. FACTS

The adjudication under the Act arose out of a contract between the plaintiffs, Inpex Operations Australia Pty Ltd and Ichthys LNG Pty Ltd ("Inpex"), and JKC Australia LNG Pty Ltd ("JKC"), dated 9 February 2012 ("EPC Contract") for JKC to provide engineering, procurement, supply, construction and commissioning of the onshore facilities for the Ichthys Gas Field Development Project ("Project") for a contract price in the order of US$13 billion. The onshore facilities are located at Bladin Point near Darwin, and include two LNG trains, LPG and condensate plants, product storage tanks, administration facilities, and a materials off-loading facility and jetty.

JKC is obliged to perform various categories of works under the EPC Contract, categorised as Lump Sum Works, Re-measurable Works, and Reimbursable Works respectively. The proceedings involved a dispute over payment claims in the Re-measurable Works category in relation to module fabrication packages under the EPC Contract.

JKC, on 3 November 2016, issued to Inpex two invoices in respect of part of the Re-measurable Works, one for US$205,825,452.00, and a separate invoice for GST on that amount. On 24 November 2016, Inpex issued a letter disputing US$133,501,780.00 of the claim and US$17,510,093.00 of the GST claimed.

On 3 January 2017, JKC served on Inpex an application under section 28 of the Act for adjudication of the resulting dispute ("Application"), in which it sought a determination that the lesser amount of US$83,933,837.00 was owing by Inpex to JKC on the ground that, although it claimed an entitlement

* Gordon Smith Legal, LLB (Hons), MBA, BE Civil, FCIArb, CArb, FSIArb, AIAMA, FIEAust, CPEng (Ret), IAMA Grade 1 Arbitrator.

[1] [2017] NTSC 45.

to the whole amount, the balance of the amounts claimed were not readily amenable to adjudication under the Act. JKC asserted that the payment dispute arose on 24 November 2016, the date of Inpex's letter disputing part of the claim.

The second defendant, the adjudicator ("Adjudicator"), an engineer, was appointed to adjudicate the payment dispute. On 17 January 2017, Inpex served its response to the Application ("Response"), in which Inpex disputed the jurisdiction of the Adjudicator on a number of grounds not relevant to the proceedings, and disputed in detail the merits of JKC's claimed entitlement to the US$83,933,837 claimed.

Article 34.2(a) of the EPC Contract contains a procedure for JKC to either re-submit a revised payment claim taking into account Inpex's objections to the amount claimed, or to re-submit to Inpex two new separate payment claims, one for the undisputed part of the original invoice and the other for the revised part of the original invoice. Article 34.2(b) of the EPC Contract provides that the procedure in Article 34.2(a) must be repeated until the parties have reached agreement as to the part of the invoice that is in dispute.

The Adjudicator, by email to the parties dated 25 January 2017, sought further submissions from the parties, which the Adjudicator referred to as a *"possible issue arises with respect to uncertainty in the payment terms of the EPC Contract"*, referring to the question as, *"whether the provisions implied into deficient construction contracts by section 20 of the NT Act should or should not be imported into the EPC Contract?"*

JKC's solicitors, by email dated 27 January 2017, requested the Adjudicator to clarify which part of the payment terms of the EPC Contract give rise to a possible issue with uncertainty. The Adjudicator responded by stating that he had *"formed a preliminary view, that due to the circular and repetitious nature of Articles 34.2(a) and 34.2(b), Inpex could indefinitely delay payment"*, and referred to the question arising as, *"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?"*

Both parties responded to the Adjudicator that there was no basis for importing the implied provisions into the EPC Contract pursuant to section 20 of the Act. Solicitors for JKC submitted that there is no uncertainty about the period *"by when payment must be made"* as per section 20 of the Act, the application of the implied terms would not make the circumstances materially different, and any circularity in the process is cured by the application of the adjudication regime under the Act.

Solicitors for Inpex similarly submitted that Article 34 of the EPC Contract contains enforceable written provisions about when and how Inpex must respond to a payment claim by JKC, and by when a payment must be made, and consequently, section 20 of the Act does not and cannot operate to imply into the EPC Contract the terms contained in Division 5 of the Schedule to the Act.

The Adjudicator handed down his determination on 1 February 2017 ("Determination"), in which he determined that Inpex was liable to pay JKC the amount of US$83,933,837.00. The Adjudicator found, contrary to the submissions of both parties, that section 20 of the Act operated to imply into the EPC Contract the implied terms set out in Division 5 of the Schedule, specifically the implied term in clause 6(2) which sets out provisions for a party to respond to a payment claim, as follows:

> "(2) The party must:
>
> (a) within 14 days after receiving the payment claim:
>
> (i) give the claimant a notice of dispute; and
>
> (ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or
>
> (b) within 28 days after receiving the payment claim, pay the whole of the amount of the claim."

The Adjudicator referred to both parties as having misconstrued the EPC Contract and the Act, as follows:

> "For the reasons that follow, in contending the implied provisions in the Schedule should not apply, both parties have misconstrued the Contract and the Act. Given the complexity of the statutory provisions and judicial authorities in issue this is understandable."

The Adjudicator's reasons are not set out in full in the judgment, but it appears from the passages set out that the Adjudicator considered that the payment terms set out in Article 34 of the EPC Contract were not sufficiently certain, thereby justifying the implication of clause 6(2) of Division 5 of the Schedule. The Adjudicator then applied the terms of clause 6(2) in determining that Inpex was liable to pay JKC the amount of US$83,933,837.00, as follows:

> "As noted, on 24 November 2016 Inpex issued the Notice of Dispute, 21 days after the Payment Claim was lodged. I have no evidence Inpex issued a notice of dispute, compliant or otherwise, within 14 days after receiving the Payment Claim as required by clause 6(2)(a) of the Schedule. In the absence of any compliant notice of dispute and pursuant to clause 6(2)(b) of the Schedule, which was necessarily implied into the Contract, Inpex was obliged to pay the Payment Claim in full when payment fell due on 1 December 2016, that is 28 days from 3 November 2016. It failed to do so. As noted below, the obligation remains."

Inpex applied to the Court for an order to quash the Determination.

III. THE COURT'S REASONING

Ground 1 – Denial of Procedural Fairness

Kelly J commenced by noting that the parties are in agreement that the Adjudicator's decision that the implied terms in Division 5 of the Schedule are imported into the EPC Contract is plainly wrong, but also noted that that by itself does not mean that the decision is amendable to judicial review. Her Honour stated that in order for there to be a valid determination within the meaning of the Act which is immune from review by reason of section 48(3) of the Act, 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, referring to the New South Wales Court of Appeal decision in *Brodyn Pty Ltd v Davenport*.[2]

Kelly J, applying this principle, stated that if the only complaint is that the Adjudicator had misconstrued the EPC Contract, then that would not, of itself, render the Determination a nullity, reviewable by the Court unless it could be shown that the Adjudicator's decision was unreasonable, in the sense referred to the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corp,*[3] or that there was a substantial failure to comply with the requirements of procedural fairness in the circumstances.[4]

Inpex contended that the Adjudicator did not warn the parties that he was considering making a determination on the basis that:

(1) *"both parties misconstrued the Contract and the Act"* and he intended to proceed on a basis that was contrary to the common position of the parties;

(2) clause 6 was implied into the EPC Contract;

(3) Inpex had not complied with the implied clause 6 in relation to the payment claim; and

(4) as a consequence, Inpex was obliged to pay the full disputed amount regardless of the merits of the matters raised by Inpex in its letter of 24 November 2016 and regardless of whether JKC had established that it had performed the work in question and what its value might be.

Kelly J agreed with Inpex, stating that it was insufficient for the Adjudicator to request for further submissions on the question of *"whether the provisions implied into deficient construction contracts by section 20 of the Act should or should not be imported into the EPC Contract"*, assuming it could

[2] [2004] NSWCA 394.
[3] [1948] 1 KB 223.
[4] [2017] NTSC 45, [28], referring to a number of cases, including *Trans Australian Constructions Pty Limited v Nilsen (SA) Pty Ltd and Another* (2008) 23 NTLR 123, 138 [43], per Southwood J, *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15, 24, [49], per Mildren J, and *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another* (2009) 25 NTLR 1, 11, [29], per Kelly J.

be inferred, as JKC contended, that the Adjudicator's request for further submissions was intended to convey a preliminary review that the provisions implied by section 20 of the Act should be imported into the Contract. She noted that the Adjudicator did not mention that the implied term he thought would apply was clause 6(2) or spell out what he thought the consequences of that would be.[5]

Kelly J noted that the Adjudicator, in his initial request for submissions, referred to a *"possible issue arises with respect to uncertainty in the payment terms"*, and in his subsequent email referred to clauses 34.2(a) and (b) of the EPC Contract which detail how payment disputes are to be dealt with, whereas the payment terms are dealt with in clauses 34.2(c) and (d), and 34.3 of the EPC Contract. Kelly J noted that the Adjudicator did not suggest that there was any uncertainty in relation to the provision in clause 34.2 providing that Inpex must notify any objections to a payment claim within 21 days.

Inpex referred to potential submissions such as the payment claim failing to comply with the requirements of the EPC Contract, estoppel or waiver, or that even if clause 6 applied, that the Adjudicator was obliged to determine if any money was owed.[6]

Kelly J rejected JKC's submission that the Adjudicator, by requesting submissions in relation to section 20 of the Act in his initial email, was implied advising the parties that that included clause 6(2) of Division 5 of the Schedule, and thereby it was open to Inpex to make the submissions which Inpex submitted it was precluded from making. Kelly J referred to the contents of the Adjudicator's request of 25 January 2017 that submissions *"must be strictly confined to the question raised"*, being *"whether the provisions implied into deficient construction contracts by section 20 of the NT Act should or should not be imported into the EPC Contract"*, which not only did not put Inpex on notice, but precluded Inpex from making submissions on the consequences of the implied terms and why the consequences should not apply.[7] Kelly J concluded that this amounted to a substantial denial of natural justice by denying Inpex an opportunity of making such submissions, applying the decisions of the Supreme Court of the Northern Territory in *Hall Contracting Pty Ltd v Macmahon Contractors Pty & Anor*,[8] and the Supreme Court of Western Australia in *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd*.[9]

Kelly J accepted JKC's submission that the Act may necessarily be productive of some kinds of procedural unfairness, referring to the Act as being a *"fairly rough and ready means of facilitating progress payments in construction contracts and for the rapid resolution of payment disputes"*, but rejected JKC's submission that the procedure adopted by the Adjudicator was this kind of *"built-in"*

[5] [2017] NTSC 45, [35].
[6] [2017] NTSC 45, [36].
[7] [2017] NTSC 45, [37].
[8] [2014] NTSC 20.
[9] [2014] WASC 40.

unfairness. Her Honour found that the procedures under the Act do not contemplate an adjudicator ignoring the issue defined by the parties and making a determination on a basis not raised by the parties. Kelley J stated that if an adjudicator decides to embark upon such a course, he or she is obliged to give the parties proper notice and a proper opportunity to make submissions on whether he or she should do so.[10]

Kelly J concluded that the Adjudicator's actions amounted to a substantial denial of procedural fairness, and issued an order quashing the Determination on that ground.

Grounds 2 and 3

Kelly J rejected two alternative bases submitted by Inpex for quashing the Determination. First, Inpex sought to draw a distinction between the two ways in which a *"payment dispute"* can arise under section 8 of the Act, that is, by rejection or dispute of the payment claim, as in this case, or when the amount claimed is due to be paid. Inpex contended that the payment dispute the subject of the application arose on 24 November 2016 when Inpex disputed part of the payment claim of 3 November 2016, and therefore, it is that dispute the Adjudicator is bound to determine. Inpex submitted that instead of determining that dispute, the Adjudicator determined a dispute which did not exist, that is, that Inpex was obliged to give notice of dispute within 14 days or pay the whole amount of the payment claim within 28 days. Inpex submitted that this took the Adjudicator outside what he was authorised to do under the Act, and as a consequence, the Determination was a nullity.[11]

Kelly J rejected Inpex submission, pointing out that it will not always be the case that the parties are in agreement about when and how a payment dispute arose. She considered that the adjudicator is not obliged to accept the parameters of the dispute as agreed between the parties, and has an independent duty to ascertain, for example , that the requirements of section 28 have in fact may be met, and a duty to give effect to his own findings.[12]

Secondly, Inpex submitted that the Determination was a nullity because the Adjudicator failed to undertake the statutory task in section 33(1)(b) of the Act, which required him to consider whether it has been demonstrated that a particular amount was due. Kelly J rejected this argument, referring to the focus of the Act being on the contract, and stated that if the contract provides for a claim to be paid in full if not disputed within a given time, then there is no reason why an adjudicator ought not give effect to that provision in making a Determination under section 33(1)(b) of the Act, and every reason why he should.[13]

[10] Referring to Barr J's dicta in *Hall Contracting Pty Ltd v Macmahon Contractors Pty & Anor* [2014] NTSC 20.
[11] [2017] NTSC 45, [49]-[51].
[12] [2017] NTSC 45, [57].
[13] [2017] NTSC 45, [58].

IV. DISCUSSION

Denial of Procedural Fairness

Procedural fairness does not require a decision-maker to invite comment on his or her evaluation of a party's case. However, the position is different when the decision-maker's evaluation is one which could not have reasonably been anticipated by the parties.[14] The decision in *Inpex v JKC* is a clear instance where the Adjudicator's finding that clause 6(2) of Division 5 of the Schedule should be implied into the EPC Contract could not have reasonably been anticipated by the parties. The Adjudicator was therefore clearly obliged to give the parties notice of his intended finding, and a reasonable opportunity to make submissions on whether he should make such a finding.

Kelly J, in her concluding remarks, was of the view that the Adjudicator, instead of enquiring into the technical merits of the claim, made his Determination on a legal technicality which the solicitors for both parties had advised him was incorrect, and questioned whether this is the kind of dispute, or the kind of process contemplated when the Act was passed.[15]

The author submits that the circumstances of the case are unusual, since it is rare for an adjudicator to come to a different view on an issue of contractual interpretation in circumstances where the parties, represented by experienced construction law practitioners, have jointly expressly advised him or her that such an interpretation is incorrect. Nevertheless, Kelly J's decision, including her concluding remarks, serves as a reminder to adjudicators of the importance of the principles of natural justice in making a determination under the Act, and the various mechanisms available to adjudicators under the Act to ensure parties are given a reasonable opportunity of presenting their cases.

Content of Procedural Fairness under the Act

One interesting aspect of Kelly J's judgment is her acceptance that the Act may necessarily be productive of some kinds of procedural unfairness, citing the example given by counsel for JKC that a respondent may go well beyond the matters raised in the application and the Act provides no opportunity for the applicant to respond to such matters unless invited to do so by the adjudicator. Kelly J referred to this type of procedural unfairness as, *"the kind which exists in the interest of*

[14] *Hamersley HMS Pty Ltd v Davis* [2015] WASC 14, [69], citing the decisions in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074, 591-592, *McKay v Commissioner of Main Roads* [2013] WASCA, [157], and *Apache Northwest Pty Ltd v Agostini [No 2]* [2009] WASCA 231, [217]-[218]. Refer also to the Supreme Court of Western Australia decision in *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd*, [2014] WASC 40, [10]. The Supreme Court of the Northern Territory, in *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20, [38], recognised the principle that a decision-maker is generally not obliged to invite comment on his or her evaluation of an applicant's case, but that this may be subject to the qualification that a party to a potentially unfavourable decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with them.

[15] [2017] NTSC 45.

facilitating the rapid, interim determination of progress payment disputes the Act is designed to achieve."[16]

The principle that the content of procedural fairness under the Act is constrained by the legislative regime is well established. For example, Beech J in his Supreme Court of Western Australia decision in *Hamersley Iron Pty Ltd v James*,[17] in the context of the Western Australia *Construction Contracts Act* 2004 (WA) ("WA Act"), rejected Hamersley's submission that procedural fairness required the adjudicator to hold an oral hearing, and in doing so, referred to the constraints inherent in the WA Act in the following terms:[18]

> "The content of the requirements of procedural fairness depends upon the statutory framework and all the circumstances of the case.[19] Regard must be had to the character and consequences of adjudication in determining whether procedural fairness required an oral hearing to determine a conflict. An adjudication determination does not finally determine substantive legal rights. It does not preclude the parties from commencing litigation or arbitration. Under s 31(2), an adjudicator is required to give the decision, with reasons, within 14 days of service of the response. In all the circumstances, it was open to the adjudicator to determine the application consistently with the requirements of procedural fairness, without holding an oral hearing."

Similarly, Kenneth Martin J, in his Supreme Court of Western Australia decision in *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd*,[20] referred to the requirements of procedural fairness in the context of the unique procedure under the WA Act in rejecting Mount Gibson's submission that the adjudicator failed to accord it procedural fairness, as follows:[21]

> "The actual requirements of procedural fairness need to be assessed specifically, in their unique presenting contexts. Again of key significance is the consideration that the process for a contractor to seek a payment under the *Construction Contracts Act* is to proceed on an informal, speedy, but interim, basis before a body more akin to a tribunal than a court. This again, in my view, is the decisive consideration in assessing the metes and bounds of the requirement for procedural fairness in this particular context.
>
> In such a context, particularly when there is still available at a later time, in another place or places, the substantive right of challenge against the payment (and the underlying authority conclusion), the approach of this adjudicator to resolving the ostensible authority point in the alternative did not on my assessment, arguably deny procedural fairness to Mount Gibson. The primary conclusion was as to the

[16] [2017] NTSC 45, [44].
[17] [2015] WASC 10.
[18] [2015] WASC 10, [87]. Refer also to *Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd [No 2]* [2013] WASC 59,, [29]-[31].
[19] Citing the decisions in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074, 591-592, *McKay v Commissioner of Main Roads* [2013] WASCA 135, [157], and *Apache Northwest Pty Ltd v Agostini [No 2]* [2009] WASCA 231, [217]-[218].
[20] [2011] WASC 172.
[21] [2011] WASC 172, [102]-[103].

> existence of express authority. The adjudicator's further observations concerning ostensible authority are to be read as a limited correlative augmentation to the primary conclusion."

Whilst the principle is easily stated that the content of procedural fairness is to be construed in the context of the procedure under the Act, such as the proceedings being informal, speedy, and interim, the difficulty for adjudicators is in assessing, in the particular circumstances of a payment dispute, how such factors affect the *"metes and bounds"* of procedural fairness. The author submits that adjudicators should be conservative in giving both parties a reasonable opportunity to be heard, in the context of the time constraints under the Act, on any issue the adjudicator considers to be relevant and material to his or her determination, rather than relying on the Act itself being *"productive of potential unfairness"*.

With respect to the example referred to by Kelly J in *Inpex v JKC* that a respondent may go well beyond the matters raised in the application and the Act provides no opportunity for the applicant to respond to such matters unless invited to do so by the adjudicator as being an instance of *"built-in"* procedural unfairness, the author respectfully submits that parties and adjudicators should not interpret Kelly J's dicta to the effect that an adjudicator is not obliged to exercise his or her discretion under section 34(2)(a) of the Act to request further submissions, information or documents from the parties arising from the respondent's response to an application under the Act.

Vickery J, in his Supreme Court of Victoria decision in *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)*,[22] discussed these circumstances in the context of the adjudication procedure under the Victorian *Building and Construction Industry Security of Payment Act 2002* (Vic) ("Vic Act"). His Honour referred with approval to McHugh J's dicta in *Muin v Refugee Review Tribunal*,[23] as follows:[24]

> "Natural justice requires that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with matters adverse to his or her interests that the repository of the power proposes to take into account in exercising the power."

Vickery J considered that the requirement for a party to be given an opportunity to deal with matters adverse to his or her interests referred to by McHugh J can be accommodated within the process contemplated by the Vic Act, since section 22(5)(a) (the equivalent of section 34(2)(a) of the Act and section 32(2)(a) of the WA Act) enables an adjudicator to request further submissions from either party and to give the other party an opportunity to comment on those submission.[25]

[22] [2009] VSC 426.
[23] [2002] HCA 30, [123].
[24] [2009] VSC 426, [134].
[25] [2009] VSC 426, [135].

A respondent's response to an application for adjudication under the Act will typically cover three categories of response, first, challenges to the adjudicator's jurisdiction to determine the payment dispute, secondly, challenges to the merits of the payment claim, and thirdly, a counterclaim or set-off defence. Applicants, in preparing their applications under the Act, will often attempt to anticipate a respondent's arguments on the first and second categories of response. However, whether this is the case or not, there will usually be matters of jurisdiction raised by a respondent not dealt with fully or at all by the applicant, and similarly, if a respondent has raised a counterclaim or set-off, it is unlikely that an applicant would have considered such a defence in its application.

The author submits that the adjudicator is obliged in these circumstances to exercise his or her discretion under section 34(2)(a) of the Act to request further submissions, information or documents from the applicant, taking account of the limited time constraints under the Act, on both the jurisdiction issues and the counterclaim or set-off defence.

Payment in Accordance with the EPC Contract

Kelly J's basis for rejecting Inpex's third ground is a reference to the Adjudicator's finding in his Determination, applying the terms of clause 6(2) of Division 5 of the Schedule, that Inpex is liable to pay JKC the full amount of US$83,933,837.00. As pointed out by Kelly J, the focus of the Act is on the contract, which is consistent with previous decisions of the Supreme Court of the Northern Territory, and the Supreme Court of Western Australia, in the context of the WA Act.

In this case, the Adjudicator incorrectly implied clause 6(2) of Division 5 of the Schedule into the EPC Contract, but many construction contracts contain provisions of similar effect to clause 6(2). Indeed, in *Inpex v JKC*, Article 34.3(a) of the EPC Contract provides that if Inpex does not dispute the payment claim, it must pay the entire amount under the payment claim within 45 days of receiving the payment claim.

Kelly J's dicta on this issue highlights the importance of a respondent ensuring that it disputes a payment claim in accordance with the terms of the relevant contract or risk an adjudicator's determination that it is obliged to pay the full amount of a payment claim.

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Gordon Smith
Barrister & Solicitor
LLB (Hons), MBA, BE (Civil), FCIArb, CArb, FSIArb. AIAMA, FIEAust, CPEng (Ret), IAMA Grade 1 Arbitrator
Gordon Smith Legal
Email: gordon.smithcharb@bigpond.com
http://www.gordonsmithlegal.com.au