

Construction Alert

\$86 million adjudication decision declared void

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The recent Supreme Court of Queensland decision of *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd & Anor* [2011] QSC 292 set aside the largest adjudication decision in Queensland, as the Court found that the Adjudicator did not comply with an essential requirement of the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIP Act**) for a valid decision.

The adjudication decision for over \$86 million in favour of McConnell Dowell Constructors (Aust) Pty Ltd and Consolidated Contracting Company Australia Pty Ltd (**MCJV**) was declared void on the basis that the Adjudicator did not consider submissions duly made by QCLNG Pipeline Pty Ltd (**QCLNG**). Importantly, this decision distinguished a number of New South Wales authorities where it was held that an accidental or erroneous omission by an Adjudicator does not amount to a failure to comply with the NSW equivalent of s26(2) of the BCIP Act. In this case, the Court found that an accidental or erroneous omission, if significant, could render a decision void.

Section 26(2) of the BCIP Act stipulates the only matters that the Adjudicator is to consider when deciding an adjudication. The matters include, amongst others, the provisions of the construction contract from which the application arose and the payment schedule to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule.

The key findings of the decision were:

- A failure by an Adjudicator to consider submissions which are of considerable significance constitutes a

failure by the Adjudicator to comply with an essential requirement of the BCIP Act for a valid decision.

- The decision went a step further in obiter to state that, had the Adjudicator considered the submissions, the Court would have been satisfied that two of the Adjudicator's conclusions were irrational (i.e. that no reasonable person in his position could have come to that conclusion), and would have been prepared to set the decision aside on that basis.

Facts

The relevant contractual provisions provided, inter alia, that:

- 32.3(a) The Contractor (MCJV) shall request a Variation in writing, and any such request must be made within 48 hours of the beginning of the Variation occurrence.
- 32.3(c) If the Contractor fails to submit requests for a Variation in accordance with 32.3(a) and fails to provide supporting estimates in accordance with 32.4(a), the Contractor shall waive all claims which it might otherwise have had to claim a Variation and any rights concerning adjustment to the Contract Price, the Milestone Dates and the Completion Date.
- 32.4(a) Within seven days of the Contractor having requested a Variation in accordance with clause 32.3(a), the Contractor shall submit to the Company (QCLNG) fully detailed estimates for the Variation works.

As part of its payment claim, MCJV included two variations VP 48 and VP 53. In its payment schedule, QCLNG claimed that MCJV had failed to comply with clauses 32.3(a) and 32.4(a) of the Contract in respect of VP 53, and by clause 32.3(c), MCJV had waived all claims it might have otherwise had to claim a variation and any rights concerning adjustment to the Contract Price, the Milestone Dates and the Completion Date.

In its adjudication application, MCJV denied that it had failed to comply with clause 32.4(a) of the Contract by reference to notices served on QCLNG and contended that it had substantially complied with clauses 32.3(a) and 32.4(a) of the Contract.

Critically, QCLNG submitted in its adjudication response that MCJV did not deliver its estimates within the seven day period required by clause 32.4(a), and went on to identify the documents purportedly said to have been served by MCJV in accordance with clause 32.4(a), and submitted that the dates the notices were served on were still outside the seven day period required pursuant to clause 32.4(a). In the circumstances, QCLNG submitted that MCJV had waived its right to variations based on its failure to comply with the requirements of clause 32.4(a).

The Adjudicator's decision

At paragraph 86 of the decision, the Adjudicator stated, *inter alia*, that the respondent had not provided details of the alleged non compliance, and held that the claimant had provided detailed estimates as required by clause 32.4(a).

The Adjudicator went on to determine that:

"the respondent has not satisfied me that there was a particular date by which the detailed estimates had to be provided. The respondent has not satisfied me that the claimant did fail to comply with clause 32.4".

The Court's findings

His Honour Justice Peter Lyons concluded that it was clear from the Adjudicator's decision that he did not consider the submissions in the adjudication response. His Honour held that, depending on the construction of

clause 32.3(c), QCLNG may have had a complete defence to what is a very substantial claim, and the failure to consider submissions which are of considerable significance constitutes a failure by the Adjudicator to comply with an essential requirement of the BCIP Act for a valid decision.

His Honour considered a number of New South Wales authorities when considering the impact of the Adjudicator's failure to consider the submissions.

In *John Holland Pty Limited v Roads and Traffic Authority of New South Wales & Ors* [2007] NSWCA 19, Hodgson JA was not convinced that the mere failure to consider a provision of the Act, contract or a submission was a matter which the legislature intended would invalidate the decision.

Justice Lyons then went on to consider the decision of Justice Hammerschlag in *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941 where his Honour noted that:

"It is accordingly necessary to consider the nature, gravity and effect of the errors, if any, made by the Adjudicator, and to assess, in the context of the purpose and operation of this particular statute, whether the Adjudicator breached a basic and essential requirement of the Act by not considering submissions duly made or by failing to make a bona fide attempt to exercise his powers under the Act, or whether the plaintiff was denied natural justice to a degree sufficient to void the adjudication."

After consideration of the submissions made by QCLNG and the conclusions reached by the Adjudicator, Justice Lyons held that the adjudication decision failed to comply with one of the basic and essential requirements of the BCIP Act, and for that reason was not a valid adjudication decision.

His Honour went further, however, and declared that if it was decided that the Adjudicator had considered the submissions of QCLNG, he would have held that the decision of the second respondent was so unreasonable that no reasonable person in his position could have made it. On that basis, his Honour would have been prepared to set aside the adjudication decision.

Implications

The decision of QCLNG makes it clear that the Courts in Queensland will not ignore a material omission in an adjudication decision if it is of considerable significance, and will declare the adjudication decision void in such circumstances.

For parties on the wrong end of an adjudication decision, this decision illustrates the importance of carefully reviewing an adverse decision to ensure that the Adjudicator has properly considered the respondents' submissions in relation to matters of significance - if not the decision might be susceptible to being declared void.

Further, the decision hints that the Queensland Courts will also set aside a decision if a respondent can demonstrate that the Adjudicator's decision was so unreasonable that no reasonable person in his or her position could have made it. This basis for declaring an adjudication decision void may be difficult to establish and in some cases near impossible to prove.

It is yet to be seen whether the decision in QCLNG is appealed, but for now, this case provides ample motivation for aggrieved respondents to meticulously scrutinise adverse adjudication decisions.

Written by:

Ben Harg
Lawyer
+61 7 3338 7537
bharg@thomsonslawyers.com.au

Andrew Kelly
Partner
+61 7 3338 7550
akelly@thomsonslawyers.com.au

For further information, please contact:

Sydney

Luke Aiken
Partner
+61 2 9020 5706
laiken@thomsonslawyers.com.au

Michael Arnot
Lawyer
+61 2 8248 3426
marnot@thomsonslawyers.com.au

Melbourne

Neil Hannan
Partner
+61 3 8080 3589
nhannan@thomsonslawyers.com.au

Michelle Roberts
Senior Associate
+61 3 8080 3621
mroberts@thomsonslawyers.com.au

Brisbane

Andrew Kelly
Partner
+61 7 3338 7550
akelly@thomsonslawyers.com.au

Ben Harg
Lawyer
+61 7 3338 7537
bharg@thomsonslawyers.com.au

Adelaide

Geoff Brennan
Partner
+61 8 8236 1301
gbrennan@thomsonslawyers.com.au

Melissa Larkin
Senior Associate
+61 8 8236 1188
mlarkin@thomsonslawyers.com.au

www.thomsonslawyers.com.au