

## Construction Alert

# Court now willing to sever errors in adjudicator's decisions

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### Introduction

The recent decision of Justice Applegarth in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QSC 67 (**BMA v BGC**) has overturned the previously settled position that a jurisdictional error, regardless of how small, in an adjudication decision made under the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIP Act**) renders the whole determination invalid.

Pursuant to a determination made under the BCIP Act, BGC was awarded approximately \$28.16 million. BMA sought a declaration that the determination was void on the basis that it was affected by three separate jurisdictional errors. In his earlier decision, Justice Applegarth held that BMA had established one of the three jurisdictional errors.<sup>1</sup> The jurisdictional error related to \$4.3 million of the total awarded amount.

Upon finding that there was a jurisdictional error, his Honour took the unconventional step of requesting the parties to agree terms of the final order for relief which he anticipated would be a declaration that the decision was void and an order remitting the matter to the adjudicator for reconsideration.

### BGC's position

In response to his Honour's request, BGC offered an alternate position by undertaking to repay the amount of \$4.3 million (plus GST and interest) which represented the amount relating to the jurisdictional error. BGC submitted that the undertaking was appropriate to remedy the jurisdictional error found by his Honour and that BMA's application should be set aside.

### BMA's position

BMA opposed any order for the matter to be remitted to the adjudicator and submitted that the court should:

- declare the adjudicator's decision void;
- restrain BGC from enforcing or otherwise relying upon the decision in any way; and
- order BGC to repay the sum of approximately \$26 million (plus interest and GST) to BMA, which represented the amount paid by BMA to BGC pursuant to the adjudication decision.

### Court's decision

In making his decision, Justice Applegarth considered the purpose of the supervisory jurisdiction of the Court and the nature and consequences of the jurisdictional error in the particular case. His Honour found that, unlike a denial of natural justice or some other jurisdictional error which may have tainted the whole of the decision making process, the jurisdictional error in the determination before him had not affected the other parts that made up the amount awarded to BGC.

In those circumstances, his Honour found that rather than declaring the decision void, the more appropriate remedy would be to require BGC to repay the amount in question and any other amounts necessary to remedy the effect of the jurisdictional error. His Honour observed that his decision would likely avoid the need for a further adjudication.

### Implications

This decision has significant consequences on the parties involved in a review of an adjudication determination. For parties seeking to review adjudication determinations on the basis that they wish to have the whole decision declared void, the party will:

- firstly need to show that there is in fact at least a jurisdictional error; and
- secondly, the jurisdictional error/s must impact the whole determination or at least so much of the determination that it cannot be severed.

Where the jurisdictional error only affects a minor or discrete part of the claim, it is no longer inevitable that the decision will be declared void.

<sup>1</sup> *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2012] QSC 346

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