JONES DAY

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COMMENTARY

Projects Disputes in Australia: Recent Cases

Below is a snapshot of some recent cases of interest across Australia and the insights they offer the industry.

Queensland: *Sierra Property v National Construction Management* [2016] QSC 108

An adjudication award under Security of Payment legislation set aside due to inadequate reasons given by an adjudicator

In the Queensland Supreme Court, Sierra Property ("Sierra") successfully overturned an adjudication award obtained by its builder, National Construction Management ("NCM"), on the basis that the adjudicator failed to provide adequate reasons in accordance with s26(3) of the *Building and Construction Industry Payments Act 2004* (Qld).

The adjudicator awarded NCM 95 percent of its claims in circumstances where Sierra contended that NCM had not undertaken some of the work for which claims were made. Despite there being distinct disputes as to the extent of work in nine different categories, the adjudicator awarded the 95 percent globally without consideration of each category. The adjudicator's reasons provided no explanation, other than stating that the decision was made "after carefully considering [Sierra's] material and concerns".

In overturning the award, the Court described the adjudicator's reasons as "opaque" and focused on the fact that the decision did not demonstrate an analysis of the extent of work in any of the nine categories. The Court concluded this was inadequate and set aside the award on the basis that it amounted to a jurisdictional error.

The case is a reminder to scrutinise an adjudicator's decision both for errors in the reasoning and also for the adequacy of the explanation. Inadequate reasons will offer an avenue to overturn an adjudication award, although what is adequate will depend on the circumstances of a particular case. It also serves as a reminder to prepare any adjudication materials in a manner that will assist an adjudicator in drafting sufficiently detailed reasons.

Western Australia: *Australian Maritime Systems v McConnell Dowell* [2016] WASC 52

The application and enforceability of alternative dispute resolution clauses in construction contracts

The Supreme Court in Western Australia considered a dispute resolution clause in a contract between McConnell Dowell ("MACD") and Australian Maritime Systems ("AMS") to design, supply and install navigation aids for MACD's construction works at Cape

Lambert Tug Harbour ("Original Agreement"). The dispute resolution clause provided:

> **40.1 Disputes**
> In the event that any dispute, controversy or difference of any kind whatsoever arising out of or in connection with the Agreement (including the validity or enforceability of the Agreement or any part thereof) or the carrying out of the Agreement, shall arise, either Party may notify the other in writing that a dispute has arisen and giving full details of the dispute.
>
> ...
>
> **40.3 Arbitration**
> If the parties are unable to resolve the dispute by negotiation or agree a method of settlement, within 30 days of notification of the dispute, the dispute may be referred by either party to arbitration by a single arbitrator ....

The parties subsequently executed a settlement agreement ("Settlement Agreement") to resolve certain disputes that arose. The Settlement Agreement modified warranties in the Original Agreement but was silent as to dispute resolution.

A further dispute arose as to claims made by MACD under the Original Agreement regarding alleged defects. AMS commenced Court proceedings seeking a declaration that the Settlement Deed released it from its obligations under the Original Agreement. MACD sought to stay these proceedings on the basis that the Original Agreement required any dispute first to be referred to arbitration.

A key question was whether the arbitration clause in the Original Agreement continued to apply despite the Settlement Agreement modifying the parties' rights. The Court found the arbitration clause did apply, due to the express recognition in the Settlement Agreement that it formed part of the Original Agreement and applied to "any dispute, controversy or difference of any kind whatsoever arising out of or in connection with the [Original] Agreement".

Interestingly, the Court held that it was "implicit" that the referral to arbitration contemplated by the clause was mandatory, despite the clause using the word "may" (as opposed to "must"). However, it is not clear whether this issue was the subject of much argument between the parties, and this may have influenced the conclusion.

The unexpected should always be expected in complex construction and infrastructure projects. Agreeing in advance on alternative dispute resolution procedures can be an excellent way of managing unexpected changes and disputes more collaboratively and efficiently to reduce the risk that they delay the success of the project. However, care must be taken in drafting such clauses to ensure clarity as to their scope and whether they are mandatory. This is equally important when entering into contract variations and settlement deeds, which are not uncommon on such projects.

Victoria: *Construction Engineering v Adams Consulting Engineering* [2016] VSC 209

The Court's appetite for expert input on technical construction matters

Construction Engineering (Aust) ("CEA") alleged that defective structural engineering drawings prepared by Adams Consulting Engineering ("Adams") resulted in substantial cost overrun on the upgrade of a large shopping centre on which CEA was head contractor. The Court sought expert input on the engineering and considered the following two available mechanisms: (i) referring technical questions to a special referee; or (ii) appointing an expert to assist the Court during the hearing.

CEA pressed for a special referee to determine certain questions; however, the Court chose to appoint an expert to assist it during the trial. The Court preferred this mechanism because the engineering issues involved questions of fact and law, and it was concerned that deferring questions to a special referee might result in further questions that would need to be resolved by the Court or by further deferral.

One of the difficulties in having projects disputes resolved through litigation is that the central questions frequently concern specialised and technical industry knowledge as much as, or more than, questions of law. The court system is increasingly recognising this by the introduction of mechanisms for expert input and the Court's broad discretion to apply them flexibly and at its own behest (even without party consent).

Use of mechanisms such as those considered in this case are paving the way for Court decisions that are more cognisant of technical matters. However, this case may also demonstrate that courts are unlikely to defer making their own decisions, even in respect of highly technical matters.

NSW: *Martin v Hume Coal Pty Ltd* [2016] NSWLEC 51

Mining licence issues on the Hume Coal project

This case overturned a decision of the Commissioner to allow Hume Coal ("Hume") access to rural properties under the *Mining Act 1992* (NSW) ("Mining Act") without landowner consent.

Hume sought access to drive through the properties within its mining exploration licence area in order to carry out prospecting operations but did not seek to carry out prospecting operations on those properties. Hume argued that because it was not seeking to undertake prospecting on the property, the access fell within provisions of the Mining Act that do not require landowner consent.

While Hume succeeded before the Commissioner, the landowners successfully argued in the NSW Land & Environment Court that the access sought was the exercise of a mining licence right which required landowner consent where there were "significant improvements" to the land, even if no actual prospecting work was to be undertaken on the property. The Court also rejected Hume's argument that the "significant improvements" claimed by the landowners (formed roads and driveways, paddocks with improved pasture, an equestrian cross-country event course, cattle laneways, irrigation piping and fences) did not qualify under the Mining Act.

The decision is a significant victory for the landowners, five families which are among a number of people trying to prevent mining in the area. It also confirms a greater burden on prospective mining licence holders to survey access routes and assess the likelihood of obtaining consents when considering the utility and value of a potential licence.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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