

## **Adjudication – Moving the goal posts – ‘active process of intellectual engagement’**

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‘The adjudicator failed to carry out an active process of intellectual engagement’ is ‘newspeak’<sup>1</sup> for ‘The adjudicator considered the issue but came to the wrong conclusion’.

Recently, both the Supreme Court of Queensland (in *QCLNG Pipeline v McConnell Dowell Constructors* [2011] QSC 292) and the Supreme Court of NSW (in *Laing O’Rourke Australia Construction v H& M Engineering & Construction* [2011] NSWSC 818) have redefined what an adjudicator must do to make a valid determination.

In *QCLNG* at [110] Peter Lyons J, and in *Laing O’Rourke* at [39] McDougall J, decided that it is not sufficient for an adjudicator to merely consider a submission by a party, the adjudicator must carry out an ‘active process of intellectual engagement’ in relation to the submission.

They decided that the adjudicator could not have come to the conclusion to which he came if he had carried out an ‘active process of intellectual engagement’.

*QCLNG* arose out of a contract for \$735 million to design and construct a pipeline in central Queensland. The claim being adjudicated included a claim for costs of \$73 million arising out of delay or disruption. The claimant provided evidence that satisfied the adjudicator [the writer] that the claimant incurred those costs and the adjudicator decided that the amount of the progress payment to be made by the respondent to the claimant should include the \$73 million.

The respondent’s adjudication response was voluminous and included an extremely lengthy submission covering jurisdictional issues and many other reasons for withholding payment. The submission cited 41 cases copies of which were included in the submission. One of the respondent’s many arguments was based upon clause 32.4 of the contract. That clause required the claimant to provide detailed estimates within a seven day period. The respondent argued that the claimant had not provided the details within time and, consequently, had waived all claims it might otherwise have had with respect to the delay costs. The claimant argued that it had substantially complied with clause 32.4.

The respondent’s arguments were contained in three paragraphs [5.24.21 to 5.24.23] of its adjudication response. Those paragraphs are reproduced at [98] of the judgment. The adjudicator considered the respondent’s arguments and concluded that the respondent had not satisfied him that the claimant did fail to comply with clause 32.4. The adjudicator considered the issue at [86] of his reasons. Paragraph [86] is reproduced at [99] of the judgment. On this issue the adjudicator concluded, ‘The respondent has not satisfied me that the claimant did fail to comply with clause 32.4’.

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1 The term is from George Orwell’s *Nineteen Eighty Four*.

At [110] Lyons J said that it is difficult to see how the adjudicator could have made this statement if he had carried out the ‘active process of intellectual engagement’ referred to by McDougall J on *Laing O’Rourke*. Lyons J said that therefore he found that the adjudicator did not consider paragraphs 5.24.21-5.24.23.

Lyons J found at [125] that had the adjudicator considered the respondent’s submissions in three paragraphs [5.24.21 to 5.24.23], the adjudicator’s conclusions were irrational. Consequently, Lyons J was satisfied that the adjudicator’s decision was not based on a consideration of all the submissions of the claimant with respect to clause 32.4.

In *Laing O’Rourke* at [39] McDougall J says that in his view the obligation to consider various matters imposed by s 22(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) should be read ‘as requiring an active process of intellectual engagement’. He continues:

It may be thought that this imposes a substantial burden on adjudicators. That may be so; but there are at least two reasons why, even if this is correct, it does not justify reading down the statutory obligation to “consider”. The first is that adjudicators are not forced to accept nomination. They may decline nomination; or they may accept only on condition that they are given some longer period of time than ten working days to produce their determination. The second reason is that the outcome of the adjudicator’s consideration may have significant consequences.

The respondent does not have to lodge an adjudication response until two business days after receiving notice of an adjudicator’s acceptance of the application [s 20(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW)]. Consequently, when an adjudicator accepts the application, the adjudicator will not know what will be in the adjudication response. For example, in *Laing O’Rourke*, the adjudicator would not have known that the response would comprise two boxes of files and 251 pages of submissions.

McDougall J says at [39] that adjudicators may ‘accept only on condition that they are given some longer period than ten working days to produce their determination’. An adjudicator’s acceptance cannot be conditional. If an adjudicator said, “I accept the adjudication application on condition that both parties agree to an extra 10 business days for me to make my determination’, it would not be a valid acceptance. In any event, it is only after examining the adjudication response that the adjudicator will be able to make any assessment of what extra time, if any, the adjudicator may require.

But just what is an ‘active process of intellectual engagement’? At [38] McDougall J says:

Thus, in *Tickner v Chapman* (1995) 57 FCR 451, Black CJ, speaking of a statutory obligation on a minister of the Crown to consider representations made to him, said at 464 that “the consideration of a representation involves an active intellectual process directed at that representation”. In the same case, Burchett J said at 476 that the obligation required “the Minister... to apply his own mind to the issues raised by [the representations]”, which involved

obtaining “an understanding of the facts and circumstances set out in them, and of the contentions they urged based on those facts and circumstances”. Kiefel J said at 495 that the obligation “requires that the Minister have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forward and to appreciate who is making them”.

In *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 at [64] McDougall J repeats what he said in *Laing O'Rourke* on the meaning of ‘consider’. However, in *Clyde Bergemann* he found that the adjudicator’s determination was valid.

The change in approach of the NSW Supreme Court is best illustrated by comparing *Laing O'Rourke* with an earlier almost identical case, namely, *Shell Refining (Australia) v AJ Mayr Engineering* [2006] NSWSC 94.

Both cases arose out of similar construction contracts. Both cases involved a payment claim for over \$10 million, a substantial portion of which was alleged additional costs for delay and disruption. In both adjudications the submissions of the parties were voluminous and very similar.

In each case, *Shell Refining* at [22] and *Laing O'Rourke* at [46], the respondent’s argument was that the claim was a global claim and the claimant had not established a nexus between the delays and the claimed amount. Each respondent argued that if the adjudicator was not satisfied that all the delay was the fault of the respondent, the claim had to fail totally; ‘all or nothing’. Both adjudications were decided by the same adjudicator [the writer] who, for the same reasons in each adjudication, decided that the claimant was entitled to substantially the whole amount claimed.

In each adjudication the respondent did not provide any alternative method of the valuing delay costs and the only valuation the adjudicator had was the claimant’s valuation. In each adjudication the adjudicator accepted the respondent’s argument that the claim was a global claim but rejected the respondent’s argument that because the claim was a global claim the claimant was not entitled to any amount whatsoever for delay costs.

In each case both senior and junior counsel for the claimant were the same. In *Shell Refining* Bergin J refused to declare the adjudicator’s determination void. In *Laing O'Rourke* McDougall J declared the adjudicator’s determination void. *Shell Refining* was not cited in *Laing O'Rourke*.

In *Shell Refining*, Bergin J found that the adjudicator had considered all the respondent’s material submissions. In *Laing O'Rourke* the Court found that when considering one of the respondent’s arguments and four statutory declarations and an expert report provided by the respondent in support of the argument, the adjudicator had not carried out an ‘active process of intellectual engagement’.

‘Global claims’ will be the subject of separate paper. This paper points out the Court’s illustrations in *Laing O'Rourke* of the adjudicator’s failure to carry out an active process of intellectual engagement. The illustrations cover three aspects, namely:

- (a) the respondent's 'all or nothing argument';
- (b) the four statutory declarations in the adjudication response; and
- (c) the SJA report.

In *Laing O'Rourke* the adjudicator's 48 page determination contained 230 paragraphs of reasons. The main dispute concerned claim 110. This was a claim under the contract claim for \$4,678,911 for an extra 51,312 man hours allegedly arising from a number of delays and disruptions for which the respondent was responsible. It was common ground that the claim is what is often called a 'global claim'.

At [74] and following McDougall J considers the decision of Byrne J in *Kvaerner*<sup>2</sup> and a 1995 journal article by Byrne J on global claims. McDougall J sets out his views on global claims. At [83] he says:

In particular, his Honour said, a global claim must fail if any part of the extra cost or time is the responsibility of the contractor. Thus, "the claimant must show that the whole of the overrun is the consequence of the compensable events for which the proprietor is contractually responsible".

At [88] McDougall J says that it was not sufficient for the adjudicator to disregard the principles explained by Byrne J by saying as he did:

I don't see any point in using the label "global claim" or "total cost claim". I don't find the authorities cited by the respondent of any assistance.

At [91] McDougall J says that had the adjudicator considered the principles enunciated by Byrne J and dealt with them, he could have concluded (for example) that the relevant claims were not global claims. That conclusion was not open. Both parties and the adjudicator accepted that the relevant claims were global claims.

At [90] McDougall J says that the adjudicator's two sentences cited at [88] state the adjudicator's reasons for disregarding the respondent's submissions on global claims. The respondent's submission is stated at [63]. It is 'that if there were shown to have been non-compensable causes of delay then, in the absence of a proven nexus between individual compensable events of delay and individual aspects of loss, the global claim could not succeed'.

This was not an issue. The respondent did not dispute this argument. The Court's conclusion that the adjudicator disregarded the respondent's submission is apparently based upon the fact that the adjudicator found that the claimant was entitled to the amount claimed.

At [92] McDougall J said:

Equally, the adjudicator may have had reasons for saying that the authorities cited by both parties] were not relevant to the process. But simply stating the conclusion does not give the reason. In circumstances where both parties appeared to think that the authorities might be of some assistance (because

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2 *John Holland Construction & Engineering v Kvaerner* (1997) 13 BCL 262.

each referred to them), the adjudicator was required at least to ask himself why this might be so, and to justify his view to the contrary.

At [113] McDougall J says that the adjudicator had to explain why the principles enunciated by Byrne J were inapplicable. The adjudicator did not find that the principles enunciated by Byrne J were inapplicable. Neither party contended that the principles were inapplicable.

In the adjudication response the respondent included four statutory declarations intended to demonstrate that the respondent had no responsibility for the cost overrun the subject of the claim. At [104] McDougall J refers to the allegations in the statutory declarations as ‘factual material’. The adjudicator said at [107] of his determination:

As well as the SJA report, the respondent has provided four statutory declarations by officers of the respondent. The statutory declarations comprise five large springback folders. Under s 22(2)(d) of the Act I can have regard to the payment schedule and only submissions (including relevant documentation) that have been duly made by the respondent in support of the payment schedule. The SJA report and the statutory declarations go far beyond merely supporting the payment schedule. They include countless matters that are not mentioned in the payment schedule. While I have read them all and looked at all the attachments, I have been mindful of the need to accord fairness to the claimant. The claimant has not seen them or had the opportunity to comment on them.

At [62] and [93] McDougall J says that the adjudicator did not deal with any of the statutory declarations. However, at [52] McDougall J says, ‘It is clear that the adjudicator did not find either the SJA report or the four statutory declarations at all persuasive. At [95] McDougall J says:

It must be accepted that (as he said) the adjudicator did read the statutory declarations. He referred to them in numerous paragraphs of his determination. But he did not refer to them, or more accurately to their substance, in dealing with claims 110, 115 and 122, except in the dismissive and unreasoned way that I have noted. As I did in relation to global claims (see at [90] above), I conclude that the adjudicator’s brief and uninformative statement as to why he disregarded the relevant aspects of the statutory declarations does not show that he considered them, in the requisite sense. I shall indicate why, in my view, this is so.

At [98] McDougall J says:

As to (d): Mr Brady gave evidence of this in para 73 of his statutory declaration. It is difficult to understand how the adjudicator, had he considered that paragraph or the document referred to in it, could have come to the view that it was unpersuasive. That is because it referred to an email that Mr Brady had received from H&M’s project manager, Mr Lance Summergreene, on 7 August 2009, in which Mr Summergreene acknowledged “our lack of progress”, a “need to significantly increase productivity” and measures that needed to be taken “[i]n an effort to curb site absenteeism” so as to prevent

impact on the project “by continual lost time”. The adjudicator’s failure even to refer to, let alone to deal with the implications of, what on its face was a clear admission supports the inference that he did not consider Mr Kennedy’s statutory declaration.

McDougall J takes some other paragraphs from the respondent’s statutory declarations and says at [102]:

If the adjudicator had considered those paragraphs, ... he would have been required to consider whether he found them at all persuasive. I do not think that his generalised assertion of want of satisfaction, in para 106 of the determination, can be considered as a sufficient intellectual response to the issues of fact and, therefore, of causation that they raised.

At [103] McDougall J says:

Of course, the adjudicator could have considered the paragraphs in question (and, no doubt, others) and could have concluded, nonetheless, that he did not accept them. But he would have been obliged to give at least brief reasons for why this was so. To my mind, his failure to refer to the paragraphs in question (either on their own account or in conjunction with the payment schedule), coupled with the non-specific and conclusory nature of his statement of want of satisfaction, supports very strongly the inference that he did not consider the material, in the sense that he did not turn his mind to it and decide what (if anything) to make of it.

It seems that the Court expects adjudicators to treat statutory declarations included by the respondent in the adjudication response as evidence of the facts alleged in the declarations. However, in an adjudication there is no scope for cross examination of the deponent. Statutory declarations should be given no more weight than any unsworn statement.

It seems that it is not sufficient for an adjudicator to find that a fact alleged in a statutory declaration is not substantiated to the adjudicator’s satisfaction because the claimant has not had an opportunity to comment on the allegation and, consequently, the adjudicator would not be according fairness to the claimant if the adjudicator accepted the allegation as true. This places the adjudicator in a very difficult position. How can the adjudicator know whether a fact alleged in a statutory declaration is true or false when the other party has had no opportunity to respond and the adjudicator has no evidence to contradict the allegation?

The respondent placed substantial reliance on a consultant’s report, called the SJA report. At [105] McDougall J says:

In this context, it is instructive to look at the reason that the adjudicator gave for not accepting the SJA report as an independent expert report (para 109 of the determination). That reason was that Mr Abbott stated on numerous occasions, in one or other form of words, “I am instructed that...” as to some particular factual proposition. The adjudicator drew from this that “SJA has not done an independent analysis of the project but essentially relied upon

instructions”. It is however entirely appropriate for an expert to state the assumptions on which he or she relies in coming to the views that he or she expresses; indeed, an expert who does not do so is open to legitimate criticism.

It may be entirely appropriate for an expert to state the assumptions upon which he or she relies in coming to the views that he or she expresses but when the expert’s only basis for reaching an opinion that a fact exists is that the expert’s instructions are that the fact exists, the expert’s conclusions are of no value.

At 106] of his determination the adjudicator says:

At p 71 of the adjudication response the respondent says that the statutory declarations provided by the respondent in the adjudication response and the SJA report provide irrefutable evidence that the alleged increase in planned resources was a result of the respondent’s own inefficiencies and time allocated to rectification of defective work. The claimant has had no opportunity to refute the declarations or report. The SJA Report and the statutory declarations do not demonstrate to my satisfaction that the alleged increase in planned resources was a result of the respondent’s own inefficiencies and time allocated to rectification of defective work.

The adjudicator spends the next 24 paragraphs of his determination analysing the SJA report and saying why the SJA report and the statutory declarations do not substantiate to his satisfaction the respondent’s allegations. Nevertheless, at [108] McDougall J says that the adjudicator took a dismissive view of the opinions of Mr. Abbott, the author of the SJA report.

At [110] McDougall J says:

A further indication that the adjudicator misunderstood, or failed to deal with, the way the case was put can be found at para 136 of the determination. That paragraph reads as follows:

[136] It would have been open to the respondent to contend that the extent of the delay caused by the respondent was a different period to that claimed but I don’t accept that there was no delay or disruption and no additional costs incurred by the respondent [sic] as a consequence of the delay and disruption. The respondent has not provided a submission on the extent of the delay which I should find occurred if I find that the claimant was delayed by the respondent. The respondent has not provided a submission on the amount at which I should assess the claimant’s costs if I accept that the claimant is entitled to the claimant’s extra costs, I am only left with the claimant’s assessment. It is the way the respondent has approached this matter that makes it so difficult for me to arrive at any amount to be included in the progress other than the amount claimed.

At [111] McDougall J says:

If the adjudicator had read and understood the “authorities” cited by [the respondent], he must have understood that the case that was put to him was

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that no causal nexus could be shown between any individual delaying or disrupting event and any individual loss of hours. Thus, on the common basis on which the claims in question were advanced and met, it was not open to either party to say that some lesser amount of delay should be assessed if some other view of causation were taken. Yet the adjudicator criticises [the respondent] for failing to undertake that which, both parties were telling him, could not be undertaken.

At [114] McDougall J says:

Were it necessary to do so, I would conclude also that, for essentially the same reasons, the adjudicator failed to exercise his statutory powers in good faith. That is because he failed to consider – to turn his mind to, and deal with on a reasoned basis – a significant element of the respondent's' defence to the payment claim.