

A late adjudication decision in NSW is unlikely to be void

By Andrew Orford, Alisha McGrady and Petrina Macpherson

Demex Pty Ltd v Marine Civil Contractors Pty Ltd & Anor [2022] QSC 141

Key takeout

The interesting issue in this case concerns the timing of an adjudicator's decision and whether it was late or not. Even though this case was heard in Queensland – the NSW case law was applied.

In NSW the case authority establishes that the late delivery of an adjudication determination under NSW's legislation does not render it void. There is contrary authority in Queensland which in different circumstances may lead to a different conclusion.

Facts

Demex Pty Ltd (**Demex**) and Marine Civil Contractors Pty Ltd (**MCC**) were parties to a subcontract to perform demolition work. A dispute arose in relation to a claim for payment. MCC made an adjudication application under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**). The adjudicator determined that MCC was entitled to a progress payment of \$386,675.45.

Demex applied for an interlocutory injunction in Queensland to restrain enforcement of the determination and challenged the decision arguing that it was void due to jurisdictional error on three grounds:

1. the payment claim was invalid, because it included a claim for work not performed;
2. the adjudicator gave insufficient reasons, or alternatively denied the parties natural justice; and

3. the adjudication determination delivered out of time

Decision

Ground one – Claim for work not performed

Demex argued that the payment claim was invalid because it included a claim for work that had not been performed and as such, the adjudicator did not have jurisdiction to determine the claim. Demex argued that the adjudicator incorrectly found that the relevant documentation had been provided.

The court found that a factual dispute does not establish jurisdictional error, stating that the very purpose of the security of payment regime is to resolve disputes of this nature. The fact that there was a factual or contractual dispute about the work that had been completed did not mean the payment claim itself was invalid.

Ground two – Insufficient reasons

Demex argued that the adjudicator gave insufficient reasons for the determination and alternatively that the parties were denied natural justice.

The court was of the view that this argument was weak, finding that the reasons given by the adjudicator were adequate. The adjudicator set out the submissions of the parties at some length and the set out the reasons for his findings. On this basis, the court held that Demex failed to demonstrate a case for a failure to give adequate reasons or a lack of procedural fairness.

Ground three – Statutory time period

Demex alleged that as the adjudicator failed to make a decision within the statutory time period, the determination was void.

The determination was due on 20 May 2022. The adjudicator determined the application on that date; however, he did not deliver his adjudication determination to Adjudicate Today until shortly before midnight. Adjudicate Today did not serve the adjudication determination on the parties until 23 May 2022.

The court considered the divergence in case law on this issue. There is a line of authority from the NSW Supreme Court establishing that the timing of an adjudication determination is not 'jurisdictional' and that a failure to make the determination in or by the time provided for, does not render the



determination invalid. However, there is case authority in Queensland which suggests a different conclusion, noting there are distinct differences between the NSW Act and the Queensland security of payment legislation.

It was held that as this matter dealt with NSW legislation, it would be difficult for Demex to overcome the established line of authority from the NSW Supreme Court.

Conclusion

The court held that the balance of convenience favoured refusing the interlocutory injunction on the following grounds:

- Demex did not have a prima facie case on the first two arguments and had, at best, a weak case on the third ground.
- The decision of the adjudicator that the sum was vital cash flow for MCC should be accepted in line with High Court authority.
- The offer by Demex to pay the sum into court did not address cash flow issues, interest or adjudicator fees.
- Both parties had an arguable case regarding the undertaking for the amount of damages by MCC and the repayment ability of Demex.

Accordingly, the application was dismissed.

ABOUT THE AUTHORS

MinterEllison.



Andrew Orford | Partner

Andrew leads MinterEllison's Construction Disputes team across Australia. He is a specialist construction disputes resolution lawyer and work with his clients in the infrastructure and resource sectors to devise and implement strategies to resolve large and complex disputes as quickly and commercially as possible. His experience canvasses all dispute resolution mechanisms in every State and Territory in Australia.

Click [here](#) to read his full biography.



Petrina Macpherson | Special Counsel

Petrina specialises in construction and infrastructure disputes, with extensive experience in all forms of dispute resolution including arbitration, across multiple Australian jurisdictions. She works with clients at all stages of a project life cycle to identify and manage risk, advise on effective contract administration, implement dispute avoidance and mitigation strategies and to investigate and resolve large and complex disputes as quickly and commercially as possible.

Click [here](#) to read her full biography.



Relationship Property Disputes Smart Solutions

FIND OUT MORE

