

Judge orders discovery of legal advice in spat over \$45B Ichthys LNG project



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A judge has ordered contractor JKC Australia to hand over legal advice relating to a settlement deed it entered with Japanese oil company Inpex in 2021, as it seeks to hold Dutch paint company AkzoNobel NV responsible for its “significant” potential liability under the settlement.

In a decision handed down last Friday, Federal Court Justice Katrina Banks-Smith ordered JKC to provide AkzoNobel with documents relied upon or taken into account in entering the settlement with Inpex, including legal advice received.

The judge said the documents were relevant where the causation of JKC's undisclosed liability under the settlement is in issue, as well as the reasonableness of the settlement itself, which the judge said "is an essential part of the proof of the claim."

"Having regard to those parts of the [settlement agreement] that have been disclosed, the disputes revealed by the pleaded case, the complexities of the interrelated disputes and the elements of causation and damage assessment that are in issue, I consider that discovery relating to the reasonableness assessment process is justified," she said.

JKC is suing AkzoNobel and subsidiary International Paint Limited over alleged defects in the paint company's Intertherm 228 coating, used on pipework and equipment modules in the \$45 billion of Ichthys LNG project, which has been plagued by delays, cost blowouts, and lawsuits. JKC says it was misled or deceived into believing I228 was a suitable product for use on the project.

In October 2021, [Inpex and JKC settled all claims](#) relating to the construction of the project in a separate but related dispute, by entering a global settlement deed in which the parties agreed to make efforts to maximise recovery from their insurers.

Under the agreement, JKC may become liable to pay a "significant amount" to Inpex unless Inpex recovers a certain amount from its own insurers or from AkzoNobel by March 2027, Justice Banks-Smith noted in her Friday judgment.

JKC relies on the settlement deed to prove part of its claim against AkzoNobel.

In claims disputed by AkzoNobel, JKC says that its potential liability to pay Inpex under the settlement is a liability in respect of the repair of the damaged I228; is less than the full amount required to replace the coating; and arose as a result of AkzoNobel's alleged misleading and deceptive conduct.

In her decision, Justice Banks-Smith found that JKC's forensic choice not to use legal advice to prove the reasonableness of the settlement amount did not mean that the documents are not discoverable.

"Generally a party cannot confine the ambit of discovery by voluntarily limiting itself to the means by which that party says it intends to prove certain facts," she said.

“It is possible that the facts surrounding a settlement may be simple so that it is apparent that there is no context in which legal advice is relevant to the pleaded issues.

“In my view, this is not such a case.”

The judge said it was “readily apparent” that the settlement raised issues as to causation and the assessment of JKC’s loss.

“In particular, questions arise on the pleadings as to the allocation of the potential sum that might be paid by JKC to INPEX to the liabilities related to I228 or to the broader P&I Non-conformances, or to other losses that may or may not be attributable to the conduct of the respondents, and whether a different allocation may have been negotiated,” she said.

“Questions arise as to the manner in which the quantum was calculated having regard to the timing of completion, or associated risks, of the other proceedings being undertaken against the insurers and the respondents.

“This is not a simple case where a settlement sum on its face is unarguably less than the liability compromised by the payment, and where the payment is unarguably apportioned solely to that liability.”

Justice Banks-Smith said AkzoNobel was entitled to test the basis of the settlement, as well as whether JKC could have secured a more favourable settlement – issues which legal advice may have a bearing on.

The proceeding between JKC and AkzoNobel is being case managed alongside separate proceedings brought by Inpex and Ichthys LNG Pty Ltd against AkzoNobel over the I228 coating.

The cases are listed for an eight-week trial beginning in June next year.

JKC is represented by Duncan Miller SC, instructed by Solomon Brothers. AkzoNobel NV is represented by Paul Walker, instructed by Clayton Utz.

The case is JKC Australia LNG Pty Ltd v AkzoNobel NV.