JOHN HOLLAND PTY LTD v ROADS AND TRAFFIC AUTHORITY OF NEW SOUTH WALES (RTA)

[2006] NSWSC 1202; BC200609447

The decision of Justice Gzell in this case is a further example of the court's narrow construction of what constitutes a denial of natural justice under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act).

Background

John Holland Pty Ltd (John Holland) entered into a contract (the contract) with the Roads and Traffic Authority of NSW (RTA) for the construction of roadworks near Kiama, NSW.

Part of this work became the subject of an adjudication determination by Sean O'Sullivan, under which Mr O'Sullivan rejected a claim by John Holland for a costs adjustment under the contract.

John Holland commenced Supreme Court proceedings challenging the adjudication determination and submitted that Mr O'Sullivan had failed to have regard to John Holland's submissions regarding the applicability of one of the cost adjustment provisions; that this constituted a denial of natural justice; and that as a result the determination was void.

Natural justice

In *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, Hodgson JA, with the other Court of Appeal judges agreeing, identified three grounds of review of an adjudication determination:

- a failure to comply with five, not necessarily exhaustive, basic and essential requirements — a construction contract to which the Act applies, a payment claim, an adjudication application, reference to an eligible adjudicator and determination in writing by the adjudicator;
- a failure to exercise power under the Act bona fides; and
- a substantial denial of natural justice.

Subsequent decisions in both the Court of Appeal[1] and the Supreme Court[2] have endorsed this position, such that so long as an adjudication determination considers the requirements of s 22(2) of the Act in good faith, then an error in considering the provisions of the Act or the contract does not automatically render an adjudicator's determination void.

This position is to be distinguished from a situation where an adjudicator appeared not to have read the submissions within an adjudication application,[3] or where an adjudicator did not properly consider at all the adjudication response provided.[4] In those circumstances a determination would be void.

Findings

Ultimately, Gzell J held that Mr O'Sullivan had considered the application of the costs adjustment provision and refused the relief sought by John Holland.

It was held that in failing to establish that Mr O'Sullivan did not have regard to its submissions, John Holland failed to establish that a denial of natural justice had occurred. This finding was made in a context where it was submitted that it was unnecessary for the court to consider issues relating to the bona fide exercise of power. Further, this failure by John Holland to establish such a denial was sufficient for Gzell J to conclude that there was also no failure to exercise power in good faith.[5] Unfortunately, this conclusion was not accompanied by any analysis as to why such conduct was not a failure to exercise power in good faith.

In making this finding, Gzell J made some brief comments on the relationship between notions of natural justice and good faith, albeit as obiter. In particular, his Honour referred to the comments of McDougall J in *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* [2006] NSWSC 798; BC200606196 and noted the uncertainty surrounding the concept of good faith and the preference of the court 'to deal with most applications on the basis of a denial of natural justice' (at [43]).

Conclusion

Even if an adjudication determination misconstrues submissions within an adjudication application, so as long as those submissions were considered in good faith, such conduct would not, prima facie, constitute the 'substantial denial of natural justice' required for that determination to be void.

While there is considerable overlap between the two grounds of review, 'substantial denial of natural justice' and 'good faith', it appears that the court has a definite preference to decide applications on the basis of a denial of natural justice rather than a lack of good faith.

Therefore, the current confusion surrounding the precise application of natural justice and bona fide grounds of review remains and awaits clarification by the courts. ●

Christopher Kerin, Senior Associate, and Veno Panicker, Lawyer, Holding Redlich, Sydney.

Endnotes

1. *Minister for Commerce v Contrax Plumbing* (NSW) Pty Ltd [2005] NSWCA 142; BC200502855, at [49] (Hodgson JA), as cited by Gzell J in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [38].
2. *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1; BC200600155, at [57] (Palmer J), as cited by Gzell J in *Brodyn v Davenport*, above note 1, at [39].
3. *Timwin Construction Pty Ltd v Façade Innovations Pty Ltd* [2005] NSWSC 548; BC200503886, at [37] (McDougall J), as cited by Gzell J in *Brodyn v Davenport*, above note 1, at [52].
4. *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd* [2006] NSWSC 375; BC200602903, at [75] (White J), as cited by Gzell J in *Brodyn v Davenport*, above note 1, at [53], and *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129; BC200509449, as cited by Gzell J in *Brodyn v Davenport*, above note 1, at [54].
5. *John Holland*, at [68] (Gzell J).

QUEENSLAND

QUEENSLAND v EPOCA CONSTRUCTIONS PTY LTD

[2006] QSC 324; BC200608850

This decision of the Queensland Supreme Court considered whether judicial review is available for an adjudicator's decision made under the *Building and Construction Industry Payments Act 2004* (Qld) (the Payments Act).

Background

By a contract dated 6 January 2005, the Department of Main Roads (the DMR) engaged Epoca Constructions Pty Ltd (Epoca) for the construction of a bikeway from Fig Tree Pocket to the Brisbane River. Prior to completion, on 22 August 2005, the DMR terminated the contract pursuant to cl 44.4(b) of the general conditions. The grounds for terminating were not an issue in this application.

On 14 November 2005, Epoca issued a payment claim under the Payments Act for $1,698,379.21. The DMR's payment schedule, delivered on 28 November 2005, stated that the DMR was not obliged to make any payments. On 12 December 2005, Epoca made an application for adjudication and the DMR responded in accordance with the Payments Act. The adjudication decision dated 29 December 2005 provided that the DMR pay Epoca $738,293.39.

The DMR filed an originating application under the *Judicial Review Act 1991* (Qld) (the JRA) and obtained an interlocutory injunction restraining Epoca from taking any action to recover the money until the final hearing of the application.

Issues

The key issue to be determined by Philippides J was whether adjudication decisions made by an adjudicator under the Payments Act are subject to judicial review under the JRA.

The court also considered the grounds of review, including that the adjudicator:

- failed to consider the provisions of the Payments Act as required by s 26(2)(a);
- failed to consider the terms of the contract as required by s 26(2)(b); and
- erred in the construction of the terms of the contract.

Decision

Applicability of the Judicial Review Act to the Payments Act

The court rejected Epoca's submission that judicial review is excluded from the Payments Act by necessary implication. Section 18 of the JRA provides that the Act does not apply to any legislation listed in Sch 1 Pt 2. Philippides J considered s 18 to be determinative of the availability of review (at [26]):

> ... given that the JRA specifically provides a mechanism by s 18 whereby legislation may be excluded from the scope of rights of review set up by the JRA, one would expect a legislative intention to exclude judicial review to be indicated in accordance with that mechanism.

The Payments Act is not included in this list and there is no provision in the Payments Act excluding the operation of the JRA. Accordingly, the court could not adopt a purposive interpretation of the Payments Act or conclude that review is excluded by necessary implication (as submitted by Epoca). Philippides J affirmed a similar decision in *J J McDonald & Sons Engineering Pty Ltd v Gall* [2005] QSC 305; BC200509343, where it was held that this conclusion is unavoidable, despite concerns that it will undermine the purpose of the Payments Act to provide prompt periodic payments to contractors.

This finding represents an important divergence from the NSW position. In the decision of *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, the NSW Court of Appeal found that review of an adjudicator's decision made under the corresponding payments legislation is limited to circumstances where the determination is invalid for failing to meet the essential requirements of a determination. Review on the basis of