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Adjudicators: beware of natural justice

Albert Monichino QC *BARRISTER, ARBITRATOR and MEDIATOR*

The recent decision of the Supreme Court of the Northern Territory in *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd*[1] provides an example of the application of the rules of natural justice (procedural fairness) where an adjudicator makes a determination on grounds not raised by either party. Briefly stated, the plaintiff (Hall) brought an adjudication application against the defendant (MacMahon) which was dismissed by the adjudicator on a ground not raised by MacMahon in its adjudication response. Hall sought relief in the nature of certiorari to quash the adjudication determination. In the alternative, it sought a declaration that the adjudication determination was void and of no effect on the ground that it had been denied natural justice. Hall succeeded in quashing the adjudication determination. The facts are set out in more detail below.

Background

Hall entered into a contract with MacMahon for dredging works. Hall served a progress claim for standby charges of $9.1 million for keeping the dredging vessel in Darwin over the wet season between 1 December 2012 and 25 February 2013. MacMahon rejected the claim in its entirety, contending that Hall had no entitlement under the contract to standby costs over the wet season. Hall submitted an adjudication application under the Construction Contracts (Security of Payments) Act 2004 (NT) (NT SOP Act).[2] The adjudicator delivered his determination in favour of Hall for the amount of $9.1 million. Hall then submitted a further progress claim for standby charges of $14.4 million between 1 December 2012 and 1 May 2013 (before MacMahon had paid the $9.1 million due pursuant to the first adjudication determination). Again, MacMahon rejected the claim in its entirety.

Hall then submitted a second adjudication application for $5.3 million (being $14.4 million, less the $9.1 million paid by MacMahon). In its second adjudication application, Hall purported to rely on its submissions and the findings in the first adjudication determination. MacMahon, in its adjudication response, rejected Hall's entitlement to do so, and raised two particular legal defences. The second adjudication determination was in MacMahon's favour, and determined that the amount to be paid was nil, notwithstanding that, in arriving at the second determination, the (same) adjudicator rejected MacMahon's defences. In particular, the adjudicator rejected the second adjudication application on the basis that Hall had not proved that the vessel was on standby over the relevant period (namely, between 25 February 2013 and 1 May 2013).

Hall challenged the second determination in the Supreme Court of the Northern Territory, contending, inter alia, that the adjudicator breached the requirements of natural justice because he decided the application on a basis that was not raised by MacMahon. Hall did not have an opportunity to respond. Accordingly, Hall sought an order of certiorari to set aside the second adjudication determination.

MacMahon accepted that the adjudicator must afford natural justice to the parties, but argued that the requirements of natural justice simply required the adjudicator to receive and consider Hall's application, which he did. It sought to distinguish *Musico v Davenport*[3] on the basis that the "new" matter relied on by the adjudicator was not an extraneous matter, but rather was a matter that was always one of Hall's essential proofs. It argued that, in the absence of an unequivocal admission in MacMahon's adjudication response (which, at its highest, was equivocal on the question whether the vessel was on standby during the relevant period), the onus remained on Hall to establish that matter. In those circumstances, MacMahon argued that it was not necessary or appropriate for the adjudicator to give Hall a "second bite of the cherry" to prove its case.

Hall argued that the payment dispute was limited to the specific issues raised by MacMahon in defending the adjudication application. On the other hand, MacMahon contended that the payment dispute encompassed all issues in dispute in relation to Hall's entitlement to be paid and was not confined to the specific issues raised in the adjudication response.

In addition to the denial of natural justice argument, Hall challenged the second adjudication determination on the ground of jurisdictional error,[4] relying on a broad range of administrative law grounds for judicial review,

including failure to take into account a relevant consideration (that there was no dispute that the dredge remained on site and idle), misconception of function, *Wednesbury*[5] unreasonableness and serious irrationality.[6] This expansive line of attack depended upon the court accepting that an adjudicator under the NT SOP Act was more akin to an administrative tribunal than an inferior court.

Decision

Justice Barr held that the adjudicator was required to invite submissions from Hall because the issue of whether the dredge was on standby was not raised by MacMahon in its adjudication response, and Hall did not have an opportunity to respond to it.[7] Accordingly, the adjudicator's failure to provide Hall with an opportunity to make submissions on a matter that was "highly significant" in his determination amounted to a substantial denial of natural justice.[8]

In arriving at his conclusion, his Honour held that the payment dispute encompassed all elements of Hall's ultimate rights and entitlements to receive any part of the payment claim, and was not limited to the specific issues or defences raised by MacMahon in defending the adjudication determination. This was because the adjudicator's function under the NT SOP Act was to determine whether MacMahon was liable to make a payment to Hall and, if so, the amount of such payment.[9] As such, the adjudicator had to determine MacMahon's liability *in addition* to any specific dispute raised by MacMahon in its adjudication response (in particular, regarding the legal effect of a letter from MacMahon dated 28 October 2012).[10]

Justice Barr thus accepted MacMahon's submission that the payment dispute was not confined to a resolution of the particular issues raised in its adjudication response.[11] Moreover, by inference, his Honour accepted that proof that the vessel was on standby was one of Hall's necessary proofs.[12] While the learned judge considered that the adjudication response was somewhat equivocal as to whether the dredge was on standby,[13] he did not find that there was any unequivocal admission that the dredge was on standby.

The dispositive question on the natural justice issue was whether Hall should have "reasonably anticipated" the point on which the adjudicator relied in making his determination — namely, whether the dredge was on standby during the relevant period. This "reasonable anticipation" test from *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd*[14] is to the effect that an adjudicator should notify the parties of proposed conclusions that were not put forward, and could not be reasonably anticipated, by the parties.[15]

Having identified the test by reference to *Zurich*,[16] his Honour did not go on to apply it to the facts before him. Rather, he decided the natural justice question on the basis that Hall was not given an opportunity to make submissions on a matter "highly significant" to the adjudicator's evaluation and which was "ultimately dispositive", in circumstances where submissions could have been called for and which may have elucidated the matter.[17]

In the end result, the court quashed the adjudication determination.

As the court concluded that there was a substantial denial of natural justice, it was unnecessary to determine the question of whether a statutory adjudicator was more akin to an administrative tribunal or an inferior court.[18] However, his Honour did opine, without deciding the question, that the weight of authority supported the view that a statutory adjudicator was more akin to an inferior court than an administrative tribunal.[19] Accordingly, the more expansive grounds of attack advanced by Hall were not available.

Comment

The fact that a matter is "highly significant" to an adjudicator's evaluation and is "ultimately dispositive" does not determine whether the matter should have been reasonably anticipated by the losing party. This is particularly so where the matter is one of the losing party's proofs.

With respect, his Honour did not explain why the point in issue should not have been "reasonably anticipated" by Hall, given that it was one of its necessary proofs and was not unequivocally admitted by MacMahon. Hence, there appears to be a missing link in the learned judge's chain of reasoning leading to the conclusion that there had been a substantial denial of natural justice.

The fact that the adjudicator may have been persuaded to come to a different view, had he requested submissions on the issue, is a question going to "materiality". Not every breach of natural justice warrants quashing a determination. Rather, the breach must be material.[20] But one does not get to the materiality question until a breach of natural justice is established, which in turn should depend on whether the matter in question should have been reasonably anticipated by the adjudicator.

Next, his Honour appears to have conflated two of Hall's grounds of judicial review, being breach of natural justice and failure to take into account a relevant consideration. Hall's evidence contained an assertion that "the dredge remained at the Project",[21] which was not acknowledged by the determination. The judge commented that the adjudicator failed to consider relevant evidence, and therefore had greater reason to call

for submissions on the point of whether the dredge was on standby.[22] However, failure to consider relevant evidence is an error within jurisdiction and is not reviewable (if one accepts, as his Honour appeared to do, that an adjudicator is more akin to an inferior court).[23]

Finally, in its adjudication response, MacMahon attacked the quality of Hall's evidence in its adjudication application. His Honour interpreted this attack narrowly as being directed to the two major arguments raised by MacMahon in its adjudication response.[24] While that may have been the better interpretation, the question is whether it was open to the adjudicator to read MacMahon's adjudication response as containing a general attack on the quality of the claimant's evidence. If it was open, the adjudicator's determination was supportable. Courts should, in my view, adopt a benevolent approach to the interpretation of adjudication determinations and should strive to uphold them, if they are able to, by giving adjudicators the benefit of the doubt.[25]

The above decision is another in a long line of judicial authority which establishes that an adjudicator's determination may be quashed on the ground of substantial denial of natural justice.[26] However, what constitutes a *substantial denial* of natural justice is not always clear. In the end, this case serves as a salutary reminder to adjudicators under the SOP Acts that they need to be extremely cautious in deciding applications on grounds not fully canvassed in the materials submitted by the parties.

Albert Monichino QC
Barrister, Arbitrator and Mediator

The author appeared as senior counsel for MacMahon in Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd.

Footnotes

1. *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd* [2014] NTSC 20; BC201404346.
2. The NT SOP Act is in substantially identical terms to the Construction Contracts Act 2004 (WA). Both Acts are collectively referred to as the West Coast Model: see Australian Legislation Reform Sub-Committee, Society of Construction Law *Australia Report on Security of Payment and Adjudication in the Australian Construction Industry* February 2014 p 15, available at www.scl.org.au.
3. *Musico v Davenport* [2003] NSWSC 977; BC200306436, which held that the rules of natural justice require an adjudicator to request further submissions from the parties if he or she intends to come to a conclusion that neither party has put forward.
4. Justice Barr considered denial of natural justice to be a distinct ground of review: above, n 1, at [34].
5. *Associated Provincial Picture Houses Ltd v Wednesbury Corp (Wednesbury case)* (1947) 45 LGR 635; [1948] LJR 190; [1947] 2 All ER 680; [1948] 1 KB 223.
6. Above, n 1, at [16]–[18].
7. Above, n 1, at [43].
8. Above, n 1, at [43].
9. Above, n 1, at [30].
10. Above, n 1, at [29]–[30]. The contract on its face did not require the dredging vessel to remain in Darwin during the wet season. Hall argued that the letter varied the contract.
11. Above, n 1, at [31].
12. Above, n 1, at [42].
13. Above, n 1, at [16], [22].
14. *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 39; BC201400448 at [10]–[11].
15. Above, n 1, at [39].
16. Above, n 1, at [41]–[42].
17. Above, n 1, at [43].
18. Above, n 1, at [47].
19. Above, n 1, at [32].
20. J Mulcahy "Security of payment: when is a denial of natural justice material?" (2014) 26(3) *Australian Construction Law Bulletin* 48.
21. This is not the same as proving the dredge was on standby — for example, if there were crew members on board.
22. Above, n 1, at [43].
23. See *Craig v South Australia* (1995) 184 CLR 163 at 176–8; 39 ALD 193; 131 ALR 595; BC9506437, as qualified by *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531; 113 ALD 1; [2010] HCA 1; BC201000230 at [66]–[77].
24. Above, n 1, at [11].
25. By analogy, a benevolent approach is adopted to the interpretation of arbitral awards, particularly those made between "commercial men": M J Mustill and S C Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn) London 1989 pp 569–70.
26. See, for example, *Abel Point Marina (Whitsundays) Pty Ltd v Uher* [2006] QSC 295; BC200608209; *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399; BC200803099; *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd (No 2)* (2010) 30 VR 141; [2010] VSC 255; BC201004054; *Built Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84; BC201310115; *Zurich Bay*, above, n 14.