

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

S CI 2010 00234

METACORP AUSTRALIA PTY LTD (ACN 110 882 990)

Plaintiff

v

ANDECO CONSTRUCTION GROUP PTY LTD (ACN 102 566 576)

First Defendant

JOHN O'BRIEN

Second Defendant

ADJUDICATE TODAY PTY LTD (ACN 109 605 021)

Third Defendant

JUDGE: VICKERY J
WHERE HELD: MELBOURNE
DATES OF HEARING: 21 MAY 2010
DATE OF JUDGMENT: 17 JUNE 2010
CASE MAY BE CITED AS: METACORP PTY LTD v ANDECO CONSTRUCTION GROUP PTY LTD [No 2]
MEDIUM NEUTRAL CITATION: [2010] VSC 255

BUILDING CONTRACTS - Finding of breach of the rules of natural justice in respect of an adjudication under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the "Act") - Consequential finding that the adjudication determination was invalid - Relief in the nature of certiorari granted - Adjudication determination quashed - Adjudication application remitted back to the nominating authority appointed under the Act for reference to an adjudicator to be determined in accordance with law.

ADMINISTRATIVE LAW - Finding of breach of the rules of natural justice in respect of an adjudication under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the "Act") - Consequential finding that the adjudication determination was invalid - Relief in the nature of certiorari granted - Adjudication determination quashed - Adjudication application remitted back to the nominating authority appointed under the Act for reference to an adjudicator to be determined in accordance with law.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M G Roberts	Piper Alderman
For the First Defendant	Mr M H Whitten	Pilley McKellar Pty Ltd

HIS HONOUR:

1 On 17 May 2010, I delivered my judgment on the principal proceeding, *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd*.¹

2 I found that the Adjudicator in this case failed to abide by the rules of natural justice and afford procedural fairness to Metacorp Pty Ltd (“Metacorp”).

3 The parties have now had the opportunity to address on the question of relief and the exercise of the discretion of the Court in the light of the findings made in the reasons for judgment.

4 The Plaintiff in this proceeding, Metacorp, by its originating motion sought relief, *inter alia*, by way of certiorari. It also sought an injunction and declaratory relief. The First Defendant, Andeco Construction Group Pty Ltd (“Andeco”) resisted the grant of any relief.

5 The grant of relief in the nature of certiorari is discretionary. This was also emphasised by the Court of Appeal in *Garde-Wilson v Legal Services Board*² in the context of a finding of a breach of natural justice at the hands of a tribunal.

6 Nevertheless, as Justice Basten said when delivering his paper in June 2007 “Natural Justice: Is There Too Much, Too Little or Just the Right Amount?”:³

Generally, the consequence of procedural unfairness is invalidity, and relief will usually follow: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82. The same consequence is likely to follow for other forms of jurisdictional error: indeed the label reflects the consequence.

7 The question of relief was also considered recently by the Supreme Court of New South Wales in *Watpac Constructions (NSW) Pty Ltd v Austin Group Pty Ltd*⁴ (“Watpac”). This case arose from an application for judicial review under the *Building and Construction Industry Security of Payment Act 1999* (NSW). A successful ground of

1 [2010] VSC 196.

2 (2008) 19 VR 398.

3 2007 National Administrative Law Forum, Canberra 14-15 June 2007.

4 [2010] NSWSC 347.

review was founded upon a breach of natural justice on the part of an adjudicator. In *Watpac*, following the decision of Hodgson JA in *Brodyn Pty Ltd (trading as Time Cost and Quality) v Davenport*,⁵ McDougall J observed, after a comprehensive analysis of the issue:⁶

... an adjudication determination is void - a nullity - if there is a want of one of the basic and essential preconditions of validity, or a substantial denial of the measure of natural justice required to be given. In this, I agree with White J, who came to the same conclusion in *Reiby Street Apartments Pty Limited v Winterton Constructions Pty Limited*.⁷

8 The issue may be framed as an excess of jurisdiction. In other words, an adjudicator appointed under the Act only has the power to make a binding adjudication determination if he or she affords the appropriate measure of procedural fairness required by the Act and the common law. This approach accords with the observations of Hayne J in *Re Refugee Review Tribunal; Ex parte Aala*, where his Honour said:⁸

... it is important to recognise that the duty to accord procedural fairness (no matter whether founded in the common law or in implication from statute) is a fetter upon the lawful exercise of power. The decision maker may affect the rights of the party who seeks the issue of a writ if and only if that party is accorded procedural fairness. That is, putting the matter in terms of jurisdiction, the authority to decide is an authority which may be exercised only if procedural fairness is extended.

9 As to the fundamental matter of a fair hearing which justifies the finding of a nullity where there has been a failure to provide procedural fairness, the general principle was well expressed by the English Court of Appeal (Denning, Romer and Parker LJJ) in *Jones v National Coal Board*,⁹ in these terms:

There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the Judge. ... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.

⁵ [2004] NSWCA 394.

⁶ [2010] NSWSC 347 at [24].

⁷ [2006] NSWSC 375 at [75].

⁸ [2000] 204 CLR 82 at 143.

⁹ (1957) 2 QB 55 at 67 cited with approval in *State v State Government Insurance Commission* (1986) 161 CLR 141 at [9].

- 10 In the context of administrative law, Gaudron and Gummow JJ and observed in *Re Refugee Review Tribunal; Ex parte Aala*:¹⁰

... the provision of procedural fairness has, as its basis, a rationale which differs from that which generally underpins the doctrine of excess of power or jurisdiction. The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures.

- 11 In the same case, McHugh J said:¹¹

One of the fundamental rules of the fair hearing doctrine is that a decision-maker should not make an adverse finding relevant to a person's rights, interests or legitimate expectations unless the decision-maker has warned that person of the risk of that finding being made or unless the risk necessarily inheres in the issues to be decided. It is a corollary of the warning rule that a person who might be affected by the finding should also be given the opportunity to adduce evidence or make submissions rebutting the potential adverse finding.

- 12 Kirby J expressed the concepts in similar terms:

Once the applicable breach is proved, the victim of the breach is ordinarily entitled to relief. It is only where an affirmative conclusion is reached, that compliance with the requirements of procedural fairness "could have made no difference" to the result, that relief will be withheld. This Court has emphasised that such an outcome will be a rarity. It will be "no easy task" to convince a court to adopt it.

...

The reason for the stringent principle of the common law is plain enough. Departure from the fair hearing rule involves a derogation from the assumptions inherent in the grant to the Tribunal by the Parliament of the decision-making power. Those who enjoy such power must conform to the conditions of the grant. If they do not, they have not exercised the power in accordance with law but, instead, in accordance with some personal predilection. Correction by the issue of the constitutional writ simply upholds the rule of law.

[References omitted]

- 13 In the present case the *Building and Construction Industry Security of Payment Act 2002* (Vic) ("the Act") laid down a particular framework for the conduct of adjudications established under the procedure provided. The Act also makes specific provision for giving the parties to an adjudication an opportunity to be heard in relation to

¹⁰ (2004) CLR 82 at 109.

¹¹ *Ibid* at 121.

submissions presented to the adjudicator by the opposite party. Sections 21(2B) and 22(5)(a) of the Act are examples of this regime.

14 However, the common law also operates alongside the statutory requirements for procedural fairness provided by the Act, and is not excluded or curtailed by its provisions. As Nettle JA observed in *Byrne v Marles & Anor*:¹²

Since *Kioa v West*,¹³ the common law of Australia has recognised a general duty to act fairly in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations.¹⁴ That right is subject to contrary statutory intention but authority is clear that an intention to exclude natural justice must be plainly evident in the words of the statute. Such an intention cannot be gleaned from “indirect references, uncertain inferences or equivocal considerations”.¹⁵ It requires a “clear manifestation”¹⁶ or “plain words of necessary intendment”,¹⁷ and it cannot be inferred from the presence in a statute of rights which are commensurate with only some of the rules of natural justice.¹⁸

15 In this case, the requirement of procedural fairness which was breached arose from the common law.

16 I have arrived at the same conclusion as McDougall J in *Watpac*. If there is a substantial denial of the measure of natural justice required to be given by an adjudicator appointed to make an adjudication determination under the *Building and Construction Industry Security of Payment Act 2002* (Vic), whether by not following the procedural requirements of the Act, or by not adhering to the principles of procedural fairness recognised by the common law, the decision will be a nullity.

17 It is open to the Court to apply the alternative relief sought by Metacorp and simply declare that the purported adjudication determination was void and of no effect because it was made beyond jurisdiction. It could also prohibit or enjoin any attempt to give effect to the adjudicator’s decision.

12 [2008] VSCA 78 at [74].

13 (1985) 159 CLR 550.

14 Ibid 584.

15 *Johns v Australian Securities Commission* (1993) 178 CLR 408, 470 (McHugh J) citing *Commissioner of Police v Tanos* (1958) 98 CLR 383, 396.

16 *Kioa v West* (1935) 159 CLR 550, 584 (Mason J).

17 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

18 *Annetts v McCann*, *ibid*; *Re Minister; Ex parte Miah* (2001) 206 CLR 57, 69 [30].

18 However, the more conventional and appropriate course, in my view, is to grant the Plaintiff's claim to relief to quash the adjudication determination. The writ of certiorari is the ordinary remedy for giving effect to that objective. Once quashed, the matter is open to be remitted back to the original tribunal to be determined in accordance with law, which is both available and appropriate in the present case.

19 This conclusion follows from my view that Metacorp should be afforded a chance to put such appropriate submissions and facts before the adjudicator on the agency point as it may be advised. In spite of my findings made in the reasons for judgment on the agency issue, and the submission made on behalf of Andeco that the Court's discretion should be exercised against the grant of any relief because the point has already been determined in these proceedings against Metacorp, it is possible that, if Metacorp is allowed a right to be heard, it may persuade an adjudicator, on different facts founded on additional evidence, to dismiss the adjudication application. Further, it may persuade the adjudicator that it is not precluded from re-agitating the agency point by the operation of issue estoppel. A further factor is that the claimant, Andeco, will not be shut out from enforcing any new adjudication determination, if it is validly determined in its favour upon the fresh hearing.

20 It is ordered that:

1. The Adjudication Determination is quashed.
2. The adjudication application of the First Defendant be remitted back to the authorised nominating authority Adjudicate Today Pty Ltd for reference to the adjudicator Mr John O'Brien as soon as practicable, to be thereafter determined in accordance with law.
3. There be liberty to apply in relation to these orders.

21 I will hear the parties on costs.
