ADJUDICATION & NATURAL JUSTICE

AMINZ BREAKFAST MEETING

AUCKLAND TUESDAY 13 MARCH 2007

RECENT LAW AND PRACTICAL ISSUES

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THE ACT

The Construction Contracts Act 2002 provides in S41 An adjudicator must … (c) comply with the principles of natural justice …

THE LAW

- *Bayley & Kennedy Grant* pg 120 – 128
- *Smellie* pg 46 – 50
- More recently:

  (i) *Costain Limited v Strathclyde Builders Limited* 2004 SLT 102 – in this important case, the adjudicator, with the permission of the parties, conducted a private discussion with a legal adviser, but then failed to divulge the contents of that discussion. It was held to constitute a breach of the rules of natural justice.

  The first important point to remember about all of the English cases is that the English legislation does not contain a statutory requirement to observe the principles of natural justice. However, the Courts have held that notwithstanding the absence of a statutory mandate, the principles nevertheless apply to an adjudication.

  The main point about Costain is a recognition that the principles of natural justice have to be tailored and construed to be applied within the very tight statutory time constraints.

  A case note is attached from Building Law Monthly (May 2004, Volume 21, Number 5) and on page 3 there is an excellent distillation of the principles of approach.

  (ii) *AWG Construction Services Limited v Rockingham Motor Speedway Limited* [2004] EWHC 888 (TCC) 5 April 2004 – the short point here was that in respect of one of the adjudication claims, the adjudicator went well beyond his jurisdiction (by dealing with a matter well outside the scope of the original notice) and in so doing had violated the rules of natural justice. A simple example of the principles in practice.

  (iii) *Carillion Construction Limited v Devonport Royal Dock Yard* [2005] EWCA C iv 1358, 16 November 2005 – this is important because the Court of Appeal confirmed the reluctance of the Courts to sanction judicial intervention in the adjudication system. Lord Justice Chadwick said:

  > **The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. …**

> **In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breach to the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense …**

This case is of interest for a second reason. The Court of Appeal made it clear that there is no "freestanding" power to award interest. It can only be awarded if the question of interest is clearly a "matter in dispute", or if it has been agreed it should be within the scope of the adjudication, or if questions of interest are necessarily connected with the dispute.

(iv) *Kier Regional Limited v City & General (Holburn) Limited* [2006] EWHC 848 (TCC), 6 March 2006 – in this case the adjudicator refused to consider two expert reports submitted by the respondent because they had not earlier been submitted to the contract administrator. It was held that the reports were relevant and should have been considered by the adjudicator. The implication is that his failure to do so was to act in breach of the principles of natural justice.

However, following the decision in *Carillion*, Mr Justice Jackson said:

> **… At worst, the Adjudicator made an error of law which caused him to disregard two pieces of relevant evidence, namely the expert reports of Driver Consult and Precept. In the light of the Court of Appeal's decision in *Carillion*, that error would not render the Adjudicator's decision invalid …**

There seem to be two important points to distil from these authorities:

- the well-established principles of natural justice must, necessarily be tempered to "fit" the statutory procedures, and

- even if there is an error of law (including a breach of the rules of natural justice) that does not necessarily mean that the adjudicator's decision should be set aside as the consequences could be a greater inefficiency to the parties than if the disgruntled party proceeds to the next step.

There may well be some New Zealand decisions in point, but I have not tumbled across them. If, as I suspect, there may not yet be anything as directly in point as these English authorities, it will be interesting to see if New Zealand Courts follow them.

PRACTICAL POINTERS

1. It is a question of getting the process right, but not letting it get bogged down.

2. My strong recommendation is that the process is structured in a way that there will be no surprises for the parties. An example of this is that in the initial letter to the parties I point out that whether or not there will be a conference will be decided in consultation with them following the receipt of the Response. Because the outcome of that procedural decision will not be known at the time they prepare their Claim and Response, they must assume that they will each have only one shot at presenting everything they want to say. Forewarned of that tight statutory restriction, it is more difficult for anyone to argue later that there has been a breach of natural justice if further information is not permitted.

3. There can often be a difficulty when the claimant says that something in the Response has taken it by surprise and it wishes to reply. If it seems obvious that the claimant will have been taken by surprise, then I will permit a reply within a very tight timeframe, making it clear that any additional procedural steps of that kind will not normally be permitted to allow an extension to the time for delivering a Determination (even to the discretionary extra 10 days).

4. If there is a challenge to jurisdiction which looks extremely weak or if the facts upon which it is based are inextricably linked with much of the evidence which is likely to come in, then I reserve the question of jurisdiction and say I will decide that at the same time that the Determination is given even if the Determination is simply to the effect that there is no jurisdiction.

   If the challenge is prima facie meritorious or there is no significant link between the basis for the challenge and the evidence which is likely to come in, then I set a mini timetable for submissions on each side (sometimes permitting a reply and sometimes not) and allowing somewhere between 24 and 48 hours for each step and again indicating that this will not necessarily mean an extension to the original date for the Determination.

5. In the first few years, a regular test of compliance with natural justice would arise when a legal representative was committed elsewhere and could not keep to the statutory time limits. I think most adjudicators have assisted where they can within the discretionary extensions allowed by the Act, but not automatically. I think most lawyers who now practice in this field know that if they take on a case under this legislation they simply have to work within the time limits or pass it on to someone else.

6. In order to keep things moving, and to avoid either side feeling that their case has not been adequately considered, I sometimes ask for clarification of specific issues and that can be a very helpful procedure. Particularly for a non-technical adjudicator, it can avoid the ignominy of overlooking something quite important and which is already in the evidence, but the significance of it has not been quite so obvious. Obviously, such a request must go to both sides and both sides must have an opportunity to respond. I have always set a limit for the response of between 24 and 48 hours, depending on how onerous I thought it would be to comply.

7. I point out in my originating letter to the parties that the purpose of a conference, if there is one, is to enable me to understand each side's case better. It is not an opportunity for cross-questioning by either side and it is not an opportunity to produce more evidence. This has now been accepted and observed. There used to be the occasional faint cry about breach of natural justice if there was not a conference, but that has subsided. In actual fact, if either side wants a conference then I will generally conduct one unless there is an extremely good reason not to – an example would be if the amount in issue is not very large and the conference is going to unnecessarily add to the cost to the parties.

8. There are still some people who think they can make submissions, subsequent to the Determination, on interest and costs, but they find out very quickly that this is not permitted. The more experienced parties always deal with these issues in considerable detail in their Claim and Response.

9. Clearly, a decision must be based on the evidence. If an adjudicator is going to include in his or her reasoning something based on their own knowledge or expertise, then the parties should be given a quick opportunity to comment on it if it is likely to take them by surprise. I have taken the view that where something is so obvious, and it is something which everyone in the construction industry is likely to be familiar with, then I do not bother.

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13 March 2007