

# SUPREME COURT OF QUEENSLAND

CITATION: *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors* [2009] QSC 205

PARTIES: **JOHN HOLLAND PTY LIMITED**  
(applicant)  
v  
**TAC PACIFIC PTY LIMITED**  
(first respondent)  
and  
**ADJUDICATE TODAY PTY LIMITED**  
(second respondent)  
and  
**JOHN L O'BRIEN**  
(third respondent)

FILE NO: BS 2388 of 2009

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 31 July 2009

DELIVERED AT: Brisbane

HEARING DATE: 27 July 2009

JUDGE: Applegarth J

ORDER: **Declare that the decision of the third respondent delivered 19 February 2009 and issued pursuant to the provisions of the *Building and Construction Industry Payments Act 2004 (Qld)* in respect of a dispute between the applicant and the first respondent is void.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXISTENCE OF OBLIGATION – PARTICULAR CASES – where an adjudication of a payment claim under the *Building and Construction Payments Act 2004 (Qld)* – where the adjudicator made the decision on the basis of an appellate authority which was not referred to by either party – where the parties were not afforded the opportunity to address the adjudicator's view that the authority overruled another authority upon which a party placed particular reliance – whether there was a substantial denial of natural justice

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where the adjudicator was required to determine if a schedule to the

contract governed claims to, and valuations of, variations – whether the adjudicator made a genuine attempt to understand and apply the contract

*Building and Construction Industry Payments Act 2004* (Qld), s 7, s 17, s 18, s 21, s 24, s 25, s 26, s 29, s 30, s 31, s 99, s 100, s 107

*Building and Construction Industry Security of Payments Act 1999* (NSW), s 21(4)

*Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, applied  
*Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) (1994) 49 FCR 576, cited  
*Habib v Director-General of Security* (2009) 255 ALR 209, cited

*Hitachi Ltd v O'Donnell Griffin Pty Ltd & Ors* [2008] QSC 135, cited

*Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83, cited

*John Goss Projects Pty Ltd v Leighton Contractors* (2006) 66 NSWLR 707, applied

*Kioa v West* (1985) 159 CLR 550, cited

*Musico v Davenport* [2003] NSWSC 977, applied

*Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor* [2008] NSWCA 279, cited

*Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd* [2006] NSWSC 205, cited

*Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor* [2009] QSC 165, applied

*Rothnere v Quasar* [2004] NSWSC 1151, cited

*Shell Refining (Australia) Pty Ltd v A J Mayr Engineering Pty Ltd* [2006] NSWSC 94, cited

*Shorten v David Hurst Constructions Pty Ltd* [2008] NSWSC 546, applied

*Trysams Pty Limited v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399, applied

*Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492, cited

*Re Refugee Review Tribunal & Anor; ex parte Aala* (2004) CLR 82, cited

COUNSEL: J Bond SC and G D Beacham for the applicant  
 R A Holt SC and P W Telford for the first respondent

SOLICITORS: Holding Redlich for the applicant  
 McCullough Robertson for the first respondent

[1] In July 2006 the applicant (John Holland) and the first respondent (TAC) entered into a construction contract that required TAC to supply and install a building management system and security system for the South Bank Education and Training Precinct. The contract made detailed provision for the calculation of the contract price and for claims for variations. TAC made a payment claim under *Building and Construction Industry Payments Act 2004* (Qld) (“the Act”) for \$913,745.76 (plus GST), calculated by

deducting amounts already paid from the sum of the original contract sum (\$2,720,733) and variation claims totalling \$1,025,547. John Holland responded that TAC was not entitled to be paid any sum, and contended, amongst other things, that TAC was precluded from making claims in respect of much of the claimed variation work because of various contractual provisions that governed TAC's entitlement to be paid for variations.

- [2] The matter proceeded to an adjudication under the Act by the third respondent.<sup>1</sup> An issue that the adjudicator was required to determine was whether certain contractual conditions relied upon by John Holland were void by reason of s 99 of the Act and whether TAC was entitled to be paid its claim for items in respect of which it had not complied with certain contractual provisions that governed its entitlement to claim payment for variations. John Holland placed particular reliance upon *John Goss Projects Pty Ltd v Leighton Contractors* ("Goss").<sup>2</sup> The adjudicator concluded that TAC should be paid the amount of its claim. His adjudication decision stated (as was the fact) that John Holland did not refer to "the recent judgment of the NSW Court of Appeal dated 31 October 2008 in the matter of *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor* [2008] NSWCA 279" ("*Plaza West*"). The adjudicator took the view that the decision in *Plaza West* was "relevantly at odds" with the earlier judgment in *Goss*. He stated:

"I am of the view that it is incumbent upon me to deal with *Plaza West* because it effectively overturns *Goss*, the case [John Holland] would have me believe reflects current law but which, in my view, does not."

After discussing his interpretation of *Plaza West*, the adjudicator rejected John Holland's submission that TAC's failure to meet conditions precedent had the effect that it was not entitled to make a payment claim under the Act in respect of the variations and was not entitled to payment of its claim.

- [3] The adjudicator proceeded to consider John Holland's submissions that TAC's claim depended on the application of Schedule R of the contract. He concluded that he was not satisfied that its provisions governed TAC's entitlement to payment under the Act. He then assessed the items claimed and decided that TAC had established, for the purposes of an interim decision under the Act, an entitlement to be paid the full amount claimed together with GST, which totalled \$1,005,120.33.
- [4] John Holland applies for an order that the adjudication decision be declared void. Its grounds are that the adjudicator:
- (a) denied it natural justice by referring to and relying upon the decision of *Plaza West* in circumstances where neither party did so, and the adjudicator did not notify the parties of his intention to rely upon the decision and his interpretation of it, nor seek further submissions from the parties;
  - (b) failed to make a bona fide attempt to consider Schedule R of the contract.
- [5] As to the natural justice ground, John Holland submits that there was a substantial denial of natural justice because the adjudicator relied upon the *Plaza West* case as

<sup>1</sup> The second and third respondents did not take part in the proceedings and, by correspondence, indicated that they submitted to all orders of the Court, save as to costs: letter to the Court dated 6 March 2009, Exhibit 1.

<sup>2</sup> (2006) 66 NSWLR 707.

effectively overturning a decision upon which John Holland relied on a crucial issue, and as authority for the proposition that the adjudicator ought to decide the payment claim without reference to the requirements of various clauses of the contract which were preconditions to payment. It submits that if it had been given an opportunity to make submissions on these matters, then there was a substantial prospect of a different result.

- [6] TAC submits in response that John Holland was heard on the critical issue in dispute, namely the interplay between s 99 of the Act and the contractual conditions that the adjudicator's decision was not based solely on *Plaza West*, that the decision was not based on an issue that had not been addressed by either party and that the adjudicator interpreted *Plaza West* as an extension of principles applied in earlier authorities.
- [7] As to the second ground upon which John Holland seeks to impugn the adjudication decision, the parties are agreed that the issue is whether there was a genuine attempt by the adjudicator to understand and apply the contract.<sup>3</sup> John Holland submits that the adjudicator refused to attempt to construe critical contractual terms, particularly Schedule R to the contract. In response, TAC submits that the adjudicator genuinely attempted to construe the contract, including Schedule R, as appears from his consideration of it in the adjudication decision. TAC submits that the adjudicator considered and adopted its submissions about the operation of Schedule R and that, on any view, there was a real attempt by the adjudicator to construe the contract.<sup>4</sup>
- [8] I shall consider:
1. The statutory scheme and the circumstances in which an adjudicator's decision may be declared void.
  2. The relevant facts.
  3. What constitutes a "substantial denial of natural justice" in the context of an adjudication decision under the Act.
  4. The issue in respect of which the denial of natural justice is alleged to have occurred.
  5. Whether there was a substantial denial of natural justice.
  6. The arguments before the adjudicator concerning the construction of the contract and the operation of Schedule R.
  7. Whether the adjudicator made a genuine attempt to understand and apply the contract.

**The statutory scheme and the circumstances in which an adjudicator's decision may be declared void**

- [9] I adopt the following agreed description of the scheme of the Act and the circumstances under which an adjudication decision may be declared void.<sup>5</sup>
- [10] The object of the Act is to ensure that a contractor under a construction contract is entitled to receive and able to recover progress payments: s 7.

<sup>3</sup> *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor* [2009] QSC 165 at [33].

<sup>4</sup> *Hitachi Ltd v O'Donnell Griffin Pty Ltd & Ors* [2008] QSC 135 at [45].

<sup>5</sup> Paragraphs [10]-[20] are taken from paragraphs 9-19 of John Holland's Outline of Submissions which TAC accepts and adopts.

- [11] In pursuance of its object, the Act provides for an entitlement to progress payments even if the contract does not do so (s 12), and allows the claimant to pursue them by serving a payment claim upon the other party: s 17.
- [12] A party served with a payment claim may respond with a payment schedule, which sets out the amount that is admitted to be owed to the claimant and the reasons why that amount is less than the payment claim: s 18.
- [13] If a payment schedule is served, the claimant may refer the payment claim to adjudication and make submissions in support of its payment claim and against the matters set out in the payment schedule: s 21. The other party is entitled to deliver an adjudication response, containing its submissions on the payment claim and payment schedule: s 24.
- [14] The matter is then determined by the adjudicator (s 26), whose task is to value the work performed by the contractor. The adjudicator is bound by s 26(2), which provides:
- “In deciding an adjudication application, the adjudicator is to consider the following matters only —
- (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
  - (b) the provisions of the construction contract from which the application arose;
  - (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
  - (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.”
- [15] Of critical significance is the fact that the adjudicator is required to consider only submissions which have been properly made: s 26(2)(c) and (d). Obviously if a party has made a submission which it was not permitted to make by operation of the earlier provisions of the Act, s 26 would require the adjudicator not to consider that submission. The effect of this limitation is somewhat ameliorated by the fact that s 25(4) –
1. permits the adjudicator to ask for further written submissions from either party and to set appropriate deadlines; and
  2. (in the event that the adjudicator takes that course) requires the adjudicator to give the other party an opportunity to comment on the submissions.
- [16] Once a decision has been obtained, the other party is obliged to pay the adjudicated amount within a prescribed period (s 29) in default of which the claimant may obtain an adjudication certificate which may be filed as a judgment for a debt and may be

enforced in a court of competent jurisdiction (ss 30 and 31). The other party may commence proceedings to have the judgment based on the adjudication certificate set aside, but its capacity so to do is severely constrained by, amongst other things, being prohibited from challenging the adjudicator's decision.

[17] A losing party who has paid or is forced to pay monies may ultimately obtain a final determination of its rights by civil proceedings outside the statutory regime (s 100(2) and (3)). In such proceedings a Court or tribunal considering such an application may make the appropriate order (including for restitution of the money paid) regardless of what has been done under the adjudication.

[18] The Courts have recognised that an adjudication decision is void if:

1. it fails to comply with the basic requirements of the Act; or
2. it is not a bona fide attempt by the adjudicator to exercise the relevant power; or
3. there has been a substantial denial of natural justice to a party;

and only a declaration regarding its invalidity (and perhaps injunctive relief, if necessary) is needed to give it its quietus.

[19] Thus in *Brodyn Pty Ltd v Davenport*<sup>6</sup> Hodgson JA said:

“[I]t is plain in my opinion that for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction...

...

What was intended to be essential was compliance with the basic requirement..., a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power... and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination.”

[20] The approach in *Brodyn* has been adopted in Queensland: *Hitachi Limited v O'Donnell Griffin Pty Ltd*;<sup>7</sup> *Walton Constructions (Qld) Pty Ltd v Salce*;<sup>8</sup> and *J Hutchison Pty Ltd v Galform Pty Ltd*.<sup>9</sup>

<sup>6</sup> (2004) 61 NSWLR 421 at 441 [52], 442 [55].

<sup>7</sup> [2008] QSC 135.

<sup>8</sup> [2008] QSC 235.

<sup>9</sup> [2008] QSC 205.

- [21] I add that the statutory scheme also was helpfully described by P Lyons J recently in *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor*.<sup>10</sup> His Honour surveyed authorities to the effect that a condition of validity of the exercise of an adjudicator's power is that the adjudicator act in good faith. His Honour concluded:

“It may be correct to say that a decision which displays an extreme degree of unreasonableness akin to that described in *Associated Provincial Picture House Ltd v Wednesbury Corporation*,<sup>11</sup> is not a decision for the purposes of s 26 of the *Payments Act*. Otherwise, I do not consider an adjudicator's decision purporting to be made under the *Payments Act* will be invalid if it is not “reasonable”. The *Payments Act* seeks to provide a mechanism for obtaining a decision which will be quick, but in a sense, provisional. It does not seem to me, consistent with the general object and tenor of the Act, to impose a requirement of ‘reasonableness’.

I am therefore of the opinion that the test advanced on behalf of *QBWSA* is too widely formulated. If the broad test for good faith is to be adopted, then what is required is a genuine attempt to exercise the power in accordance with the provisions in the *Payments Act*. Specifically, in relation to a consideration of the construction contract, what is required is a genuine attempt to understand and apply that contract.”<sup>12</sup>

In arguing this matter the parties agreed that his Honour's reasons state the appropriate test to be adopted, and I respectfully adopt his Honour's view.

### **The relevant facts**

- [22] In order to address the issues in relation to John Holland's contention that there was a substantial denial of natural justice and its second contention that the adjudicator failed to make a genuine attempt to understand and apply the relevant provisions of the parties' contract, it is necessary to refer to relevant provisions of the contract.<sup>13</sup>
- [23] The contract price (referred to as the “Subcontract Sum”) was defined in Schedule D of the contract, as follows:<sup>14</sup>
- “Guaranteed Maximum Price as detailed in **Schedule R** (excluding GST) (as adjusted in accordance with the Subcontract)”
- [24] Schedule R, entitled "Sub-contract Sum", provided as follows:<sup>15</sup>
- "The Contract Sum is an aggregate of the Guaranteed Maximum Price (GMP) figures listed in Table 2 and the Provisional Sums listed in Table 2.

<sup>10</sup> [2009] QSC 165.

<sup>11</sup> [1948] 1 KB 223.

<sup>12</sup> *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor* supra at [32]-[33].

<sup>13</sup> The following six paragraphs of the judgment are extracted from the parties' submissions as an agreed statement of the relevant facts.

<sup>14</sup> Affidavit of Troy Jonathan Lewis filed 11 March 2009, CFI 4 (“Lewis”) ex TJL2 p. 556 (reverse side).

<sup>15</sup> Lewis ex TJL2 p. 671.

It is the intention of the Main Contractor and the Subcontractor that the Works (made up of the Sections of Work listed in Table 1 and Table 2) will be completed as one subcontract, separated into separate buildings. Separate progress claims and security will be required for each building.

The only instance in which the contract sum will be varied will be in accordance with Table 4 and 5 of this Schedule.

The Stage 1 works have been confirmed as Guaranteed Maximum Prices.

The Stage 2 works have been allowed as separate Provisional Sums, based on a Schedule of Quantities for each building. At the time of "Approved for Construction" (AFC) documentation for each building being available, the Subcontractor will confirm the GMP price and the Subcontract Sum will be adjusted according to this Schedule R.

The Subcontractor has provided its GMP on the basis of the Works Description given in Schedule D Particulars and the intent of this documentation. A controlled set of these documents, stamped, dated and signed by the Main Contractor and Subcontractor is stored electronically in pdf format.

At the date of this subcontract the Main Contractor continues to prepare the construction documentation. Both the Main Contractor and Subcontractor acknowledge that this documentation will differ from the documents used to prepare the Works Description and GMP, and the Contract Price is inclusive of these changes."

- [25] The Schedule went on to set out the Guaranteed Maximum Price ("GMP") for the Stage 1 works, and the provisional sums for the Stage 2 works, and to provide for the conversion of the provisional sum for Stage 2 works into a GMP. The effect in relation to variations was emphasised in these terms:<sup>16</sup>

"The Sub-contractor represents that it has a very good understanding of the requirements to this project having scrutinized the Stage 1 scope of works over a 2 month period and the Sub-contractors' GMP for Stage 1 works. The GMP includes:

...

- all of the unforeseen work and due allowance for unforeseen work;
- the affect and cost of sequencing various work faces on the site of labour requirements;

...

- the sub-contractor accepts that no variation to the GMP will be issued unless John Holland receives a variation from the Principle [sic].

...

All cost increases calculated in accordance with Schedule R and E [entitled "Contract Sum Breakdown/Variation Rates"] will be shared

<sup>16</sup>

Lewis ex TJL2 p. 673.

between the Contractor and Sub-contractor on the basis stated in Table 5. ...

Any cost to the GMP will be confirmed by the Contractor as a Variation Order in accordance with Clause 11 of the General Conditions of the Sub-contract in the form of Form 2."

- [26] Table 5 in Schedule R set out the manner in which the additional costs imposed by variations would be shared between the applicant and first respondent. It provided, for example:<sup>17</sup>

Item	Share of Increased Cost to Main Contractor	Share of Increased Cost to Subcontractor
Building iA ◦ increase in Provisional Sum by more than 10% (BMS) or 5% (Security) ◦ increase in Scope due to Client Variation issued to JHPL ◦ all other increases in Scope after conversion to GMP	50%   100%  0%	50%   0%  100%
...		

and made similar provision for the other parts of the work.

- [27] Table 4 in Schedule R made complementary provision for the sharing of cost savings – with limited exceptions, the first respondent was entitled to all cost savings achieved under the contract.<sup>18</sup>
- [28] Finally, by the general conditions, the contract also provided:<sup>19</sup>

"11 Variations

11.1 Variation Orders

John Holland may in its absolute discretion at any time issue an instruction in writing to the Subcontractor to carry out a Variation ("Variation Order") in the form of Form 2. The Subcontractor acknowledges and agrees:

- a) no claim can be made for a Variation unless a Variation Order has been issued;
- b) a Variation does not include any work to overcome a breach of the Subcontract or any negligent act or omission by the Subcontractor;

<sup>17</sup> Lewis ex TJL2 p. 676

<sup>18</sup> Lewis ex TJL2 p. 674

<sup>19</sup> Lewis ex TJL2 p. 734-5, 739, 741-2

The Subcontractor will have a Claim in relation to a Variation only when:

- a) it has received a direction from John Holland to perform a Variation;
- b) it has received a signed Form 2;
- c) it has given any notice required by the Subcontract strictly in accordance with the requirements of the Subcontract;
- d) the Variation was not directed at the request of and solely for the convenience of the Subcontractor;
- e) John Holland's Representative may, at any time, by notice in Form 2 direct the Subcontractor to perform a Variation, or require the Subcontractor to submit a proposal in Form 3 for a proposed Variation.

...

If the Subcontractor has received:

- a) a notice in Form 2 and disagrees with any of the terms contained in the notice then, before the Subcontractor starts the work comprising the Variation and, in any event, within 3 days of receiving the notice in Form 2, the Subcontractor must forward to John Holland's Representative a notice in Form 3; or
- b) a direction from John Holland's Representative to perform a Variation either orally or in a form other than Form 2, the Subcontractor has not within 3 days of receiving the direction, submitted to John Holland's Representative a notice in Form 3.

John Holland shall not be liable to the Subcontractor for any Claim and the Subcontractor is barred from making any Claim against John Holland arising out of any failure by the Subcontractor to comply with the requirements of this clause 11.1.

...

### 11.3 Cost of Variation

The Subcontract Sum will be adjusted for all Variations which have been the subject of a Variation Order. The adjustment shall be the amount (if any) stated in the Variation Order or, at John Holland's election, an amount determined by John Holland using any rates or prices in the Subcontract to the extent they are applicable, or a reasonable amount agreed between the parties or failing agreement a fair and reasonable amount as determined by John Holland.

The cost of variations shall include all costs associated with the variation, including construction costs, delays and disruption costs.

...

### 12.10 Final Payment Claim

Within the time specified in the Particulars after the issue of a Completion notice the Subcontractor must give John Holland:

- a) a Payment Claim endorsed ("Final Payment Claim") which:
- b) as a precondition to the Subcontractors entitlement to make a Final Payment Claim includes a release in the form contained in Schedule Q to the Subcontract duly signed by the Subcontractor;
  - (i) must include all amounts which the Subcontractor claims from John Holland under the Subcontract or otherwise in respect of any fact, matter or thing arising out of or in connection with the Works or the Subcontract which occurred prior to the date of Completion;
  - (ii) is in addition to the other notices which the Subcontractor must give to John Holland under the Subcontract in order to preserve its entitlements to make any such claims; and
  - (iii) does not include any amounts which are barred by the terms of the Subcontract.

...

### 13.5 Completion Claim

Within 5 days of JH issuing the Completion Notice, the Subcontractor must give JH a notice which:

- a) includes all amounts which the Subcontractor claims from JH under the Subcontract or otherwise in respect of any fact, matter or thing arising out of or in connection with the Subcontractor's Activities or the Subcontract which occurred prior to the date of Completion; and
- b) is in addition to the other notices which the Subcontractor must give to JH under the Subcontract in order to preserve its entitlements to make any such claims.

The Subcontractor cannot include in its notice any claims which are barred by any other clause of this Subcontract.

..."

### **What constitutes a “substantial breach of natural justice” in the context of an adjudication decision under the Act?**

[29] The obligation to afford natural justice is shaped both by the statute pursuant to which the impugned decision has been made and the particular circumstances of the case. The Full Court of the Federal Court in *Habib v Director-General of Security* (“*Habib*”)<sup>20</sup> recently summarised the requirements of natural justice as follows:

"Natural justice requires that a person know the substance of the case against him or her and be given the opportunity to respond to adverse material that is credible, relevant or significant: *Kioa v West* (1985) 159 CLR 550 at 629; 62 ALR 321 at 380–1; [1985] HCA 81 (*Kioa*) (per Brennan J). As the respondents have submitted, however, the obligation to afford natural justice is shaped not only by the statute pursuant to which the impugned decision has been made but also the particular circumstances of the case: *Ex parte Aala* at [59] (per Gaudron and Gummow JJ); *Re Minister for Immigration and*

<sup>20</sup> (2009) 255 ALR 209 at 225 [63]-[64].

*Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; 179 ALR 238 ; [2001] HCA 22 at [128]–[151] (per McHugh J); *Kioa* at CLR 611–12; ALR 367 (per Brennan J). Thus, the content of the tribunal’s obligation must be considered in the context of s 33 of the *AAT Act* and with due regard to practical considerations related to the course of the hearing including, in the present case, the receipt of a large volume of evidence during a hearing over some 20 days.

There are sound practical reasons why a decision-maker is generally not obliged to expose his or her reasoning process or provisional views for comment by the person affected: *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 201 ALR 437; 75 ALD 1; [2003] HCA 60 at [51]–[54] (per Gummow and Heydon JJ), at [85] (per Kirby J); *Alphaone* at FCR 591; ALR 715; ALD 330. There may nevertheless be circumstances where fairness requires prior disclosure of such matters, as where they relate to a critical issue or factor, or where they do not follow from an obvious or natural evaluation of the evidence: see *Alphaone* at FCR 591; ALR 715; ALD 330; *Somaghi* at FCR 108–9; ALR 348; ALD 677 (per Jenkinson J); *Lidono* at [18]–[20] (per Gyles J).”

- [30] TAC properly emphasises that the obligation of an adjudicator under the Act to afford natural justice must take account of the provisions of the Act. It points to the proscriptive operation of s 26(2)(a) of the Act and that the purpose of the Act is to provide a mechanism by which claims for payment under construction contracts can be decided as quickly as possible and, in any case, within the short period of time provided for in s 25(3) of the Act.<sup>21</sup> As Muir JA (with whom Holmes JA and Chesterman J agreed) stated in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd*:<sup>22</sup>

“[T]he Act is intended to provide a mechanism by which claims for payment under construction contracts can be decided quickly, on an interim basis and by which payment can be enforced even though a dispute in respect of the right to payment is being litigated or is subject to an alternative dispute resolution process. It is apparent also that in making decisions under the Act adjudicators will often lack the evidence upon which and the time within which to make fully informed considered decisions. That does not matter in the scheme of things, as adjudicators’ decisions do not finally determine parties’ contractual rights. That is left to the courts or to alternative dispute resolution processes agreed upon by the parties.”

In this statutory context, TAC submits that it is sufficient if the adjudicator provides the parties with an opportunity to be heard in respect of “the critical issue or factor on which the decision is likely to turn”. The quoted words are drawn from the judgment

<sup>21</sup> This provides that, subject to ss 25(1) and (2), an adjudicator must decide an adjudication application as quickly as possible and, in any case –

- (a) within 10 business days after the earlier of –
  - (i) the date on which the adjudicator receives the adjudication response; or
  - (ii) the date on which the adjudicator should have received the adjudication response; or
- (b) within the further time the claimant and the respondent may agree, whether before or after the end of the 10 business days.

<sup>22</sup> [2008] QCA 83.

of Mason J in *Kioa v West*.<sup>23</sup> TAC further submits that the obligation to afford natural justice does not impose a duty on the adjudicator “to inform the parties of every matter or circumstance on which the adjudicator ruminates prior to reaching his decision” or to go beyond the critical issue or factor on which the decision is likely to turn and seek further submissions from the parties on every authority on which the adjudicator may seek to rely. In short, TAC submits that the obligation to afford natural justice relates to the critical issue or factor on which the decision will turn and its content in the context of the impugned decision must be consistent with the “statutory imperatives of speed, simplicity and cost effectiveness in what is ultimately an interim payment procedure”.<sup>24</sup>

[31] John Holland submits that TAC’s focus upon the opportunity to be heard in respect of “the critical issue or factor” on which the decision is likely to turn pays insufficient attention to the manner in which the adjudicator actually deals with the dispute. It submits that in determining whether there has been a denial of natural justice the requisite focus is on the way in which the adjudicator actually went about deciding the dispute. This includes asking whether that involved deciding the dispute on a basis not contended for by either side, of which the adjudicator had not notified the parties, and which denied the parties an opportunity to put submissions. Particular reliance is placed upon authorities in relation to comparable New South Wales legislation, to which I turn.

[32] In *Musico v Davenport*<sup>25</sup> McDougall J considered a suggestion that although certain matters were not explicitly raised, nonetheless, because, in effect, the adjudicator was required to consider the provisions of the contract, the provisions of the payment schedule and the provisions of the Act, it was open to him to reach the view that he did, notwithstanding that one of the parties, Grosvenor, had not advanced or contended for those views in its adjudication application. His Honour stated:

“If that be Grosvenor’s position it is, in my opinion, wrong. It may readily be accepted that the Act provides for a somewhat rough and ready way of assessing a builder’s entitlement to progress claims. It may also be accepted that the procedure is intended not only to be swift, but also to be carried out with the minimum amount of formality and expense. Nonetheless, what an adjudicator is required to do is to decide the dispute between the parties. Under the scheme of the Act, that dispute is advanced by the parties through their adjudication application and adjudication response (which, no doubt, will usually incorporate the antecedent payment claim and payment schedule). **If an adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it.** In my opinion, this is a purpose intended to be served by s 21(4) of the Act (although the functions of s 21(4) may not be limited to this).

It follows, in my opinion, that **where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator**

<sup>23</sup> (1985) 159 CLR 550 at 587.

<sup>24</sup> TAC’s Outline of Submissions, para 26(a).

<sup>25</sup> [2003] NSWSC 977 at [107]-[108].

**has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have “a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it”.**<sup>26</sup> (emphasis added)

The reference in this passage to s 21(4) of the New South Wales Act refers to the analogue to s 25(4) of the Queensland Act, which provides, amongst other things, that an adjudicator may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions, and may set deadlines for further submissions and comments by the parties.

- [33] In *Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd*<sup>27</sup> Einstein J summarised the requirements of natural justice and referred to *Musico v Davenport* as “authority for the proposition that an adjudicator breaches the requirements of natural justice where an application is determined upon a basis not advanced by either party”.
- [34] McDougall J discussed and applied the principles of natural justice in *Goss*.<sup>28</sup> That case involved a second adjudication in which the claimant relied upon an authority, *Rothnere*,<sup>29</sup> in support of a submission that a distinction exists between an entitlement to be paid for construction work and the valuation of that construction work. The respondent did not submit to the adjudicator that what was said in *Rothnere* was incorrect, but submitted that the facts in *Rothnere* were “clearly distinguishable” from the facts in the adjudication and so should not govern its outcome.<sup>30</sup> The approach that the adjudicator took to the material part of the decision in *Rothnere* was not one for which either party had contended. The adjudicator treated the relevant paragraphs of the decision in *Rothnere* as obiter dictum and also as being “incorrect”, whereas the respondent did not submit that it was incorrect.<sup>31</sup> McDougall J determined a challenge on the basis of a denial of natural justice and observed that it was fundamental to the task to be undertaken by the adjudicator that he apply himself to the parties’ submissions based upon what had been said in *Rothnere*.<sup>32</sup>
- [35] His Honour stated that the “concept of materiality is inextricably linked to the measure of natural justice that the Act requires the parties to be given in a particular case.”<sup>33</sup> The principles of natural justice did not require an adjudicator to give the parties an opportunity to put submissions on matters that were not “germane to his or her decision”. However, the relevant aspect of the decision in *Rothnere* was germane to the adjudicator’s decision. If the adjudicator had decided the case on the basis that the relevant part of the decision in *Rothnere* was obiter then no question of denial of natural justice could have arisen, according to McDougall J. However, the adjudicator went further and found that what had been said in *Rothnere* was wrong, and that he would not follow it. The question for the determination of McDougall J was whether this was material, and, if so, whether the adjudicator was obliged to give the parties an opportunity to address it. His Honour concluded that if the adjudicator had notified the

<sup>26</sup> The quoted words are from the speech of Lord Diplock in *O’Reilly v Mackman* [1993] 2 AC 237 at 279.

<sup>27</sup> [2006] NSWSC 205 at [10].

<sup>28</sup> *Supra* at [24]-[55].

<sup>29</sup> *Rothnere v Quasar* [2004] NSWSC 1151.

<sup>30</sup> *Goss* at [17].

<sup>31</sup> *Ibid* at [29]-[30].

<sup>32</sup> *Ibid* at [41].

<sup>33</sup> *Ibid* at [42].

parties of the issue, then the claimant could have put submissions directed to at least two points and that he deprived the claimant of the opportunity to put submissions that could well have persuaded him to take a different course.

- [36] The respondent submitted to McDougall J that there was no denial of natural justice because the question of the meaning and application of the relevant provision of the Act was clearly within the defined area of dispute, the real question was whether the adjudicator was constrained by the relevant part of the decision in *Rothnere* and the parties had had an opportunity to put submissions on *Rothnere*. McDougall J rejected these submissions because, although it was correct to say that the issue before the adjudicator required him to decide the meaning of particular words in s 22(4) of the Act and its application to the facts before him, the debate was conducted on the basis that the meaning of the subsection had been addressed in the relevant part of the reasons of *Rothnere*, and had not been conducted on the basis that the relevant part of the reasons was wrong. There was a “significant conceptual difference between saying that a decision was correct but distinguishable, and saying that it is incorrect”.<sup>34</sup> Although the parties had the opportunity to put submissions in relation to *Rothnere*, those submissions did not challenge the correctness of the decision or the conclusions that were expressed in the relevant part of the decision. McDougall J concluded that the adjudicator, in deciding the way he did, denied the claimant natural justice.
- [37] *Goss* serves to confirm that the denial of natural justice must relate to a matter that is germane to the adjudicator’s decision and that the opportunity to be heard must have been denied “in a real and material sense”.<sup>35</sup> Attention is required to the way in which the adjudicator decided the way that he or she did. The application of these principles in *Goss* is relevant in the present case, in which the adjudicator determined the application on the basis that the decision in *Goss* on the operation of the Act was at odds with *Plaza West*, that *Goss* had been effectively overturned by *Plaza West* and did not reflect “current law”. The position that *Goss* did not represent the law was not contended for by TAC, but was a basis upon which the adjudicator determined the matter without notifying the parties.
- [38] Aspects of materiality were further considered in *Trysams Pty Limited v Club Constructions (NSW) Pty Ltd*<sup>36</sup> in which McDougall J stated:  
 “It does not follow from what I said in *John Goss* (or, for that matter, in *Musico*) that any failure by an adjudicator to ask for submissions on a matter not raised by the parties will amount to denial of natural justice sufficient to justify the Court’s declaring the adjudication to be void, on *Brodyn* grounds. At the very least, the point must be (as I said) “germane to [the] decision”. In addition, perhaps, it must be at least arguable that meaningful submissions could have been put if an opportunity to put them had been afforded: i.e, that there was something to be put that might well persuade the adjudicator to change his or her mind.”
- [39] A convenient summary of relevant principles is contained in *Shorten v David Hurst Constructions Pty Ltd*<sup>37</sup> in which Einstein J discusses the way in which principles of natural justice have been applied in adjudication proceedings. I adopt, with respect,

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<sup>34</sup> Ibid at [48].

<sup>35</sup> Ibid at [46].

<sup>36</sup> [2008] NSWSC 399.

<sup>37</sup> [2008] NSWSC 546 at [27]-[30].

the summary of relevant principles. As John Holland submits, they are consistent with the more general proposition that a party should be given the opportunity to respond to matters prejudicial to its interests that are known only to the decision-maker and which might be taken into account in the determination of issues that may affect the party's property, rights or legitimate expectations.<sup>38</sup> The New South Wales authorities on the application of the requirements of natural justice in adjudication proceedings which I respectfully follow serve to emphasise the concept of materiality, and that the principles of natural justice do not require an adjudicator to give the parties an opportunity to put submissions on a matter that are not "germane" to his or her decision. On an application of the present kind, this requires attention to both "the critical issue or factor" on which the decision turns and the way in which the adjudicator decided it.

- [40] The adjective "substantial" has been used in the relevant authorities<sup>39</sup> to capture the principle that the opportunity denied was material, namely that the matter about which the adjudicator did not provide an opportunity to be heard was a point upon which the adjudicator based his or her decision and was significant to the actual determination.<sup>40</sup> In addition, the Court's concern is with the practical effect of the alleged denial of natural justice. Reference to the High Court's decisions in *Stead v State Government Insurance Commission*<sup>41</sup> and *Ex parte Aala*<sup>42</sup> supports the proposition that even if the Court is satisfied that there has been a denial of natural justice, relief may be denied if it can be shown that compliance with the requirements of natural justice could have made no difference to the outcome. It is probably sufficient in this regard for the applicant for relief to show that there were substantial submissions that, as a matter of reality and not mere speculation, might have persuaded the adjudicator to change his or her mind.<sup>43</sup>

**The issue in respect of which the denial of natural justice is alleged to have occurred**

- [41] I shall later refer to the parties' contentions to the adjudicator in relation to the valuation of TAC's claim and the adjudicator's consideration of John Holland's reliance upon Schedule R of the contract. This arises in connection with the second ground of challenge to the adjudication decision. I shall first refer to the issues that are relevant to the natural justice ground.
- [42] In its submissions in support of its adjudication application<sup>44</sup> TAC addressed the four reasons given by John Holland in its payment schedule for withholding payment. These were:
- “(a) that the Payment Claim does not comply with contractual preconditions;
  - (b) that the Claimant has not complied with the preconditions for claiming variations;

<sup>38</sup> *Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492 at [27].

<sup>39</sup> *Brodyn Pty Ltd v Davenport* (supra) at 441-442, [55].

<sup>40</sup> *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* (supra) at [52].

<sup>41</sup> (1986) 161 CLR 141 at 147 cited along with other authorities in the context of an adjudication decision in *Fifty Property Investments v O'Mara* [2006] NSWSC 428 at [53].

<sup>42</sup> *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at 91 [17], 130-131 [131]. Applied in *Shorten v David Hurst Constructions Pty Ltd* (supra) at [23]-[24].

<sup>43</sup> *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* (supra) at [45]; *Shorten v David Hurst Constructions Pty Ltd* (supra) at [28].

<sup>44</sup> Lewis ex TJL-2 pp 4-27.

- (c) that the Claimant has not complied with the final payment claim and completion notice provisions; and
- (d) that the Respondent has reached a different assessment of the claimed items, and is entitled to set-offs against the claimed amount.”

Substantial submissions were addressed concerning the contractual preconditions relied upon, and TAC submitted that many of John Holland’s contentions should be dismissed on the same basis, namely that s 99 of the Act rendered void any contractual provisions that are inconsistent with the rights granted by the legislation. Submissions were directed to John Holland’s reliance upon the decision in *Goss*. TAC submitted that John Holland’s reliance upon the decision in *Goss* was misplaced because the decision was not concerned with preconditions to making a payment claim under the legislation, but were concerned with the preconditions for taking steps under the contract. TAC submitted that:

“Accordingly, *John Goss* does not have the meaning contended by the Respondent. It does not in any way restrict the operation of section 99 and therefore cannot be relied upon in support of the contractual preconditions set out in the Payment Schedule.”

[43] In its adjudication response John Holland relied upon TAC’s alleged non-compliance with a number of contractual preconditions to an entitlement to be paid for work, and responded to TAC’s submission that the preconditions were void by reason of s 99 of the Act. It relied upon the decision of McDougall J in *Goss* and submitted:

- “6.3 It is apparent from the Claimant’s submissions that it has failed to appreciate the fundamental distinction drawn by the New South Wales Supreme Court in *John Goss Projects v Leighton Contractors* [2006] NSWSC 798 which is both pivotal, and fatal to the Claimant’s position.
- 6.4 *John Goss* stands as clear authority for the clear proposition that there is a distinction between, on the one hand, a pre-condition to the making of a payment claim at all, and, on the other hand, a clause restricting or operating as a pre-condition to what claims could be included in a payment claim, whilst still maintaining a Claimant’s right to make the payment claim. The latter do not contravene section 99 of the Act.
- 6.5 The reason for this distinction is that section 17 of the Act sets out the requirements for a valid payment claim, and the time in which a payment claim can be made. Therefore any attempt to include additional prerequisites or decrease such timeframes will be an attempt to contract out of the Act.
- 6.6 The further fundamental distinction between a clause which contravenes section 99 of the Act, and one that does not is the distinction between, on the one hand, again, a clause which acts as a precondition to the submission of a payment claim, and, on the other, a clause which operates as a precondition *to payment*.
- 6.7 Whilst not discussed by the Claimant in its submissions, this fundamental distinction arises as a result of the requirement of

the adjudicator to determine the amount payable “under the Contract” (see section 13 of the Act).

6.8 In *John Goss Projects v Leighton Contractors Pty Ltd* the New South Wales Supreme Court was required to consider this pivotal distinction. In doing so, the Court upheld the validity of a notification provision not dissimilar to those relied on by the Respondent and concluded that such a provision was not void by operation of the New South Wales equivalent of section 99 of the Act. ...”<sup>45</sup>

[44] In its submissions to the adjudicator TAC did not contend that *Goss* was wrongly decided, or was inconsistent with other decisions including the decisions of Hodgson JA to which the adjudicator came to refer, but to which neither party referred on the present issue.<sup>46</sup> Instead, as appears from the written submission that I have quoted, TAC submitted that *Goss* did not have the effect contended for by John Holland, did not restrict the operation of s 99 and could not be relied upon in support of the contractual preconditions upon which John Holland relied. No party referred to the decision of the New South Wales Court of Appeal in *Plaza West*. TAC did not submit that *Goss* no longer stated the law.

[45] In summary, the relevant issue in dispute before the adjudicator was whether he was obliged to apply the clauses of the contract upon which John Holland relied, and whether they were void because of the operation of s 99 of the Act.

**Was there a substantial denial of justice?**

[46] The adjudication decision addressed the parties’ contentions, including John Holland’s reliance upon the judgment in *Goss* in support of its submission that each of the preconditions relied upon by TAC were preconditions to *payment* or to the inclusion of a claim in a payment claim under the Act. John Holland’s contention was that a clause that provided that compliance with it was a precondition to payment was not rendered void by s 99 of the Act. The adjudicator stated:

“The questions then arise: is the Claimant entitled to payment of a claim for items in respect of which there has been non-compliance with conditions precedent in the Contract and are such conditions rendered void by s 99 of the Act?”

Having defined the questions for his determination, the adjudicator continued:

“The Respondent referred to and relied on a substantial number of cases in its submissions; notably, on this issue, *John Goss Projects v Leighton Contractors & Anor [2006] NSWSC 798*. The Respondent did not however refer to the recent judgment of the NSW Court of Appeal dated 31 October 2008 in the matter of *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor [2008] NSWCA 279*. In my view, the Court of Appeal's decision in that matter is relevantly at odds with McDougall J's earlier judgment in *Goss*.

It is not my practice to cite cases which have not been referred to by either party however the Respondent has relied on and provided an entire folder full of what it says are cases that reflect relevant law. In

<sup>45</sup> Lewis ex TJL 3 pp 785-6.

<sup>46</sup> Transcript of hearing 27 June 2009, 1-47 line 50; cf TAC’s Outline of Submissions paras 21, 22, 26(c) and see John Holland’s Outline of Submissions in Reply para 4(d)(i).

relation to the present issue, I am of the view that it is incumbent upon me to deal with *Plaza West* because it effectively overturns *Goss*, the case the Respondent would have me believe reflects current law but which, in my view, does not.

The *Plaza West* matter related to the consequences at adjudication of the failure of a superintendent to issue a Payment Certificate as required by clause 37(2) of the relevant contract in response to a Payment Claim. The Adjudicator in his Determination, in which the Court decided that the Adjudicator erred at law, accepted that the claimant in the matter was entitled to the full amount of the Payment Claim because clause 37(2) operated to that effect. The Adjudicator erred in not valuing the work as required by section 9(a) of the NSW Act because he formed the view that, as a result of the operation of clause 37(2) there was no need for him to do so.

Hodgson JA made reference to the requirement for an Adjudicator to value work in accordance to section 9(a) of the Act. He referred to and concurred with his earlier expressed view in the Court of Appeal matters of *Transgrid v Siemens Limited* and *John Holland Pty Limited v Road & Traffic Authority of New South Wales* that the words "'calculated in accordance with the terms of the contract' in section 9(a) of the [Act] does not engage contract mechanisms determining what is due under the contract, independently of calculations referable to the work performed". Hodgson JA went on: "This means that contractors are not deprived of entitlement to *payment under the Act* [my italics] because a condition precedent [in the Contract], such as the obtaining of a superintendent's certificate has not been satisfied; and it means equally that contractors are not *ipso facto* entitled to payment because of the operation of a deeming provision such as clause 37(2) of the contract in this case". In other words, it works both ways.

Accordingly, I am obliged to consider the value of the Work pursuant to the Act and to allow a claim for that value irrespective of any alleged failure of the Claimant to meet any condition precedent in the Contract. The Claimant may therefore not be deprived of a payment for the value of its work because purportedly the claim or part of the claim is allegedly not permitted under numerous clauses in the Contract."

- [47] The result was that the adjudicator rejected John Holland's submission that TAC's failure to meet conditions precedent had the effect contended for by John Holland, namely that TAC was not entitled to payment of its claim. He did so by finding that the case upon which John Holland relied had been effectively overturned and did not reflect the law.
- [48] TAC did not submit to the adjudicator that *Goss* did not reflect the law. It accepts that *Plaza West* was not relied upon in submissions before the adjudicator, and does not submit that the adjudicator's view of that authority is correct. In these proceedings it submits that the issue with respect to which the adjudicator applied *Plaza West* was the subject of extensive submissions by each party, including the submission that *Goss* did not have the effect contended for by John Holland. TAC submits that the "critical

issue or factor” on which the decision was likely to turn was the effect of s 99 of the Act on the contractual provisions upon which John Holland relied, including the issue of whether *Goss* had the effect for which John Holland contended. TAC submits that to require an adjudicator to “seek further submissions from the parties on every authority on which the adjudicator may seek to rely would set a dangerous precedent that would contradict the accepted purpose of the legislation”. It submits that the adjudicator’s conclusion was not based solely on *Plaza West*, and was based on the adjudicator’s view of principles that Hodgson JA had expressed in earlier decisions. TAC characterises the adjudicator’s reliance on *Plaza West* as involving a finding as to the state of the law after considering submissions on the relevant issue. It notes that even if the adjudicator was in error in concluding that *Plaza West* effectively overturned *Goss* this was a “mere error of law and does not result in the decision of the adjudicator being void”.<sup>47</sup> It further submits that the result that the adjudicator reached was consistent with the submissions made to him by TAC.<sup>48</sup>

- [49] In summary, TAC submits that there was not a substantial denial of natural justice because the parties had the right to be heard in relation to the critical issue or factor in dispute, namely the interplay between s 99 of the Act and the contractual preconditions contained in the contract, both parties made submissions on these issues and the need for speed, simplicity and cost effectiveness in determining an interim payment matter did not require the adjudicator to seek further submissions in relation to an authority which he considered to be an extension of principles discussed in earlier authorities.
- [50] In determining whether there has been a substantial denial of natural justice it is not sufficient to simply identify the issue in dispute between the parties, and to determine whether they had an opportunity to make submissions with respect to that issue. The passage from *Habib* that I have earlier quoted, being an authority relied upon by TAC, and other authorities refer to disclosure of matters where they relate to “a critical issue or factor”. These general statements of principle apply to a wide range of circumstances, and in the present context the reference to “a critical issue or factor” should not be equated with the general issue joined between the parties in dispute. The subject of a decision is entitled to have his or her mind directed to “the critical issues or factors *on which the decision is likely to turn* in order to have an opportunity of dealing with it”.<sup>49</sup> In a case such as the present, if the decision is likely to turn on a point of law not contended for by one of the parties, and about which the parties have not been given an opportunity to address, then the requirements of natural justice will not have been observed. It is the issue of law, and not the general issue in dispute, upon which the decision is likely to turn.
- [51] In dealing with submissions that have been made, including whether a cited legal authority stands for a proposition contended for by one of the parties, the adjudicator will not be required to call for further submissions. The situation is otherwise where the adjudicator proposes to determine the issue in dispute on a basis other than that contended for by the parties, and on the basis of the view that a crucial authority upon which a party relies has been effectively overruled by an appellate authority to which no reference was made in the proceedings. Where, as with the adjudicator’s decision in *Goss*, the adjudicator intends to determine the issue in dispute on the basis that a

<sup>47</sup> TAC’s Outline of Submissions para 24.

<sup>48</sup> Ibid para 25(b), 26(c).

<sup>49</sup> *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591 (emphasis added), citing *Kioa v West* (supra) at 587 and other authorities. Followed in *Habib* (supra) at 225 [64].

crucial authority is incorrect, being a ground for which neither party has contended, then natural justice requires that the parties be given notice of that intention so that they may put submissions on it.

- [52] As the adjudication decision shows, the adjudicator's view that *Plaza West* effectively overturned *Goss* and that *Goss* did not reflect the law, was critical to his determination of the issue in dispute. This is not a case in which the adjudicator located and relied upon an additional authority which followed an earlier line of authority upon which a party relied in contending that *Goss* did not correctly state the law. TAC did not contend that *Goss* was incorrect. Its contention was that it did not have the effect contended for by John Holland. The correctness of *Goss*, and the view that it had been effectively overturned by an appellate authority, were germane to the adjudicator's decision. Each was a critical issue or factor upon which his decision was likely to turn.
- [53] Contrary to TAC's submissions, the natural justice issue in this matter is not distinguishable from the issue of natural justice which arose for consideration by McDougall J in *Goss*. In both matters the adjudicator resolved the substantial issue on a basis not contended for by a party, and on the basis that an authority upon which one of the parties relied in a crucial respect was incorrect. The adjudicator in this matter determined the substantive issue not simply because he took the view, without any encouragement from a party, that *Goss* should not be followed because it conflicted with a line of authorities. He took the view that *Goss* did not reflect the law because it had been effectively overturned by a Court of Appeal authority to which no party had referred.
- [54] It is not to the point that the *result* was consistent with TAC's submissions to the adjudicator.<sup>50</sup> The result was reached by a view of the law for which TAC did not contend, and for which it would not have contended had it and John Holland been given the opportunity to address *Plaza West* and whether it affected the correctness of *Goss*.
- [55] In the circumstances, it was not sufficient to discharge the requirements of natural justice that John Holland had the opportunity to address the fundamental issue in dispute about the operation of s 99 of the Act and whether John Holland could rely on the contractual preconditions in response to TAC's payment claim. Natural justice required the adjudicator to afford the parties the opportunity to make submissions about a critical issue upon which he was minded to determine the matter, being a view of the law for which neither party contended.
- [56] The allegation of a denial of natural justice is not answered by characterising the decision as simply a matter in which the adjudicator reached a view of the law after considering the submissions of the parties and the principles derived from the authorities about the operation of contractual preconditions of the kind relied upon by John Holland.<sup>51</sup> The adjudicator's view of the law was not one contended for by either party.
- [57] It also does not assist TAC to contend that an error made by the adjudicator in his view of the law "is a mere error of law and does not result in the decision of the adjudicator being void."<sup>52</sup> The issue of natural justice relates to the condition upon which the

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<sup>50</sup> TAC's Outline of Submissions para 25(b).

<sup>51</sup> Ibid at para 22.

<sup>52</sup> Ibid at para 24.

adjudicator exercised his powers, as distinct from the result he reached and the insulation of that result from review for error of law. John Holland was not given an opportunity to make submissions to the adjudicator that the view he proposed to take about the law was wrong, and to thereby avoid legal error. The statutory scheme may permit an adjudicator to make unreviewable errors of law in quickly deciding complex legal issues in adjudications of the present kind after considering the parties' submissions. The statutory scheme does not permit an adjudicator to determine an adjudication on the basis of a view of the law for which neither party has contended. An adjudicator may be free, as it were, to make an unreviewable error of law based on the submissions of one of the parties. He should not be so free where the error is all his own work and might have been avoided by affording natural justice.

- [58] In summary, the adjudicator was minded to determine the issue in dispute on a ground for which neither party contended, namely that *Goss* did not reflect the law and had been effectively overturned by *Plaza West*. He did not notify the parties of that intention and provide an opportunity to make further submissions on the point within time constraints appropriate for such a course.<sup>53</sup> He thereby breached the requirements of natural justice.
- [59] John Holland submits that the denial was substantial because the adjudicator misunderstood *Plaza West*. Its written submissions develop at length why the adjudicator misconstrued *Plaza West* as having effectively overturned *Goss*. It is unnecessary to summarise these submissions. TAC does not contend that the adjudicator's view of *Plaza West* is correct. John Holland was deprived of an opportunity to put submissions on a matter that was significant to the way in which the matter was actually decided. If John Holland's submissions that *Goss* remained a correct statement of the law and its submissions about the effect of that decision had been accepted, then the adjudicator would have been required to consider the effect of clauses 11, 12.10 and 13.5 on TAC's claim under the Act, with the real prospect that he may have reached a different result. They were submissions that, as a matter of reality and not mere speculation, might have affected the determination.
- [60] The consequence is that there was a substantial denial of natural justice. John Holland is entitled to appropriate declaratory relief.
- [61] For completeness, I note that this decision does not require adjudicators to expose their provisional views about the legal issues contended for by the parties, or to seek submissions "on every authority on which the adjudicator may seek to rely".<sup>54</sup> Such a course would not be in accordance with the requirements of natural justice or the purpose of the legislation. My decision relates to the circumstance in which an adjudicator is minded to decide a significant legal issue on a basis for which neither party contended and for the reason that a legal authority upon which a party placed particular reliance had been overturned by an appellate authority, and therefore no longer reflects the law. To require an adjudicator to disclose his intended reliance on such a matter to determine a dispute is not onerous, and to do so is consistent with the purpose of the legislative scheme. The legislative intent is that natural justice is essential to the validity of a determination.<sup>55</sup>

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<sup>53</sup> The Act, s 25(4)(a) and (b).

<sup>54</sup> cf TAC's Outline of Submissions para 10.

<sup>55</sup> *Fifty Property Investments v O'Mara* [2006] NSWSC 428 at [44]-[45].

**The arguments before the adjudicator concerning the construction of the contract and the operation of Schedule R**

- [62] The adjudicator was seized of substantial arguments about the construction of the contract, including John Holland’s submissions about the construction and operation of Schedule R.<sup>56</sup> In essence, John Holland’s submission was that Schedule R operated so as to establish entitlements to claim a variation, quite distinctly from clause 11.3 of the contract, and that, contrary to TAC’s submissions, Schedule R and clause 11.3 operated together. TAC submitted that Schedule R provided a mechanism for confirming the settled contract sum, and was not intended to govern variations to the contract generally.<sup>57</sup> TAC’s submission was based upon the definition of “Subcontract Sum” in the Particulars to Schedule D of the contract and that Schedule R was concerned with the development of the Guaranteed Maximum Price, and did not govern claims for variations or the valuation of variations.

**Whether the adjudicator made a genuine attempt to understand and apply the contract**

- [63] In his adjudication decision the adjudicator remarked on the complexity of Schedule R and briefly described certain aspects of it. He dealt in some detail with the contents of statutory declarations upon which John Holland relied in support of the construction for which it contended, and reached the conclusion that this evidence did not convince him that Schedule R was to govern the valuation of all variations. He then stated:

“Having expended considerable time reviewing the evidence on this matter, I have concluded that the proper meaning, interpretation and application of Schedule R should be clear on the face of the document. In my opinion it is not. I cannot therefore be satisfied that it has application to the Claimant's Payment Claim as has been given to it by the Respondent. I am not satisfied that its provisions govern the Claimant's entitlement to payment under the Act. I am satisfied therefore that for the purposes of valuation of the Payment Claim, it cannot operate to reduce or impede the Claimant's entitlement on an interim basis to a progress payment under the Act.”

- [64] In essence, the adjudicator rejected John Holland’s construction of the contract because he was not satisfied that Schedule R had the operation for which it contended. He was not satisfied of this because he thought that the meaning and application of Schedule R should be clear, and they were not. He proceeded to accept TAC’s submissions about the application of Schedule R.
- [65] The issue for my determination is not whether the adjudicator’s decision was correct, and whether he approached the task of construction without error. It is therefore unnecessary to determine the issues of construction developed by John Holland in its written submissions to the Court. Instead, I have regard to them and, more importantly, to the submissions made to the adjudicator on the issues of construction in determining whether the adjudicator made a proper attempt to construe the contract. John Holland may be correct in its contentions about the meaning and operation of Schedule R and in its criticism of the adjudicator’s resolution of the issue on the basis of a requirement that “the proper meaning, interpretation and application of Schedule R should be clear on the face of the document.” However these alleged errors in the

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<sup>56</sup> Adjudication response paras 4.1-4.25; 20.1-20.14; Lewis ex TJL-3 pp 781-784, 803-804.  
<sup>57</sup> Submissions in support of adjudication application paras 178-189; Lewis ex TJL-2 pp 23-24 which developed additional submissions that the provisions were irreconcilable and that clause 11 prevailed.

interpretation of the contract and the adjudicator's approach to interpretation do not mean that the adjudicator did not make a genuine attempt to construe the contract and to reach a conclusion concerning the operation of Schedule R.

- [66] John Holland may have substantial reasons for disputing the conclusion that Schedule R did not govern entitlements to variations and the reasoning that led to it. However, in circumstances in which adjudicators are required to determine complex legal issues quickly, the detection of flaws in reasoning or poorly expressed reasons in an adjudication decision do not compel the conclusion that the adjudicator did not attempt to understand and apply the contract. Adjudicators provide their determinations in a "somewhat pressure cooker environment".<sup>58</sup> In some instances the adjudicator "cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided on a full curial hearing".<sup>59</sup> The Court should be slow to conclude that adjudicators who work under the very tight deadlines imposed by the Act, and who, in seeking to do their best, make a mistake, have not acted in good faith.<sup>60</sup>
- [67] The reasons of the adjudicator show that he understood the issue of whether Schedule R governed TAC's claim for variations. He resolved the issue by reference to the evidence upon which John Holland relied and by then turning to Schedule R to see if it could be interpreted so that it governed the claimed variations. He may have made an error in approaching the task of construction by imposing a requirement that the Schedule's meaning be clear. However, this does not mean that he did not make a genuine attempt to construe the contract to determine the operation of Schedule R. His reasons indicate that there was a genuine attempt by him to understand the contract and to determine John Holland's contention that he should be satisfied that Schedule R governed TAC's entitlement to be paid for variations.
- [68] John Holland argues that the denial of natural justice provides an additional ground upon which to infer that the adjudicator did not attempt to construe the contract. I do not accept that my finding that there was a denial of natural justice leads to the conclusion that the adjudicator was attempting to avoid determining the effect of the contractual provisions relied upon by John Holland. I consider that the adjudicator's determination of the issue which gave rise to the natural justice challenge was an attempt in good faith to determine the issue on the basis of his understanding of the operation of the Act on the relevant provisions of the contract. John Holland has not satisfied me that it was other than a genuine attempt to apply what the adjudicator understood to be the effect of the case law. Without the assistance of further submissions, and by viewing the relevant paragraphs of the judgment of Hodgson JA in *Plaza West*<sup>61</sup> in isolation, the adjudicator may have genuinely considered that the decision had the effect that he expressed. Such a conclusion may have been reached under time pressures and without adequate reflection. I am not satisfied of the serious allegation that the adjudicator's conduct in denying natural justice was an arbitrary attempt by him to avoid the effect of the contractual provisions relied upon by John Holland, or to value TAC's claims without reference to them.<sup>62</sup>

<sup>58</sup> *Shell Refining (Australia) Pty Ltd v A J Mayr Engineering Pty Ltd* [2006] NSWSC 94 at [27].

<sup>59</sup> *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1219 at [14]; followed in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2007] QSC 220 at [12].

<sup>60</sup> As to the implications of such a finding on an adjudicator's immunity and the operation of the Act see *Goss* (supra) at [58] and the immunity in s 107(1) of the Act.

<sup>61</sup> Supra at [53]-[54].

<sup>62</sup> John Holland's Outline of Submissions para 75.

[69] In summary, reference to the adjudicator's decision shows that he made a genuine attempt to understand the meaning of Schedule R, and, having done so, reached the conclusion that he was not satisfied that it operated in the way for which John Holland contended. As a consequence, the second ground upon which John Holland seeks an order that the adjudication be declared void fails.

**Conclusion**

[70] John Holland has succeeded upon the first ground upon which it seeks a declaration that the adjudication decision is void. I will hear the parties in relation to consequential orders, including the necessity for injunctive relief, and on the question of costs.

[71] My order will be:

“Declare that the decision of the third respondent delivered 19 February 2009 and issued pursuant to the provisions of the *Building and Construction Industry Payments Act 2004* (Qld) in respect of a dispute between the applicant and the first respondent is void.”