

Breach of Natural Justice under the Construction Industry Payment and Adjudication Act 2012

IN THIS ARTICLE, MARINAH RAHMAT EXAMINES HOW AN ADJUDICATION DECISION CAN BE SET ASIDE FOR BREACH OF NATURAL JUSTICE.

Introduction

The **Construction Industry Payment and Adjudication Act 2012** (“Act”) was introduced to address cash flow issues affecting contractors in the construction industry as a result of delays and/or lengthy periods of payment under construction contracts.

Under the Act, an unpaid party¹ is entitled to initiate an adjudication proceeding in order to claim any amounts due and/or owing to them under a construction contract.

Briefly, an adjudication proceeding must consist of a payment claim² and payment response³, followed by an adjudication claim⁴, adjudication response⁵ and adjudication reply⁶, all of which are to be filed strictly within the time periods stipulated under the Act (it may vary from five working days to 10 working days).

Once the necessary pleadings are filed, an adjudicator is then tasked with the duty to resolve payment-related issues and possibly ease the cash flow between parties by delivering a decision within 45 working days.

Setting aside an adjudication decision for breach of natural justice

Once an adjudication decision has been obtained, parties are provided with an avenue to set aside an adjudication decision. Parties can only make an application to set aside the decision on four specific grounds listed under section 15 of the Act. One of the four grounds for setting aside an adjudication decision is the denial of natural justice (section 15(b) of the Act).

However, it may not be an easy task to satisfy the court that there has been a breach of natural justice for setting aside an adjudication decision.

The Court of Appeal in **Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd**⁷ upheld the position on breach of natural justice taken in the English case of **Primus Build Limited v Pompey Centre Limited & Slidesilver Limited**⁸ that:

“...if there has been a breach of natural justice, but it cannot be demonstrated that it goes to the heart of the adjudicator’s decision, it will not affect the enforcement of that decision.”

Likewise, in **Kerajaan Malaysia v Shimizu Corp**⁹, the High Court emphasised that an allegation of breach of natural justice by an adjudicator must be material and not made on mere grounds of dissatisfaction.

“...a breach of natural justice must be ‘either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant, it must be material’...”

There has been a few recent cases where aggrieved parties were successful in their setting aside applications on the ground that the adjudicator had denied them natural justice. Below are some examples.

- The Federal Court in **View Esteem Sdn Bhd v Bina Puri Holdings Bhd**¹⁰ ruled, amongst others, that the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant (the respondent in the adjudication proceeding) on the basis that it was not firstly raised in the payment response. The Court found that the adjudicator had wrongly construed the scope of his jurisdiction by refusing to consider the defences raised in the adjudication response.
- The Court of Appeal in Leap Modulation concluded that, regardless of the Court's views, it was bound by the decision in View Esteem. As such, the Court of Appeal found that it could not depart from the established position that a failure by an adjudicator to consider defences, though not set out in the payment response but are submitted in the adjudication response, amounts to a breach of natural justice resulting in the award of the adjudicator being set aside.
- A similar rationale was relied on by the High Court in **TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd**¹¹ in deciding that there was a material breach of natural justice where the defence of "waiver" or "estoppel" was not considered at all and that the adjudicator had failed to hear a dispute properly submitted for his adjudication.
- The adjudicator in **Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia**¹² made a ruling that the claimant's "loss and expense claim" was not a valid claim under the Act as "evaluating a loss and expense claim is a very tedious exercise which requires some expertise" and "cannot be done within the short timelines given in CIPAA". Despite concluding that he had no jurisdiction to decide the matter, the adjudicator went further to dismiss the claim in totality. The High Court in finding in favour of the claimant in the adjudication proceeding held:

"A refusal to assume jurisdiction and decide on the matter submitted to it on the erroneous understanding of his lack of jurisdiction would be equally a breach of natural justice in that the Claimant's Claim, in this case, under Claim No. 4 for 'Loss and Expense Claim' was not heard at all when it has been properly submitted for Adjudication."

The High Court echoed the decision in **Pilon Ltd v Breyer Group Plc**¹³ where the Court stated that, when an adjudicator erroneously takes a restrictive view of its own jurisdiction, it is tantamount to a breach of natural justice.

Conclusion

Although an application to set aside an adjudication decision on the ground of breach of natural justice is a difficult task, an aggrieved party may still be successful if he is able to show that the breach of natural justice was in fact material and, in some instances, arose out of the adjudicator's too narrow interpretation of his own jurisdiction under the Act.

¹ Defined under Section 4 of the Act as *“a party who claims payment of a sum which has not been paid in whole or in part under a construction contract”*.

² Section 5 of the Act.

³ Section 6 of the Act.

⁴ Section 9 of the Act.

⁵ Section 10 of the Act.

⁶ Section 11 of the Act

⁷ [2018] MLJU 773

⁸ [2009] EWHC 1487

⁹ [2018] MLJU 169

¹⁰ [2018] 2 MLJ 22

¹¹ [2018] MLJU 217

¹² [2017] MLJU 673

¹³ [2010] EWHC 837 (TCC)

This article is presented for information purpose only and covers legal issues in a general way. The contents are not intended to constitute advice on any specific matter and should not be relied upon as a substitute for detailed legal advice.

© 2018 Shearn Delamore & Co. All rights reserved.

For further information regarding financial services matters, please contact our Dispute Resolution Practice Group.