

Commercial Litigation

White Barnes has experience and resources available to provide clients with a full range of litigation services and advice in this area.

White Barnes regularly represents its clients in relation to commercial disputes regarding possessory applications, claims for damages, declarations for inductive relief and breach of contract. Recently White Barnes have undertaken successful litigation establishing a range of important precedents in the building and construction industry.

In particular, we were involved in the leading authority of *Musico & Ors v Davenport & Ors* [2003] NSWSC 977 (31 October 2003).

We have experience in all jurisdictions of the New South Wales Court system. We have acted in Supreme Court proceedings in relation to declarations and injunctions regarding relief and forfeiture in the equity division and claims for damages and declarations in respect of options. White Barnes is regularly involved in all aspects of conveyancing and real property law.

Our services include:

- Tendering and reviewing documentation and contracts;
- Drafting contracts, contract amendments and special conditions;
- Making contractual claims or responses to them;
- All litigation building work;
- Alternative Dispute Resolution processes including mediation, conciliation, arbitration, representation etc.

Musico & Ors v Davenport & Ors

Facts

Our client Musico (Plaintiff) was involved in a dispute with contractor Grosvenor (Defendant) in relation to a contract for additions and alterations to a shopping centre. Grosvenor served a claim for payment for the contracted work. We were of the position that no money was owed and consequently forwarded a payment schedule on Grosvenor asserting same. We also asserted that Grosvenor owed Musico a substantial amount for various reasons.

Grosvenor applied for adjudication and we lodged a response in respect of same. The appointed adjudicator was Mr Davenport.

The determination of Mr Davenport was that Musico was to pay Grosvenor \$712,757.00 plus interest for the work performed. Musico did not make such a payment and Grosvenor filed an Adjudication Certificate to have the determination formalized as a judgment for a debt and enforceable by law.

We sought relief from the Supreme Court on the following bases:

- Mr Davenport's determination erred in law and for this reason, it should be vitiated;
- Mr Davenport's determination failed to deliver natural justice to our client Musico;

- Mr Davenport had misunderstood his function and misconstrued the limitations on his authority. Firstly, Mr Davenport had acted outside the jurisdiction granted to him by the Court and secondly, he failed to exercise his jurisdiction under the “slip rule”.

Issues

The Court considered:

1. Whether the determination of the adjudicator is subject to judicial review;
2. If it is, the grounds on which judicial review may be available;
3. Whether these grounds are made out on the facts at hand;
4. Whether there are and the weight of any other reasons why relief should be refused should such grounds be made out.

Ratio

1. An adjudicator’s determination is subject to judicial review.

In making this finding, Justice McDougall considered well established principles of administrative law and also made the following statements of principle:

- In principle, prerogative relief is available against an adjudicator’s determination; and
 - The Building and Construction Industry Security of Payment Act 1999 (NSW) (Act) does not exclude judicial review in the nature of prerogative relief, despite the fact that the Act limits challenges (see ss 25(4) and 30 of the Act) that may be brought against an adjudicator’s determination. While Grosvenor contended that “*the only way in which the Adjudicator’s Determination may be set aside is by the issue of traditional process in litigation or arbitration,*” the Court disagreed and considered Lord Diplock’s judgment in *Ridge* that “*wherever a person or body of persons has authority conferred by legislation to make decisions [including determination by an adjudicator], it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision...by the rules of natural justice or fairness...*” McDougall J was of the view that legislation should not be taken as to deprive parties of access to the courts unless expressly stated or by necessary implication.
2. Judicial review of an adjudicator’s determination made under the Act may be on jurisdictional grounds. These being the refusal to exercise jurisdiction, acting in excess of jurisdiction, the denial of natural justice and where there is a *prima facie* jurisdictional error of law. However, Justice McDougall qualified the last of these grounds in that relief will not quash an adjudicator’s determination if such relief was based on a non-jurisdictional error of law.

Following the decision in *Public Service Association (SA) v Federated Clerks Union of Australia, South Australian Branch* (1991) 173 CLR 132, McDougall J affirmed that “*a statement that a decision is final and conclusive is construed not to exclude certiorari for error of law..*” On natural justice and approving *Haoucher v Minister for Immigration and Ethnic Affairs* on this issue, McDougall J held that an adjudicator is obliged to adhere to the principles of natural justice in the absence of legislative intent to exclude it.

The Court also expressed a concern for efficiency and emphasized that judicial review should be made in an efficient manner to correct erroneous determinations.

3. On the facts, the Court found that Mr Davenport had made several errors of law on the face of the record. Mr Davenport also denied Musico the right to natural justice by failing to notify Musico (and Grosvenor) of his intention to consider the application on grounds that neither party had contended. The Court also found that Mr Davenport erred in his approach, in that Mr Davenport had erred in finding that the liquidated damages provision in the contract was a penalty and also that time was “at large” simply because the architect had failed to administer the time provisions as required.
4. Discretionary defences against the grant of relief did not apply to this case.

Accordingly, the Court quashed the determination and delivered judgment in favour of our client.

Implications

The implication of this case is that additional pressure will be placed on adjudicators in providing clear and well reasoned determinations. Parties that have been denied natural justice may now also seek relief through judicial review.