

JOHN HOLLAND PTY LTD v CARDNO MBK (NSW) PTY LTD & ORS
[2004] NSWSC 258
Supreme Court of New South Wales – 20 April 2004

FACTS

John Holland Pty Ltd ('John Holland') engaged Cardno MBK (NSW) Pty Ltd ('Cardno') as a consultant for civil works associated with the Parramatta Rail Link Project. Cardno issued a Payment Claim under s 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act') on John Holland in the amount of \$1,281,703 plus GST. John Holland responded with a Payment Schedule disputing the amount and the matter proceeded to Adjudication. John Holland contended that Cardno had made submissions in the Adjudication Application on new claims, which were not raised in the Payment Claim. Accordingly, John Holland challenged the Adjudication on the basis that it was a jurisdictional error for the Adjudicator to rely on these matters, or alternatively, that it was denied natural justice by not having an opportunity to adequately respond to these matters in its Payment Schedule and therefore was not able to present an adequate defence in its Adjudication Response, being expressly barred by s 20(2B). Cardno denied this, asserting that the matters were claims alleged in the Payment Claim or submissions in response to John Holland's Payment Schedule.

ISSUES

Given the prohibition that a Respondent is expressly prevented from including in the Adjudication Response any reasons for withholding payment unless those reasons have already been included in the Payment Schedule provided to the Claimant [s 20(2B) of the Act] and procedural fairness, can a Claimant furnish:

- (i) new contractual reasons in its Adjudication Application; and/or
- (ii) new supporting documents in its Adjudication Application;

which have not been included in the Payment Claim, notwithstanding that there is no express provision in the Act?

FINDING

An adjudication determination can be set aside, where:

- the Claimant advances in an adjudication application new *contractual bases* or *supporting documentation* which was not included in the payment claim; and
- the adjudicator takes account of these matters without providing the respondent with an opportunity to make submissions thereon.

The Adjudication Determination miscarried as there was jurisdictional error on the grounds of a denial of natural justice. The Adjudicator took into account a new contractual basis for a claim which basis had not been put forward as part of the Payment Claim. The Respondent was not invited to address the submission in relation to the new contractual basis. The Adjudication also miscarried due to the reliance on new supporting documentation (timesheets) included in Cardno's Adjudication Application.

QUOTE

Einstein J at paragraph 23 relevantly stated: "...whilst it is not permissible to construe section 13 as providing that in order to be a *valid* Payment Claim, such a claim must do more than satisfy the requirements stipulated for by subsection 2 (a), (b) and (c), the consequence to a claimant which does not include sufficient detail of that claim to be in a position to permit the respondent to meaningfully verify or reject the claim, may indeed be to abort any determination."

IMPACT

A Claimant should not introduce a new contractual basis or new supporting documentation in an Adjudication Application which has not been furnished in its Payment Claim.

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