IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2017 000009

MINESCO PTY LTD (AS TRUSTEE FOR THE TARCISCO CREMASCO UNIT TRUST) (ABN 63 609 431 256) — Plaintiff

v

ANDERSON SUNVAST HONG KONG LTD — First Defendant

And

THOMAS JONES — Second Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	2 MAY 2017
DATE OF JUDGMENT:	2 JUNE 2017
CASE MAY BE CITED AS:	*MINESCO PTY LTD v ANDERSON SUNVAST HONG KONG LTD*
MEDIUM NEUTRAL CITATION:	[2017] VSC 299

ADMINISTRATIVE LAW — Judicial review — Delay in commencing proceeding — Extension of time — *Supreme Court (General Civil Procedure) Rules 2015* (Vic) — O 56 — r 56.02(3).

ADMINISTRATIVE LAW — *Building and Construction Industry Security of Payment Act 2002* (Vic) — Natural justice — Whether lack of appearance of procedural fairness in adjudication process amounts to breach of natural justice.

BUILDING AND CONSTRUCTION — Claim for relief in the nature of certiorari quashing an adjudication determination — Whether adjudicator denied respondent natural justice — The *Hickory principle* (*Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* (2009) 26 VR 112, 143 [142] considered — *Building and Construction Industry Security of Payment Act 2002* (Vic) s 21.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M H Whitten QC with Ms H J E Nash	Ganci Huggett Lawyers
For the First Defendant	Mr R Andrew	Giannakopoulos Solicitors

HIS HONOUR:

Introduction

1 This proceeding concerns an application for judicial review of an adjudication determination made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('the Act').

2 The Plaintiff, Minesco Pty Ltd ('Minesco'), is a company specialising in the supply of windows and material cladding for large-scale construction projects.

3 Minesco was contracted to supply façade works for the construction of the Monash Children's Hospital in Clayton, Victoria (the 'Project').

4 In March 2015, Minesco entered into a design and fabrication subcontract with the First Defendant, Anderson Sunvast Hong Kong Ltd ('Anderson'), for the manufacture, supply and delivery of curtain wall units from China for the Project, for the sum of $1,824,936.00.

5 On 2 August 2016, Anderson served a final payment claim on Minesco for the sum of $238,976.05 in respect of its works. The claim was endorsed as a final payment claim and was expressed to be a payment claim 'made under the Building and Construction Industry Security of Payment Act (2002)' in accordance with s 14(2)(e) of the Act.

6 On 9 August 2016, Minesco served a payment schedule under s 15 of the Act, in which the schedule amount was determined as 'NIL' on the basis of an alleged previous agreement between the parties, the upshot of which was alleged to be that Anderson owed Minesco $80,876, which was due and payable.

7 On 23 August 2016, Anderson submitted an Adjudication Application pursuant to s 18 of the Act to an authorised nominating authority, Adjudicate Today Pty Ltd (the 'Nominating Authority').

8 On 29 August 2016, the Second Defendant, Mr Thomas Jones, accepted an appointment as the adjudicator pursuant to s 20 of the Act (the 'Adjudicator'). The parties were notified of the appointment on the same day.

9 On 31 August 2016, Minesco served its Adjudication Response pursuant to s 21 of the Act.

10 On 7 September 2016, Anderson, through a letter from its solicitors to the Nominating Authority, requested an opportunity to respond to what it perceived were new matters in the Adjudication Response that had not been raised by Minesco in its Payment Schedule. Materially, the request was in the following terms:

> We refer to the Respondent's Adjudication Response dated 31 August 2016 ("***Adjudication Response***").
>
> We note that the Adjudication Response includes reasons for withholding payment that were not included in the Respondent's payment schedule dated 8 August 2016.
>
> Section 21(2B) of the Building and Construction Industry Security of Payment Act 2002 (Vic) provides as follows:
>
> *If the adjudication response includes are reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant:*
>
> *(a) setting out those reasons; and*
>
> *(b) stating that the claimant has two business dates after being served with the notice to lodge a response to those reasons with the adjudicator.*
>
> Further, we note that in paragraph 3.4 of the Adjudication Response, the Respondent acknowledges that pursuant to section 21(2B) of the Act, the Claimant ought to be given the opportunity to respond to new matters.
>
> Accordingly, please confirm whether the Adjudicator will issue a section 21(2B) notice for the Claimant to respond to the new matters set out in the Adjudication Response.

11 On the same day, and through the Nominating Authority, the Adjudicator requested further submissions from Anderson on two specific issues (the 'Adjudicator's Request'). The Adjudicator's Request indicated that it was made pursuant to s 21(2B) of the Act, the relevant text being:

> In its adjudication response, the respondent included two reasons for withholding payment that were not included in its payment schedule, namely:
>
> (i) the adjudication application was made out of time and I do not have jurisdiction to make a determination (para 2.1) and/or
>
> (ii) the claimant's payment claim was made out of time and I do not have jurisdiction to make a determination (para 2.9) …

12 On 7 September 2016, the Adjudicator, through the Nominating Authority, requested an extension of time to make his determination to 16 September 2016. The text of the request for the extension was in the following terms:

> We refer to the above mentioned matter and confirm that the Adjudicator, Thomas Jones, requests further submissions as follows:
>
> *In light of my notification to you under section 21(2B) of the Act and the need to properly consider your response, I request an extension of time to make my determination to Friday 16 September 2016.*

13 On 9 September 2016, Anderson served by email a response (the 'Anderson Further Submissions') and a further statutory declaration, which were both expressed to be 'for the Adjudicator's attention'. Part A of the Anderson Further Submissions, entitled 'SECTION 21(2B) RESPONSE', contained Anderson's responses to the two issues specified by the Adjudicator in the Adjudicator's Request. However, Part B of the Anderson Further Submissions, which was entitled 'CLAIMANT'S FURTHER SUBMISSIONS', sought to address three additional issues (the 'Anderson Additional Issue Submissions') beyond the submission on the two points requested by the Adjudicator. The Anderson Additional Issue Submissions were in summary that:

(a) the Adjudicator had jurisdiction to determine Anderson's claim with respect to foreign exchange adjustments;

(b) Anderson's conduct in making the payment claim was not an attempt to resile from the terms of the alleged Global Resolution Agreement and a breach of contract; and

(c) Anderson and Minesco had not agreed to a further deduction of $150,000 with respect to unspecified defects.

14 As mentioned above, an additional statutory declaration of Mr Martin Coleman was also supplied by Anderson with the Anderson Further Submissions in support of the Anderson Additional Issue Submissions in relation to issues (b) and (c) above.

15 On 12 September 2016, Minesco's solicitors emailed to the Nominating Authority a letter expressed to be a 'letter for the Adjudicator's attention'. Relevantly, it read:

> We refer to the email of 4:16 pm, 9 September 2016 enclosing the Claimant's further s 21(2b) response dated 9 September 2016 **(the Response)**.
>
> On review of the same we are very disturbed that the claimant has clearly gone well beyond what the adjudicator had asked for…
>
> Clearly, the submissions and materials set out in Part B on page 4 of the Claimant's Response titled "Further Submissions" go well beyond the further submissions requested in the Notice.
>
> We therefore request that the adjudicator not read or consider anything in the further submissions beyond Part B on page 4 of the Claimant's Response as those matters are clearly outside the scope of the Notice. Thank you.

16 Minesco did not receive any response from the Adjudicator to its emailed letter of 12 September 2016.

17 On 19 September 2016, the Nominating Authority advised Minesco's solicitors that the Adjudicator had finalised his adjudication determination, and requested payment of the Adjudicator's fees before release of the determination.

18 On 22 September 2016, the adjudication determination, which was dated 16 September 2016 (the 'Adjudication Determination'), was released to the parties. Among other things, the Adjudicator determined the adjudicated amount to be $231,608.05 (excluding GST) (the 'Adjudicated Amount').

19 On 27 September 2016, Anderson's solicitors demanded payment of the Adjudicated Amount.

20 On 20 December 2016, Anderson's solicitors informed Minesco's solicitors that Anderson had obtained judgment in the County Court against Minesco pursuant to s 28R of the Act and enclosed a copy of the orders made by his Honour Judge Anderson dated 5 December 2016.

21 On 24 January 2017, Minesco filed and served a summons in County Court Proceeding Number CI-16-05383, seeking orders that the order made by Judge Anderson dated 5 December 2016 be set aside; alternatively, that the judgment be stayed pending the determination of the present proceeding.

22 On 13 February 2017, orders in the County Court proceeding were made by consent, inter alia, adjourning Minesco's summons *sine die*.

This proceeding

23 By originating process dated 20 January 2017, Minesco seeks the following substantive relief:

1. an extension of time to commencing the proceeding pursuant to r 56.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (the 'Rules');

2. a declaration that the Adjudication Determination is void ab initio; and

3. an order that the Adjudication Determination and the Adjudication Certificate be quashed and/or set aside.

24 The grounds relied upon by Minesco and pressed at trial were, in summary:

(a) the Adjudicator failed to accord Minesco natural justice or procedural fairness by failing to provide Minesco with an opportunity to comment and/or provide further submissions on the matters set out in the Anderson Further Submissions dated 9 September 2016, being the Anderson Additional Issue Submissions and the further statutory declaration, which went beyond the two issues specified by the Adjudicator; and

(b) the Adjudicator fell into jurisdictional error by taking the additional submissions, being the Anderson Additional Issue Submissions and the further statutory declaration, into consideration in his determination.

Submissions of Minesco

25 The Plaintiff pressed two principal points.

26 First, as a preliminary matter, the Plaintiff contended that it was entitled to an extension of time for filing its originating motion seeking judicial review of the Adjudication Determination pursuant to r 56.02(3) of the the 'Rules'.

27 Second, if an extension were to be granted, the Court should order that the Adjudication Determination be quashed and/or set aside on the ground of substantial denial of natural justice as manifested by the Adjudicator having:

(a) denied the plaintiff an opportunity to comment on and/or provide further submissions on matters raised in the Anderson Additional Issue Submissions and further statutory declaration;

(b) taken the Anderson Additional Issue Submissions and further statutory declaration into account in making his determination in contravention of s 22(5)(a) of the Act; and/or

(c) considered submissions of the claimant which were not 'duly made' in determining the adjudication application in contravention of s 23(2)(a) and (c) thus rendering the Adjudication Determination void pursuant to s 23(2B)(a) of the Act.

28 It was submitted that, because the Anderson Additional Issue Submissions and the further statutory declaration went beyond those issues specified by the Adjudicator, the Adjudicator was obliged to give Minesco an opportunity to respond, whether pursuant to the rules of natural justice under the common law or by application of s 22(5)(a) of the Act. This failure gave rise to a substantial denial of natural justice.

29 Section 22 of the Act provides for adjudication procedures in the following terms:

Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator must serve a written notice—

(a) on any relevant principal and any other person who is included in the adjudication response under section 21(2)(c); and

(b) on any other person who the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial or contractual interest in the matters that are the subject of the adjudication application.

(3) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.

(4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—

(a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or

(b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.

(4A) A claimant must not unreasonably withhold their agreement under subsection (4)(b).

(5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator—

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and

(b) may set deadlines for further submissions and comments by the parties; and

(c) may call a conference of the parties; and

(d) may carry out an inspection of any matter to which the claim relates.

(5A) Any conference called under subsection (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator.

(6) The adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission or comment within the time or to comply with the adjudicator's call for a conference of the parties.

30 It is convenient to set out the submissions made in respect of each of these points in turn.

Extension of time

31 The Plaintiff submitted that the Court should exercise its discretion to grant it an extension of time for filing the present application for judicial review.

32 Judicial review by the Supreme Court of Victoria is available, inter alia, under O 56 of the Rules. Rule 56.02 provides:

Time for commencement of proceeding

(1) A proceeding under this Order shall be commenced within 60 days after the date when grounds for the grant of the relief or remedy claimed first arose.

(2) Where the relief or remedy claimed is in respect of any judgment, order, conviction, determination or proceeding, the date when the grounds for the grant of the relief or remedy first arose shall be taken to be the date of the judgment, order, conviction, determination or proceeding.

(3) The Court shall not extend the time fixed by paragraph (1) except in special circumstances.

33 The proceeding in this case was commenced on 20 January 2017, more than 60 days after the date on which the Adjudication Determination was received, being 22 September 2016.[1] The Plaintiff contended that it should be granted an extension of time pursuant to sub-r (3) as 'special circumstances' existed which prevented it from filing the proceeding in accordance with sub-r (1).

34 The Plaintiff drew attention to the discussion of the phrase 'special circumstances', as it appears in r 56.02(3), of this Court in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture & Ors (No 2)*. There the phrase was described as one:[2]

> … of considerable width, generality and flexibility. [The words] defy an exhaustive definition, and do not warrant specific limitation. The concept encompasses an infinite and unforeseeable range of circumstances. Provided such "special circumstances" exist, the gateway must be opened to ensure that a plaintiff is not shut out from making an application for judicial review in cases where an extension of time should be granted in the interests of justice.

35 Reliance was also placed on the observation of Cavanough J in *Kocak v Wingfoot Australia Partners Pty Ltd & Goodyear Tyres Pty Ltd & Anor*[3] that:

> … the true, and only, question is whether having regard to the whole of the circumstances of a particular case, the Court is satisfied that the circumstances are sufficiently special to justify an extension of time.

36 The following considerations were further relied upon as being relevant to the Court's exercise of its discretion under sub-r (3):[4]

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1 Last day for filing: 21 November 2016.

2 (2009) 26 VR 172, 179 [28].

3 [2011] VSC 285 [35] referring to the statement of Osborn J in *Mann v Medical Practitioners Board of Victoria* [2002] VSC 256 [19] as endorsed by Hansen AJA. See *Mann v Medical Practitioners Board* [2004] 21 VAR 429 [57], [72].

(a) period of delay;

(b) reason for delay;

(c) whether the plaintiff has an arguable case;

(d) justice to both parties including any prejudice; and

(e) public interest in the finality of litigation

37 The Plaintiff framed its submissions on the extension of time issue in accordance with these five factors.

Period of delay

38 The length of the delay of two months in bringing the application was submitted to not be excessive in the circumstances. This was contrasted with an example of 'significant and unacceptable' delay demonstrated by the recent case of *Samuel Homes Pty Ltd v Derek Raithby*,[5] which involved an application to quash an adjudication determination under the *Building and Construction Security of Payment Act 1999* (NSW). In that case, Hammerschlag J refused to entertain the substantive grounds of the application, unremarkably observing that the remedies available in judicial review are discretionary and may be refused on a number of grounds including delay.[6] His Honour noted that the judicial review proceedings were commenced eight months after the adjudication determination was made,[7] and that the dilatory conduct was in part explicable by the plaintiff's deliberate decision to advance other litigation against the first defendant rather than file the instant application.[8]

39 Further, that the period of delay straddled the Christmas and New Year holiday period was also submitted to be an ameliorating factor the Court should not disregard.

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4 *Goodman v Victorian Civil and Administrative Tribunal & Ors* [2011] VSC 35 [29] (Habersberger J).
5 [2017] NSWSC 205 [13].
6 Ibid [12].
7 Ibid [2(e)].
8 Ibid [13].

Reason for delay

40 The plaintiff relied on the reasons for delay deposed to by Mr Terry Cremasco, director of the Plaintiff company, in his affidavit dated 19 January 2017. In summary these were:

(a) He (Mr Cremasco on behalf of Minesco) did not think this application would be necessary because he thought he could negotiate with Mr Chris Anderson, director of the First Defendant company, after receiving the Adjudication Determination;

(b) In early to mid-October 2016, Mr Anderson called to discuss the matter and he asked Mr Anderson to send a proposal to Minesco's lawyers;

(c) He expected to receive some further communication from Mr Anderson on its proposal or intentions;

(d) The only further communication he received was by letter from Anderson's solicitors dated 20 December 2016 advising that judgment had been obtained on 5 December 2016; and

(e) The circumstances of the case, including the facts that:

(i) the Adjudication Determination contained serious errors;

(ii) Anderson was a foreign corporation which does not have an Australian office or address and is not registered for GST; and

(iii) there was a hope that a resolution with Anderson could be achieved without resort to further litigation

took this matter out of the ordinary.

41 Within approximately one month (including the Christmas/New Year vacation period) of becoming aware that:

(a) there would be no negotiated resolution; and

(b) Anderson had obtained an ex parte judgment on the adjudicated amount on 5 December 2016,

the proceedings were commenced.

Arguable case

42 It was submitted that the substantive submissions in support of its application demonstrate an arguable case for judicial review.

No prejudice

43 It was further submitted that neither of the affidavits filed by the Anderson in objection to the plaintiff's application identify any specific prejudice it would suffer as a result of time being extended.

Public interest

44 The plaintiff submitted that the public interest in finality of the litigation is outweighed by:

(a) generally, the provisional nature of the scheme of the Act; and

(b) specifically, the need to provide relief in circumstances where patent jurisdictional errors have (allegedly) been committed by an adjudicator.

Natural justice and the adjudication process under the Act

45 In addressing the operation of the requirements of natural justice as applied to the Act, Minesco relied on the decision of this Court in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd & Ors*,[9] which, it submitted, distilled the following relevant principles:

(a) Two central themes emerge: adaptation of the principles of natural justice to the circumstances of each case and the materiality of the alleged breach;

[9] [2010] VSC 199 [234]–[243] ('*Metacorp*').

(b) As to adaptation, one essential standard is that the person concerned should have a reasonable opportunity of presenting his or her case;

(c) The law requires judicial fairness;

(d) What is fair in a given situation depends upon the circumstances;

(e) Procedural fairness is not an abstract concept but is instead 'essentially practical' and that 'the concern of the law is to avoid practical injustice';

(f) The concept of 'materiality' requires an adjudicator to give the parties an opportunity to put submissions on matters germane to his or her decision;

(g) An adjudicator's determination will only be brought into question if:

(i) there has been a substantial denial of the measure of procedural fairness required under the Act; and

(ii) submissions that could have been put might have had some prospect of changing the adjudicator's mind on the point.

(h) It was submitted that the Court should not be too ready to find that a denial of natural justice was immaterial; that it had no real or practical effect; or that there was nothing that could have been put on the point in question.

46 In the course of argument, the Court also raised an issue to the following effect: Was there an argument that natural justice requires not only the actuality of a fair hearing being given to the parties, but also the appearance of this being done? Was it, therefore, a breach of the rules of natural justice for an adjudicator not to give the appearance of justice being administered in a case such as this? The Court referred the parties to the observations of Kirby P (as his Honour then was) in *Bromby v The Offenders' Review Board*,[10] and the decision in *NIB Health Funds Ltd v Private Health*

[10] (1990) 22 ALD 249.

Insurance Administration Council.[11] I will call this issue the 'Appearance of Justice point'.

47 Minesco, through its counsel Mr Whitten QC, embraced the Appearance of Justice point.

The additional submissions

48 The grounds raised by the Plaintiff in support of its contention that the Adjudication Determination was void on the basis of a substantial denial of natural justice turned on what it asserted was a failure by the Adjudicator to disregard the Anderson Additional Issue Submissions and further statutory declaration.

49 The plaintiff submitted these additional submissions were:

(a) beyond the ambit of the Adjudicator's request for further submissions made 7 September 2016; and

(b) germane to the reasons contained in the Adjudication Determination.

50 Broadly stated, the Anderson Additional Issue Submissions and further statutory declaration related to whether:

(a) Anderson's conduct in making the payment claim was an attempt to resile from the terms of an alleged Global Resolution Agreement made between the parties and a breach of contract;

(b) Anderson and Minesco agreed to a further deduction of $150,000 with respect to unspecified defects; and

(c) the Adjudicator had jurisdiction to determine Anderson's claim with respect to foreign exchange adjustments.

51 The following aspects of the reasons contained in the Adjudication Determination were said to evidence the fact that the Adjudicator took into account and based parts

[11] (2002) 115 FCR 561.

of his determination on the Anderson Additional Issue Submissions and further statutory declaration:

(a) The findings of the Adjudicator with respect to Minesco's submission that Anderson had resiled from the Global Resolution Agreement reached in December 2015 made by the Adjudicator at paragraphs [10]–[17] of his determination under the heading 'The December 2015 meeting';

(b) The finding of the Adjudicator on the issue of the alleged agreed deduction of the sum of $150,000 for any future defects and non-conforming items as dealt with in the Adjudication Determination at paragraphs [18]–[20] under the heading 'Defects and non-conforming items'. At [19]–[20], the Adjudicator refers to an absences of evidence from Minesco in respect of the existence or terms of the alleged deduction agreement.

(c) The finding of the Adjudicator on the issue of the foreign exchange fluctuations was dealt with at paragraphs [27]–[28] of the Adjudicator under the heading 'Foreign exchange component'. Although this issue had previously been raised by the parties, it was said to have been raised only in a limited respect.

Contravention of s 22(5)(a) of the Act

52 The Plaintiff submitted that, contrary to the mandatory requirement specified in s 22(5)(a) of the Act, the Adjudicator failed to provide Minesco with an opportunity to comment on or respond to the Anderson Additional Issue Submissions, as it had requested to do by its letter.

53 Section 22(5)(a) of the Act provides:

> (5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator —
>
> (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions

54 Section 23 of the Act is headed 'Adjudicator's determination'. It relevantly provides:

(2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only—

(a) the provisions of the Act any regulations made under this Act

…

(2B) An adjudicator's determination is void—

(a) to the extent that it has been made in contravention of subsection (2);

…

55 Anderson submitted that, in determining the Adjudication Application, but failing to observe the requirements of s 22(5)(a), the Adjudicator failed to consider the provisions of the Act, as required by s 23(2). As a consequence, pursuant to s 23(2B)(a), the Adjudication Determination is void to the extent that it has been made in contravention of s 23(2).

56 Further or alternatively, to the extent the Adjudicator misconstrued the requirements of s 22(5)(a) or the Act, it was submitted that he committed a jurisdictional error of law[12] and the Adjudication Determination ought be quashed and/or set aside on this basis.

Consideration of submissions not 'duly made'

57 During the course of the hearing, Mr Whitten QC on behalf of Minesco advanced a further argument in support of the breach of natural justice contention. This was to the effect that under s 23(2)(c) of the Act, in determining an adjudication application an adjudicator is obliged to consider, inter alia, 'the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim'. As a corollary, it was submitted that if, in determining an adjudication application, an adjudicator considers submissions which are not 'duly made' within the meaning of the Act, the adjudicator would again contravene sub-s (2) and the adjudication determination would be void pursuant to s 23(2B)(a).

12 *Craig v South Australia* (1995) 184 CLR 163, 176–179 [10]–[12], referred to in *Metacorp* [2010] VSC 199 [60]-[61] and *Gill v Gill* [2014] VSC 250 [44].

58 Attention was also drawn to the decision of *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd & Ors*, where Einstein J held that the power to seek additional submissions under s 21(4) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) — the analogue of s 22(5) under the Victorian Act — 'permi[ts] no more than additional submissions which *clarify* earlier submissions: those earlier submissions being constrained' by, inter alia, the requirement that they must be 'duly made'.[13]

59 Thus, it was put that, as the Anderson Additional Issue Submissions and further statutory declaration were extraneous and not provided in accordance with the Adjudicator's request, they were not 'duly made' within the meaning of the Act. While the additional submissions may have been delivered under the guise of a s 21(2B) response, they went beyond that which was expressly solicited. It followed that the Adjudication Determination was void to the extent that it could be shown that the additional submissions were considered by the Adjudicator.

Denial of opportunity to comment on/respond to 'additional submissions'

60 The Plaintiff submitted that the requirements of natural justice, whether sourced from the common law or as applied under the Act, require the Adjudicator to respond to Minesco's email of 12 September 2016 to indicate his position in respect of the request made of him. The absence of any response meant that Minesco was put in a position where it could never know the extent to which its request was complied with, if at all.

61 Further, the requirements of natural justice at common law obliged the adjudicator to invite Minesco to comment on or respond to the additional submissions. This was so despite Minesco never having requested an opportunity to do so. Had the Adjudicator done this, Minesco asserts that it would have made submissions and adduced further evidence to refute the Anderson Additional Issue Submissions and further statutory declaration. An outline of the further submissions and evidence that Minesco would have presented was set out in the affidavit of Terry Cremasco sworn 24 March 2017 which was filed with the written submissions.

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13 [2004] NSWSC 258 [26] (emphasis in original).

Denial of natural justice was 'material' or 'substantial'

62 Minesco next contended that, as the Adjudicator had failed to provide an opportunity for it to address him on matters which were germane to the outcome of the Adjudication Determination, the Court should find that this failure to follow the requirements of natural justice was 'material'. In particular, the Court was asked to have regard to the affidavit of Terry Cremasco sworn 24 March 2017 as evidence of submissions that could, as a matter of reality, have been made which would have affected the outcome of the Adjudication Determination.

Hickory principle

63 Finally, in reply submissions, Minesco addressed the First Defendant's application of the principle in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* (the '*Hickory principle*').[14] The Court was taken to the following statement from that case:[15]

> Further, in accordance with the rules of natural justice, an adjudicator appointed under the Act is obliged to adopt procedures which are appropriately flexible, but which are fair to the parties in the light of the statutory requirements, the interests of the individual parties and the purposes which the Act seeks to advance. *In the appropriate case*, this would involve permitting a party at its instigation to provide material directly to the adjudicator in order to more fully present its case, provided this is done on proper notice to the opposing party. Such a step may involve delivering documents or submissions to the adjudicator for the first time in the process, or supplementing any submissions which have already been delivered with the application, pursuant to s 18(3)(f) of the Act. Either way, this would be in addition to the powers of an adjudicator expressly provided for in s 22(5) of the Act, which is not an exclusive repository of the procedures which may be employed in an adjudication conducted under the Act to ensure that the principles of natural justice are applied.

64 Three observations were made by Minesco on the *Hickory principle*. First, it was said that it is not clear what might define an 'appropriate case' where this step of unsolicited further submission may properly be given. Second, the passage does not address or inform the circumstances at hand, being where the adjudicator has issued a request under s 21(2B) specifying what is to be the subject of further submissions and receives a response which goes beyond what was requested. Third, it did not provide

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14 See [70]–[71] of these reasons.

15 *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* (2009) 26 VR 112, 143 [142] (emphasis added).

any support for Anderson's contention that it was entitled to volunteer unsolicited additional submissions on the three further issues in response to the Adjudicator's request under s 21(2B).

Submissions of Anderson

Extension of time

65 Anderson submitted that, on the facts of this case, no special circumstances existed to support Minesco's application for an extension of time under r 56.02(3) of the Rules.

66 While a denial of natural justice may, in some cases, amount to 'special circumstances', Anderson submitted that, in this case, there was no denial of natural justice.

67 Further, the fact that the Adjudication Determination is an interim finding only would also operate against granting leave to Minesco to proceed with its application for judicial review.

68 Anderson submitted that the delay of nearly two months is considerable and there is no reasonable explanation for the delay considering that:

(a) Minesco was legally represented throughout the adjudication process;

(b) On 27 September 2016, the solicitors for Anderson wrote to the solicitors for Minesco informing them that, if Minesco failed to pay the Adjudication Amount by 29 September 2016, they would request an Adjudication Certificate pursuant to s 28Q of the Act;

(c) On 13 October 2016, Mr Cremasco informed Mr Anderson that he would 'set the wheels in motion with his solicitor to 'appeal' the Adjudication Determination';[16] and

(d) There is no evidence to support a reasonable belief that the matter could be negotiated and no steps towards negotiation were taken.

16 Affidavit of Christopher John Anderson sworn 3 March 2017 [4].

69 Anderson submitted that the object of the Act, and the procedural framework prescribed in particular in ss 18, 21, 22, 23 and 24, is to facilitate an expedited adjudication process. It is within this legislative framework that an adjudicator must balance the rights of the parties to be heard.

Natural justice

70 Anderson referred to *Hickory* where this Court held that:[17]

> ... [i]n accordance with the rules of natural justice, an adjudicator appointed under the Act is obliged to adopt procedures which are appropriately flexible, but which are fair to the parties in the light of the statutory requirements, the interests of the individual parties and the purposes which the Act seeks to advance.

71 Anderson submitted that, outside the two express and separate avenues to provide additional submissions contained in the Act, being ss 21(2B) and 22(5)(a), there is scope for a party to submit additional information to an adjudicator to fully present its case, provided that it does so on proper notice to the other party. When considering this third avenue and the fact that the solicitors for Minesco had notice of the submissions sent to the Adjudicator, the additional information provided by Anderson ought to be characterised as appropriate submissions duly made.

72 Anderson also submitted that there was no denial of natural justice in the adjudication process because Minesco had a reasonable opportunity to present its case. The Court was referred to the reasons of Tucker LJ in the Court of Appeal decision in *Russell v Duke of Norfolk,*[18] which has been cited with approval in a long line of cases, where his Lordship held that:

> … [t]he requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity to be heard.[19]

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17 (2009) 26 VR 112, 143 [142].
18 [1949] 1 All ER 109.
19 Ibid 118.

73 Applying these principles to the facts of this case, and considering the object of the Act, being to provide an expedited adjudication process, Anderson submitted that there was no denial of natural justice because Minesco was entitled to provide its own additional submissions on proper notice to Anderson, and it elected to not do so and adopt an obstructionist approach.

74 On the question whether there was a material denial of natural justice in the Adjudication Determination, Anderson advanced its case essentially on two bases. First, that there is no evidence to support the conclusion that the Adjudicator did, in fact, take into account the Anderson Additional Issue Submissions and further statutory declaration in his Adjudication Determination. Secondly, Anderson submitted that Minesco can only succeed if it can identify that there were submissions that it could have made, which might have had an impact on how the Adjudicator determined the matter.

What the Adjudicator took into account

75 On the finding in paragraph [17] of the Adjudication Determination that Anderson had resiled from the Global Resolution Agreement reached in December 2015, Anderson submitted that reliance by the Adjudicator on its additional submissions is not made out because:

(i) There is no express reference to any additional evidence from Mr Coleman. The only reference is to Minesco's conduct in early 2016 and the email exchange of 29 March 2016 between Mr Coleman and Mr Cremasco;

(ii) Evidence of the email exchange of 29 March 2016 between Mr Coleman and Mr Cremasco was provided by Anderson in its Adjudication Application; and

(iii) Minesco made detailed submissions on this question in its Adjudication Response.

76 On the Adjudicator's finding in paragraphs [18]–[20] of the Adjudication Determination that there was no agreement for a deduction of $150,000 for the cost of rectifying any defective or non-conforming goods, Anderson submitted that, again, no reliance by the Adjudicator on the additional information can be established because the evidence, being an email from Mr Cremasco dated 4 April 2016, was included in the Adjudication Application.

77 On the Adjudicator's reliance on s 10 of the Act in relation to the foreign exchange rate, Anderson submitted that Minesco's objection overlooks the Adjudicator's obligation to determine the matter in accordance with the provisions of the Act, including its s 10.

Material submissions

78 Anderson submitted that Minesco can only succeed if it can demonstrate that there were submissions it could have made, which would have had the prospect of an impact on the mind of the Adjudicator.

79 In support of this proposition, the Court was referred to the decision of McDougall J in *Watpac Constructions v Austin Corp,*[20] where his Honour stated:[21]

> I accept, however, that the court should not be too ready to find that a denial of natural justice was immaterial; that it had no real or practical effect; or that (in the present context) there was nothing that could have been put on the point in question. But it remains the case, I think, that the denial of natural justice must be material, and that submissions that could have been put might have had some prospect of changing the adjudicator's mind on the point.

80 Anderson submitted that the evidence provided by Minesco in the affidavit of Mr Cremasco of 24 March 2017 is substantially a redrafting of a statutory declaration of Mr Cremasco, which had been provided to the Adjudicator. As such, it fails to provide any new evidence or submissions that might have had an impact on the decision of the Adjudicator. This is because

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20 [2010] NSWSC 168.

21 Ibid [147].

(i) On the question of the Global Resolution Agreement, paragraphs [6]-[14] of the affidavit provide a narrative of the issue surrounding the December 2016 meetings, but no new evidence that could have impacted on the decision of the Adjudicator;

(ii) On the question of the deduction of $150,000, paragraphs [15]-[21] of the affidavit restate the narrative previously provided in the statutory declaration of Mr Cremasco, and the additional information had no prospect of impacting on the decision of the Adjudicator; and

(iii) On the question of the foreign exchange adjustments, paragraph [5] of the affidavit simply refers to the global settlement at the December 2016 meeting. This point was determined by the Adjudicator in favour of Anderson for other reasons, which were covered in the original submissions of the parties.

Statutory jurisdictional error – s 22(5)(a)

81 On the question as to whether the Adjudicator fell into jurisdictional error by failing to request additional submissions from Minesco pursuant to s 22(5)(a) of the Act, Anderson submitted that the section was not invoked in this case. This is because the Adjudicator did not exercise its discretion to request further submissions from Anderson under s 22(5)(a). Therefore, there was no requirement for the Adjudicator to allow Minesco to comment on submissions that were never made.

82 It was submitted that a careful review of the Adjudication Determination evidences that the Adjudicator did not deal with s 22(5)(a) in his Adjudication Determination.

The Appearance of Justice point

83 In relation to the Appearance of Justice point, and to his credit, Mr Andrew of counsel referred the Court to the seminal statement of Lord Hewart LCJ in *R v Sussex Justices; Ex parte McCarthy* that:[22]

[22] [1924] 1 KR 256, 259 ('*Sussex Justices*').

> a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

84 *Sussex Justices* was cited in an equally long line of cases. The Court was referred to the High Court decision in *Stollery v The Greyhound Racing Control Board*[23] where Barwick CJ referred to the passage of Lord Hewart and added:[24]

> As in that case, so in this the continued presence of a disqualified person is fatal to the validity of the decision taken as a result of deliberations in his presence. (…) The basic tenet that justice should not only be done but be seen to be done does not, of course, warrant fanciful and extravagant assertions and demands. What justice requires will ever depend on circumstances, and the degree to which it should be manifest that it is being done will likewise be related to the particular situation under examination by a supervising tribunal. But, in my opinion, dissatisfaction engendered in the mind of an observer aware of the facts, by the continued presence of Mr Smith in this board room, having regard to his personal connexion with the matter in hand, is not extravagant or far-fetched. As I have said, a reasonable man could very properly suspect that the clear opportunity which Mr. Smith had for influencing the decision of the Board might well have been used.

85 Mr Andrew also referred the Court to a statement by Marks J in *Gas and Fuel Corporation of Victoria v Wood Hall Ltd and Leonard Pipeline Contractors Ltd,*[25] where his Honour remarked:[26]

> There are two rules or principles of natural justice. The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim - *nemo judex in causa sua*. The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim - *audi alteram partem*. In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done. Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.

Extension of time analysis and conclusion

86 I am satisfied that the Court should exercise its discretion to grant an extension of time for filing the present application for judicial review.

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23 (1972) 128 CLR 509.
24 Ibid 519 (Barwick CJ).
25 [1979] VR 385.
26 Ibid 396.

87 Having regard to the whole of the circumstances of this particular case, I am satisfied that they are sufficiently special to justify an extension of time. This opens the gateway for the Plaintiff to make its application for judicial review pursuant to r 56.02(3) of the Rules.

88 The following are the circumstances found by the Court which, when taken together, combine to provide the 'special circumstances' within the meaning of r 56.02(3).

89 First, the length of the delay of two months in bringing the application was not excessive in the circumstances. The delay was not explicable by any deliberate decision on the part of the Plaintiff which was extraneous to the case at hand.

90 Second, I accept that the period of delay was straddled by the Christmas and New Year vacation period which I regard as an ameliorating factor the Court should have regard to.

91 Third, I accept the reasons for delay deposed to by Mr Terry Cremasco, director of the Plaintiff company, Minesco, in his affidavit dated 19 January 2017. Mr Cremasco was not challenged in cross-examination on his evidence. In summary his evidence on the question of delay was:

(a) He (Mr Cremasco on behalf of Minesco) did not think this application would be necessary because he thought he could negotiate with Mr Chris Anderson, director of the First Defendant company, after receiving the Adjudication Determination;

(b) In early to mid-October 2016, Mr Anderson called to discuss the matter and he (Mr Cremasco) asked Mr Anderson to send a proposal to Minesco's lawyers;

(c) Mr Cremasco expected to receive some further communication from Mr Anderson on its proposal or intentions; and

(d) The only further communication Mr Cremasco received was by letter from Anderson's solicitors dated 20 December 2016 advising that judgment had been obtained on 5 December 2016.

92 Fourth, I find that the hope of Mr Cremasco that a resolution with Mr Anderson could be achieved without resort to litigation was both reasonable and consistent with the overarching purpose found in s 7(2)(b) of the *Civil Procedure Act 2010* (Vic). Pursuant to this sub-section the parties to a dispute are encouraged by the Act to achieve the overarching purpose, inter alia, by agreement between them. Mr Cremasco was entitled to take the view that Mr Anderson would pursue that path.

93 Fifth, within approximately one month (including the Christmas/New Year vacation period) of Mr Cremasco becoming aware that there would be no negotiated resolution and the First Defendant having obtained an ex parte judgment on the adjudicated amount on 5 December 2016, there was no material delay and the proceeding was commenced.

94 Sixth, it is noted that the affidavit material filed by the First Defendant in opposition to the Plaintiff's application for an extension of time did not identify any specific prejudice it would suffer as a result of time being extended.

95 Seventh, I was satisfied that the substantive submissions in support of its application demonstrate that the Plaintiff had an arguable case for judicial review.

96 These seven matters in combination took the case out of the ordinary.

Breach of natural justice analysis and conclusion

The s 21(2B) Request and Anderson Additional Issue Submissions

97 The Adjudicator requested further submissions from Anderson on two specific issues. The text of the Adjudicator's Request indicated that it was made pursuant to s 21(2B) of the Act. This was confirmed on 7 September 2016 by the text of the communication by the Adjudicator, through the Nominating Authority, requesting an extension of time.

98 On 9 September 2016, Anderson served by email a response to the Adjudicator's Request by its Anderson Further Submissions, which included the Anderson Additional Issue Submissions and a further statutory declaration.

99 A question arises as to the status of the Anderson Additional Issue Submissions which went beyond that requested by the Adjudicator.

No response to the 12 September letter and Adjudication Determination

100 On 12 September 2016, Minesco's solicitors wrote its letter to the Nominating Authority for the attention of the Adjudicator. The letter concluded with a statement that 'the submissions and materials set out in Part B on page 4 of the Claimant's Response titled 'Further Submissions' go well beyond the further submissions requested in the Notice' [the Adjudicator's Request]. It requested that the Adjudicator 'not read or consider anything in the further submissions beyond Part B on page 4 of the Claimant's Response as those matters are clearly outside the scope of the Notice.'

101 There was no response from the Adjudicator to this letter.

102 The next event of substance to happen was the delivery of the Adjudication Determination dated 16 September 2016.

103 The Adjudication Determination did not list the documentation (or parts of the documentation) which the Adjudicator had taken into account (or not taken into account) in deciding the Adjudication Determination.

104 Although the Plaintiff submitted that it was clear from the findings made in the Adjudication Determination that the Adjudicator had, in fact, taken into account the Anderson Additional Issue Submissions and further statutory declaration, in my opinion, the passages of the Adjudication Determination relied upon by the Plaintiff in this respect, although they raise a suspicion that this might have been the case, do not demonstrate that the Anderson Additional Issue Submissions and further statutory declaration were in fact taken into account, and I am not satisfied that they were.

Jurisdictional error under s 22(5)(a)

105 On the question as to whether the Adjudicator fell into jurisdictional error by failing to request additional submissions from Minesco pursuant to s 22(5)(a) of the Act, as submitted by Anderson, no such error arose, because the section was not invoked in this case.

106 Section 22(5)(a) relevantly provides:

> (5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator —
>
> (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions;
>
> [Emphasis added]

107 In this case the Adjudicator did not exercise any discretion to request further submissions from Anderson under s 22(5)(a) of the Act. It follows that any failure to give Minesco an opportunity to comment on these submissions as required by the sub-section did not amount to a contravention of the Act.

Appearance of a fair hearing — Procedures adopted by administrative decision-makers must be seen to be just

108 There is authority to justify setting aside an Adjudication Determination in circumstances where a lack of appearance of natural justice can be established. This stems from the fundamental principle that procedures adopted by administrative decision-makers must be seen to be just in addition to being just.

109 In *Kioa v West*,[27] Brennan J stated:

> It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information.

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27 [1985] 159 CLR 550, 629 (Brennan J) (*'Kioa'*).

110 The last sentence of the passage of Brennan J in *Kioa* was interpreted by Allsop J (as his Honour then was) in *NIB Health Funds Ltd v Private Health Insurance Administration Council*[28] as showing that:

> the necessity to disclose such material in order to accord procedural fairness is not based on answering a causal question as to whether the material did in fact play a part in influencing the decision, but rather on the appearance of a fair hearing and the maintenance of confidence in the administrative process and judicial review of it.[29]

111 Allsop J's comment in *NIB* was cited with approval by the High Court in *Applicant of VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*.[30] There, the Court[31] added:

> It follows that asking whether, despite what was said in its reasons, the Tribunal may have been subconsciously affected by the information distracts attention from the relevant inquiry. The relevant inquiry is: what procedures should have been followed? The relevant inquiry is neither what decision should the decision-maker have made, nor what reasons did the decision-maker give for the conclusion reached.[32]

112 A decision which bears upon the present case is that in *Bromby v Offenders' Review Board*.[33] In dissent, Kirby P (as his Honour then was) applied the reasoning in *Johns v Release on Licence Board*[34] and stated that:[35]

> … the concern of the law was not only with the actuality of procedural fairness but also with the manifest appearance that fairness has been observed. …

113 Justices of Appeal Clarke and Handley disagreed in result with Kirby P, but not it seems on the applicable principles as much as on the findings on the evidence before them. Their Honours commented:[36]

> In some cases a court may be justified in setting aside an administrative decision although an actual breach of the rules of natural justice has not been established because natural justice will not appear to have been given. In our opinion the mere presence of files containing undisclosed material is not

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28 (2002) 115 FCR 561 ('*NIB*').
29 Ibid 583 [84].
30 (2005) 225 CLR 88.
31 Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.
32 (2005) 225 CLR 88, 97.
33 (1990) 22 ALD 249 ('*Bromby*').
34 (1987) 9 NSWLR 103.
35 *Bromby* (1990) 22 ALD 249, 261.
36 Ibid 267.

sufficient to establish either the reality or appearance of a denial of natural justice. …

114 Reference is also made to the decision of the Full Court of the Federal Court in *SZRMQ v Minister for Immigration and Border Protection*,[37] where Allsop CJ made the following relevant observations on the requirements of natural justice at common law:[38]

> 6. The requirements of procedural fairness are not generally apt for precise delineation. Some aspects can be reduced to a verbal expression of law. The test for apprehended bias is perhaps an example of that. The difficulty in precise formulation of many aspects of the requirements is that the informing norm and root of the principle is fairness: *Kioa v West* (1985) 159 CLR 550 at 583-585. Even in relation to the proper test for apprehended bias, however, the use of the *fair-minded* observer in the construct imports the norm of fairness: *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [2].
>
> 7. Fairness is normative, evaluative, context specific and relative. As such, its assessment is sometimes imprecise in articulation and open to debate. Nevertheless, subject to any clear contrary statutory intention, fairness is an inhering requirement of the exercise of state power: *Jarratt v Commissioner of Police for NSW* (2005) 224 CLR 44 at [26]; and *SZRUI* at [5].
>
> 8. The requirement of power to be exercised fairly will generally carry with it the requirement to exercise the power in a way that is apparently fair. This derives from the recognition of the importance of the *process* of the exercise of state power and not just the correctness of the outcome. The process of the exercise of state power is integral to the legitimacy of the outcome of the exercise of that power: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [19]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638 at [209]; *NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 115 FCR 561 at [84]; and *SZRUI* at [2].
>
> …
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> 10. … The enquiry is not to investigate, and the applicant's burden is not to establish, a precise causal link between any irregularity and an adverse result, but to assess whether the decision-making process (including the hearing and the making of the decision) was fair. Even if one cannot show an operative causal influence of any irregularity upon the decision, it may still be that the irregularity *might* reasonably have had such an effect through its materiality or repetition or context. Any such conclusion may affect the legitimacy of the process in that it may not be able to be concluded that it was fair. Such may be expressed as requiring the appearance of a fair hearing: cf *Assistant Commissioner*

37 (2013) 219 FCR 212.

38 Ibid 215 [6]–[8], 215–216 [10].

> *Condon v Pompano* at [209]; *NIB Health* at [84]; *R v Tran* [1994] 2 SCR 951 at 988, Lamer CJ, writing for the Canadian Supreme Court otherwise comprised of La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ, in a passage cited by Kenny J in her Honour's influential decision in *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6 at [30]. …

115 Flick J agreed that procedural fairness required that the decision-making process to be 'seen to be fair':[39]

> 51. Natural justice or procedural fairness requires more than an opportunity in which a claimant may meaningfully advance his claims. Natural justice or procedural fairness requires that the hearing be one which is both procedurally fair and one which is seen to be procedurally fair.
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> 52. The insistence upon justice being administered in a way which is both fair and seen to be fair is nothing new.
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> 53. When delivering judgment in 1924 in *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, Lord Hewart CJ observed at 259:
>
> > ... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done …
>
> …

116 His Honour continued:[40]

> 56. The requirement that justice is both done and seen to be done is a hallmark of both judicial decision-making and administrative decision-making. In the context of administrative decision-making, public confidence in the integrity of the administrative process is just as much shattered by a decision-maker who is not seen to be impartial as by an administrative process seen to be fundamentally and procedurally flawed. Indeed, with the ever expanding manner in which administrative decision-making may impact prejudicially upon the rights and expectations of individuals, it is ever more necessary to ensure that administrative decision-making remains open to meaningful judicial scrutiny that insists upon the procedures pursued by administrative decision-makers being both just and seen to be just.

A Denial of Natural Justice in This Case

117 This is a unique case.

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39 Ibid 225 [51]–[53].

40 Ibid 227 [56].

118 I am satisfied that the procedures adopted by the Adjudicator in this case were not such as to result in justice being seen to be done.

119 The Anderson Additional Issue Submissions and the further statutory declaration in support were advanced against the case presented by Minesco. They went beyond what the Adjudicator had requested pursuant to s 21(2B) of the Act.

120 Minesco was left not knowing whether the Anderson Additional Issue Submissions and further statutory declaration were:

(a) read or proposed to be read by the Adjudicator or ignored;

(b) read by the Adjudicator, but proposed not to be taken into account in the formulation of the Adjudication Determination; or

(c) proposed to be taken into account in the formulation the Adjudication Determination, and if so to what extent and in what manner.

121 In effect, Minesco was left with not knowing the case it had to answer.

122 This uncertainty arose from a failure on the part of the Adjudicator to respond to the Minesco letter of 12 September 2016.

123 True it is that the process did not bar Minesco from volunteering a response submission to the Anderson Additional Issue Submissions and the further statutory declaration under the *Hickory principle*. However, the Adjudicator did not invite any such response submission. Had such an invitation been extended by the Adjudicator, it would have put Minesco on notice that the Anderson Additional Issue Submissions and the further statutory declaration had been read by the Adjudicator or were in fact being considered as part of the body of material before him. In these circumstances, an invitation to Minesco to respond would have provided fair opportunity to answer the case made against it, and no breach of natural justice rules could be said to arise.

124 Alternatively, a step could have been taken by the Adjudicator to advise Minesco by letter of the precise position which he had adopted in relation to the Anderson Additional Issue Submissions and further statutory declaration.

125 A failure to take either of these steps resulted in Minesco being placed in a position of not knowing whether to respond or not, or seek the opportunity to do so.

126 This gave rise to the appearance of justice not being done. In spite of the fact that a causal link between the irregularity described and the adverse outcome to Minesco cannot be demonstrated in this case, it was, nevertheless, an irregularity which *might* reasonably have had such an effect had the Adjudicator read the additional material, which was entirely possible. The failure to specify in the Adjudication Determination the precise documents (or parts of documents) which the Adjudicator had regard to, or alternatively in this case, the failure to discount the Anderson Additional Issue Submissions and the further statutory declaration as documents he did not have regard to, gave rise to this possibility.

127 It follows that a breach of a rule of natural justice has occurred.

128 Further, I am satisfied that had Minesco been appraised of the true position adopted by the Adjudicator at the relevant time, and had that position warranted a response submission from it, if made, any such response submission if delivered might have had some prospect of changing the Adjudicator's mind on the points addressed.

Conclusion

129 The Adjudication Determination will be declared void and set aside.

Orders and Costs

130 I shall hear the parties as to the form of the orders to give effect to these reasons and on the question of costs.
