

# Case Note:

## John Holland Construction & Engineering Pty Ltd v. Majorca Projects Pty Ltd and Bruce Henderson Pty Ltd

Supreme Court of Victoria

Byrne J.

26 July 1996 (unreported)

**Contract administrator, duty to act fairly and impartially, negligence, proximity, reliance, consequential damages for purely economic loss, contractual background against which duty exists.**

In the recent Victorian case of *John Holland Construction & Engineering Pty Ltd v. Majorca Projects Pty Ltd and Bruce Henderson Pty Ltd* (Unreported, Supreme Court of Victoria, 26 July 1996, before Byrne J.) a dispute arose as to the impartiality of the contract administrator.

By a JCCB 1985 standard form building contract, the proprietor Majorca, the first defendant, entered into an agreement with John Holland, the plaintiff. The proprietor, engaged the second defendant, Bruce Henderson, as the architect to perform services including that of contract administrator.

Holland alleged that the architect was in breach of a duty to act fairly and impartially in carrying out its functions as a certifier under the building contract resulting in the builder suffering loss and damage.

An issue that arose in this case was whether a duty to act fairly and impartially is a duty that can be raised in negligence resulting in the award of damages.

Holland alleged that the architect had acted in the best interests of the proprietor and in disregard of Holland's interest by the way in which it assessed the contract value of the work executed by Holland, determined the amounts of the adjustments, and assessed liquidated damages. Holland alleged that the architect did so by seeking and/or receiving representations from the proprietor which were intended to influence it without giving Holland the opportunity of answering such representations.

Although it was agreed by the parties that the architect did have an obligation to act fairly and impartially, the question which arose was whether this duty was an obligation which if breached would amount to negligence and the consequential damages that would flow from a breach. As this was a case of pure economic loss. In order to answer this question, the court had to decide whether there existed between the parties a sufficient proximity so that the common law would recognise such a duty.

Byrne J. examined the circumstances surrounding the relationship between the parties which were essentially to be found in the terms of the building contract and in the 'admitted facts' that the architect would exercise its functions fairly and impartially and that Holland was entitled to expect it to do so. There was no express term in the contract that the architect had to act impartially.

### **Consideration of overseas case law**

Byrne J. reviewed the history of this issue which culminated in three cases tending to show support for existence of such a duty in a certifier. However, in the more recent case of *Pacific Associates Inc v. Baxter* [1990] 1 QB 993, the English Court of Appeal found that no duty of fairness and impartiality existed in a certifier. Each of the three Justices of Appeal placed considerable reliance upon the contractual background against which the duty was alleged to exist. Importantly the building contract contained a clause exempting the certifier from liability to Pacific Associates for any acts or omissions under the contract, and a comprehensive arbitration clause. It was the existence of the arbitration clause which was considered by the Justices to be determinative in their finding of the absence of the duty of care.

### **What did Byrne J. decide?**

Byrne J. rejected reliance on this case, stating that it depended very much upon the contractual situation in which the certifier was working and found that a *common law duty* can exist in a certifying architect to act fairly and impartially, a breach of which can result in an award of damages. He stated that it was reasonably *foreseeable* that the decisions of a certifying architect might cause loss to a contractor in a conventional building contract if made negligently and that this loss is a purely economic loss. He stated that this foreseeability is not removed by a right to review the decision by arbitration. Byrne J. did not believe that the existence of such a duty would open the flood-gates of indeterminate liability because the builder in this case was "clearly an identifiable member of the limited class of two persons who must have been in the contemplation of the architect as being directly affected by its decisions".

Byrne J. then confirmed that, in terms of the contractual framework in which the parties to the project operated, it must be established that the builder actually *relied* on or depended upon the careful and impartial performance by the architect

of its certifying functions. Byrne J. did not find a case for reliance on the facts before him because of the builder's inability to demonstrate reliance on the fair and impartial performance by the architect of its certifying functions which was borne out through the terms of the contract.

**So, a contract administrator may be under a duty to act fairly and impartially**

It remains to be seen whether Byrne J.'s findings are taken up by an aggrieved builder who can demonstrate that they relied on the contract administrator's careful and impartial performance of its certifying functions.

**Brian Cook**, *Deacons Graham & James*