

131

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2011-404-3148

BETWEEN CHOW GROUP LIMITED
Plaintiff

AND JOHN GEOFFREY WALTON
First Defendant

AND CLEARWATER CONSTRUCTION
LIMITED
Second Defendant

Hearing: 9 June 2011

Counsel: M Heard and ED Nilsson for Plaintiff
No appearance for First Defendant
FJ Thorp for Second Defendant

Judgment: 9 June 2011

ORAL JUDGMENT OF RODNEY HANSEN J

Solicitors: Lee Salmon Long, Auckland (Email: Michael.heard@lsl.co.nz)
Mr J G Walton, Barrister, Auckland (Email: john@johnwalton.co.nz)
Mr FJ Thorp, Barrister, Auckland (Email: fred.thorp@fjt.co.nz)

Introduction

[1] The second defendant (Clearwater) entered into a contract with the plaintiff (Chow) to carry out building works on the Palace Hotel which then stood on the corner of Federal Street and Victoria Street West. It was a heritage building of considerable architectural value which had been originally constructed in 1886. On 18 November 2010, after renovation work had begun, the Auckland Council ordered its demolition when it became clear that it was in imminent danger of collapse.

[2] After Chow declined to make what would have been the fifth progress payment under the contract, Clearwater claimed under the Construction Contracts Act 2002 (the Act). In a determination dated 11 May 2011, the first defendant (the Adjudicator) ordered Chow to pay Clearwater the total sum of \$837,645.36 and approved the issue of a charging order over the land, pursuant to s 29 of the Act. Chow has applied for judicial review of the decision and seeks interim orders, under s 8 of the Judicature Amendment Act 1972, restraining Clearwater from acting on or enforcing the determination pending resolution of the substantive application for review.

Principles governing interim relief

[3] Section 8 of the Judicature Amendment Act 1972 provides that an interim order may be made if, in the opinion of the Court, it is necessary to do so for the purpose of preserving the position of the applicant. The modern approach to the exercise of this power, first articulated in *Carlton United Breweries Ltd v Minister of Customs*,¹ recognises that, once the statutory threshold is reached, the Court has a wide discretion to consider all of the circumstances in deciding whether to grant interim relief.

[4] The application of s 8 in the particular context of a review of a determination under the Act was considered in *Concrete Structures (NZ) Ltd v Palmer*.² Courtney J

¹ *Carlton United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 429.

² *Concrete Structures (NZ) Ltd v Palmer* [2006] NZAR 513.

rejected a submission that the power to grant interim relief under s 8 was excluded by the Act. She noted that a recent decision of the New South Wales Supreme Court in *Grosvenor Construction (NSW) Pty Ltd (in administration) v Musico*³ involving the stay of enforcement of a judgment under the equivalent Australian legislation, took the view that the policy of the legislation suggested that stays would be less readily available in relation to debts arising under the Act, in contrast to stays pending appeal in curial proceedings. After reviewing evidence bearing on the issue, she said:⁴

It is for the plaintiff to show the necessity for interim relief to preserve its position. To do so it would need to show, at the least, a real risk that if it pays over the outstanding sum the second defendant will be unable to repay it if the plaintiff succeeds in the judicial review proceedings. The evidence before me fails to do that.

[5] Counsel also referred me to the extensive discussion of Bell AJ as to the approach to be taken when interim relief is sought against the enforcement of determinations under the Act in *Kariiti Ltd v Donovan Drainage & Earthmoving Ltd*.⁵ He noted⁶ that the issue may come before the Courts in a variety of applications. In addition to applications for interim relief under s 8 of the Judicature Amendment Act, there may be an application for a stay of liquidation application under r 31.11 of the High Court Rules; an application to set aside a statutory demand under s 290(4)(c) of the Companies Act 1993; and an application for stay of execution under r 15.8 of the District Court Rules, as when an adjudicator's determination is entered as a judgment under ss 73 and 74 of the Act.

[6] Bell AJ went on to say:⁷

While each application will turn on its own facts and circumstances, there are two important considerations:

- a) How real is the risk that the payee will not repay once there has been a final determination on the merits under a dispute resolution procedure under s 26(1)?

³ *Grosvenor Construction (NSW) Pty Ltd (in administration) v Musico* [2004] NSWSC 344.

⁴ At [28].

⁵ *Kariiti Ltd v Donovan Drainage & Earthmoving Ltd* HC Whangarei CIV-2010-488-613, 19 November 2010.

⁶ At [9].

⁷ At [10].

- b) How strong is the payer's claim that the payee will have to repay under that later determination?

[7] I extract the following principles from the judgments in *Concrete Structures* and *Kariiti*:

- (a) As with any application to stay execution of a judgment or determination, the onus of establishing that the right of review or appeal may be rendered nugatory is on the applicant.
- (b) The applicant must show a real risk that the payee may not be able to repay.⁸ The risk must be more than nominal. It is not enough for the payer to simply express a concern about the payee's ability to pay.⁹ There needs to be "a high degree of likelihood that the payee will not be able to repay if a determination ... goes in the payer's favour".¹⁰
- (c) Even if the applicant is able to reach the required threshold, relief will not automatically follow. It will also be necessary to show that the applicant has a good arguable case for relief in the substantive claim.¹¹

The risk in this case

[8] Chow's application was supported by an affidavit by Mr Derek Tait, its corporate counsel. On the issue of Clearwater's ability to repay, he deposed:¹²

Chow Group Limited has serious concerns that in light of the large damages claim that will be brought against Clearwater, the publicity around the collapse of the Palace Hotel, and the present economic climate (in which most construction companies are struggling financially), Clearwater will be unable to repay the amount prima facie payable under the Determination when it is ordered to make that repayment (which may be years away). Clearwater has done nothing to satisfy Chow Group that it is solvent and able to remain solvent.

⁸ *Concrete Structures (NZ) Ltd v Palmer* at [28].

⁹ *Kariiti* at [11].

¹⁰ *Kariiti* at [17].

¹¹ *Kariiti* at [17].

¹² At [28].

[9] In response, Clearwater filed affidavits by a director, Mr Michael Sullivan, and a senior manager of ANZ National Bank Limited, Mr Andrew Chambers, who is responsible for managing the relationship between ANZ and Clearwater. Mr Sullivan deposes that Clearwater has been engaged in the construction industry for in excess of 22 years. It specialises in industrial and commercial construction. Its works over the last three years have included two projects with a combined contract value of approximately \$90m. He asserts that Clearwater is solvent and able to pay its debts. It has no trade creditors whose invoices have been outstanding for more than 60 days. He states that he is quite confident that Clearwater would be in a position to repay the amount which Chow has been ordered to pay.

[10] Mr Chambers confirms that Clearwater has an overdraft facility with ANZ. He states that over the seven years during which relevant records have been maintained, Clearwater has operated within the requirements of its facility. Mr Chambers exhibits a statement showing the lowest and highest balance in the current account of Clearwater for each of the last twelve months and as at the end of the last three financial years. Those balances show that the overdraft has remained comfortably within the limit at all times and that throughout the period substantial credit balances have been held during each of the relevant periods.

[11] Although Mr Heard strenuously sought to persuade me otherwise, there is nothing in the information provided to convey the merest hint of financial difficulties. On the contrary, the balances appear to me to fairly reflect the operations of a substantial and successful construction company.

[12] In a reply affidavit, Mr Tait has referred to Clearwater's omission to provide further details of its financial position in the form of accounts, projected income and the like. He has also drawn attention to a proceeding in this Court brought by the owners of a leaky home complex seeking damages of several million dollars from Clearwater. Mr Heard submits that the absence of more detailed information, the existence of the outstanding claim referred to by Mr Tait and the claim which Chow will be pursuing against Clearwater in respect of the loss of the Palace Hotel development, are sufficient to establish that there is a real risk that Clearwater will be unable to repay a payment by Chow in satisfaction of the determination.

[13] I do not accept that these matters detract in any material way from the conclusion I have reached based on the evidence adduced by Clearwater. The possibility of successful claims against it at some stage in the future, in all likelihood after the application for review has been determined, does not affect my assessment of its financial viability. Chow has fallen well short of discharging the onus on it of showing that there is a clear risk that Clearwater will not be able to repay.

Arguable case

[14] Because I am left in no doubt on the threshold issue, it is strictly unnecessary for me to consider the only other factor that could have assumed relevance. That is the strength of the claim to review the determination. In that respect I am in the same position as Courtney J was in *Concrete Structures (NZ) Ltd v Palmer*. I will, however, briefly comment on the merits of the application for review.

[15] Chow's grounds of review are in two broad categories. There are claimed errors of law as to process and there are alleged fundamental and material errors of law in the determination itself.

[16] In submissions the greatest emphasis was placed on the alleged errors of law in relation to process as these were submitted by Mr Heard to establish a strong case on the merits. The errors arose from the adjudicator's refusal to give Chow an opportunity to respond to a submission made by Clearwater in reply. In his notice of acceptance of appointment as adjudicator, the first defendant gave directions for the service of the claim, the response and a reply. Mr Heard submits that in declining Chow's request to have an opportunity to respond to the reply by Clearwater, the adjudicator was in breach of the rules of natural justice which, by s 41(c) of the Act, he is required to comply with and of s 42(1)(b) of the Act which provides that an adjudicator may "request further written submissions from the parties to the adjudication but must give the relevant parties an opportunity to comment on those submissions".

[17] Mr Heard relied on *Construct Interiors v Jones*¹³ in which Cooper J held that the failure to afford an opportunity to make submissions in response to a reply was a breach of s 42(1)(b) of the Act and contrary to the principles of natural justice. Those defects led to an order setting aside the adjudication.

[18] There are material points of distinction between the *Construct Interiors* case and the facts of this case. In *Construct Interiors* the reply introduced substantially new material which had a direct bearing on material findings in the determination. In the present case, the reply is largely confined to a response to three arguments advanced and developed at length in the response. There was limited additional factual material introduced by way of a further statement of evidence, to which was attached two one-page documents. Mr Thorp's position is that the additional material did not impact on the matters in issue or on the determination itself and, in declining Chow's request for a hearing or to make further submissions, the adjudicator was neither in breach of his statutory duties nor of the rules of natural justice.

[19] Chow clearly has an arguable case that the adjudicator's action involved breaches of the Act. However, the issue is by no means clear cut – certainly not as clear cut as it was in *Construct Interiors*. And even if Chow were able to establish that there had been procedural error, it is conceivable that they were of insufficient moment to affect the determination. If so, the Court could well exercise its discretion against granting relief by setting aside the determination. In making this observation, I do not overlook the decision in *Survey Nelson v Maritime Museum*¹⁴ referred to me by Mr Heard in reply. In my view, the circumstances there being addressed by the Court of Appeal are materially different from those which arise in this case.

[20] I do not propose to review in detail the claimed errors of law in the determination which were not canvassed in any depth in oral argument. I do not discount Chow's prospects of success. For the purpose of this application, I accept that they are arguable. But that does not take Chow's position any further. Even if it

¹³ *Construct Interiors v Jones* HC Auckland CIV-2010-404-897, 23 August 2010.

¹⁴ *Survey Nelson v Maritime Museum* [2010] NZCA 629.

were to succeed, I am satisfied that there is no risk (based on the evidence before me) that Clearwater will be unable to repay the amount it is entitled to receive under the determination. On that basis alone, the application must fail.

Result

[21] The application for interim relief is declined.

[22] Clearwater is entitled to costs on a category 2 band B basis.