IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-3148

UNDER	The Judicature Amendment Act 1972
IN THE MATTER OF	an application for judicial review of a statutory power of decision
BETWEEN	CHOW GROUP LIMITED Plaintiff
AND	JOHN GEOFFREY WALTON First Defendant
AND	CLEARWATER CONSTRUCTION LIMITED Second Defendant

Hearing: 14 July 2011

Counsel: D Salmon and M Heard for Plaintiff
LJ Turner for Second Defendant

Judgment: 14 July 2011

ORAL JUDGMENT OF TOOGOOD J

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[1] The plaintiff has applied for an early fixture in relation to the substantive hearing of judicial review proceedings.

[2] The second defendant, Clearwater Construction Limited ("Clearwater") entered into a contract with the plaintiff, Chow Group Limited ("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.

[3] 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. 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").

[4] 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 issuing of a charging order over the land pursuant to s 29 of the Act.

[5] Chow has applied for judicial review of the Adjudicator's decision. It sought 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. That application for interim relief was heard by Rodney Hansen J on 9 June 2011. In an oral judgment delivered at the end of the argument, His Honour declined to make an order for interim relief.

[6] In doing so, the Judge held principally that the plaintiff had failed to make out its case on the threshold issue of the second defendant's financial position and to satisfy the Court that it was necessary for interim relief to be awarded in order to preserve the plaintiff's position. In essence, the plaintiff had argued that Clearwater's financial position was such that unless interim relief was granted it would effectively be denied the benefits of any substantive relief subsequently

granted. The Judge held that the threshold was a high one and that the plaintiff had failed to meet it.

[7] The Judge went on, although he said it was strictly unnecessary to do so, to consider the only other factor which would have assumed relevance; namely, the strength or merits of the claim to review the determination. He noted that there were two broad grounds for review in the plaintiff's application: claimed procedural errors of law; and alleged fundamental and material errors of law in the determination itself.

[8] The plaintiff had relied on a decision of Cooper J in *Construct Interiors v Jones*[1] in which it was held that the failure of an adjudicator to afford an opportunity to make submissions in response to a reply was a breach of s 42(1)(b) of the Construction Contracts Act, and contrary to the principles of natural justice. Those defects led to an order setting aside the adjudication. Hansen J considered that there were material points of distinction between the *Construct Interiors* case and the facts of the present case. He ruled, nevertheless, that the plaintiff had an arguable case that the Adjudicator's actions involved breaches of the Act. Having reached the view, however, that the plaintiff failed to satisfy the Court that there was a risk that Clearwater would be unable to repay the amount it is entitled to receive under the determination, the Judge held that the application for interim relief should fail.

[9] I am now in a position of having to decide, not whether interim relief should be granted, but whether this matter should be given an early hearing.

[10] The second defendant has obtained an award by the Adjudicator which has been registered as a judgment of the District Court, upon which the defendant would be entitled to take enforcement proceedings. The basis upon which the plaintiff seeks an early adjudication of the substantive issues is principally that the plaintiff's allegations of errors of law in relation to the adjudication should be dealt with, if possible, before any further litigation takes place, so that in the event that the plaintiff succeeds there will not be wasted time and costs.

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

[11] The plaintiff has provided the second defendant with a statement of financial position, which I am told is a precursor to enforcement steps being taken under the District Court Rules. I am also told that, in the High Court in Wellington, there is a proceeding for liquidation of the plaintiff based on the debt which is said to arise from the registration of the Adjudicator's determination in the District Court. That matter is due for a first call in Wellington in mid-August 2011. The plaintiff says that it would suffer unnecessary cost, and result in wasted court time, if it succeeds in the substantive application.

[12] When this matter first came before me on Monday, I asked counsel to obtain from the Court an indication as to when a date might be available in this Court to hear the substantive application for judicial review if an early hearing was given, and also to find out when the Court would hear this matter if it simply went into the List to be allocated a fixture in due course. The information I have been given is that if this matter was left to be allocated a fixture in due course, it would not be heard until early next year. On the other hand, I understand from the Registry that this matter could be set down for a one-day hearing in the weeks beginning 8, 15 and 22 August 2011.

[13] There is some debate between counsel as to the time required to conduct the substantive hearing. Mr Salmon estimates one day; Mr Turner, for the second defendant, says that one-and-a-half days would be necessary.

[14] In opposing the application for an early hearing, Mr Turner placed reliance upon expressions of principle contained in the judgment of Allan J on 20 July 2010 in *Birnie Capital Property Partnership Ltd v Birnie & Ors.*[2] In that case the Judge said:[3]

> Under High Court rule 7.13 a Judge may give a direction allocating a hearing date for a proceeding. The Court has a broad discretion under the rule to allocate a priority fixture if it is satisfied that it is just to do so.

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[2] *Birnie Capital Property Partnership Ltd v Birnie & Ors* HC Auckland, CIV-2010-404-3000, 20 July 2010.
[3] At [58].

Allan J then went on to consider the basis upon which the plaintiff in that proceeding applied for a priority fixture. The grounds advanced were that:[4]

> a) The financial position of the plaintiff had deteriorated significantly and there was no certainty that the company would be able to carry on trading beyond February 2011;
>
> b) The financial position of the defendants was also likely to deteriorate further, and their ability to satisfy a judgment may be compromised if no early hearing is available;
>
> c) The plaintiff's attempts to exercise a put option had already been delayed for almost a year by reason of the stance adopted by the defendants (or some of them).

[15] It seems to me that those grounds amount to claims of hardship and depravation of an opportunity to have a meaningful hearing of the substantive proceedings. I note that in that case that the parties were seeking a fixture of some three weeks. In that case, although the Judge accorded priority, the trial was not set down to begin until March 2011, that is, some eight or nine months after the Judge considered the application.

[16] Mr Turner pointed out that the Judge, in coming to his view in that case, referred to a 1987 Practice Note issued by the Executive Judge at Auckland in which it was said, in relation to priority fixture applications, that generally speaking some particular hardship to a litigant other than the usual hardship must be shown to justify priority; health problems, financial hardship or public interest are grounds frequently relied upon by successful applicants. Mr Turner pointed out that Allan J went on to refer to the judgment of Barker J in *Shattock v Devlin,*[5] where His Honour said:

> One expects strong evidence of, for example, compassionate grounds, impending financial disaster, the public interest or the interests of children before allowing the case to 'jump the queue' occupied by less complaining citizens waiting patiently for their cases to be reached.

It was on the basis of those expressions of relevant considerations that Allan J granted the fixture.

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[4] At [59].
[5] *Shattock v Devlin* (1988) 1 PRNZ 271 at 278.

[17] There is no doubt that the discretion under r 7.13 is a broad one in which the decision as to whether or not a priority fixture should be allocated is based on the interests of justice. I do not regard Allan J as having limited that discretion by referring only to hardship. Hardship was the context in which he was considering the application before him. The question here, in my view, is whether or not the Court has time available in which it could allocate a fixture for the substantive hearing which might, depending on the outcome, mean that other enforcement proceedings might become unnecessary. I do not see it as being irrelevant that an early determination of the substantive proceedings here may avoid the need for the parties to spend time and money in other litigation, and may ultimately save court time.

[18] It is not a question in this case of the other business of the court being set aside, although it is clear that if this matter is set down for an early hearing it is likely to be at the expense of judgment writing time, which imposes an additional burden on the judiciary. But the fact that the High Court Rules require application in a manner which will secure the just, speedy and inexpensive determination of any proceeding[6] suggests to me that the Court should take whatever steps it can to deal with matters promptly where it is considered to be appropriate to do so.

[19] I have taken into account Mr Turner's submissions that the plaintiff is currently in default of payment in respect of the judgment registered in the District Court. As I said to counsel during the argument, although the granting of an early fixture may have implications if any steps are taken to stay any other proceedings of an enforcement nature, I am not determining whether or not enforcement proceedings should continue. I have no jurisdiction to make any orders in respect of the liquidation proceedings currently before the Court in Wellington. I simply approach this matter on the basis of what is the just thing to do in the circumstances relating to the hearing of the substantive proceedings.

[20] As I see it, the disadvantage or prejudice to the plaintiff if an early fixture is not granted is that it will have to deal with enforcement proceedings, whether only the liquidation proceedings or others as well, in circumstances where it has, in the

[6] High Court Rules, r 1.2.

view of Rodney Hansen J, an arguable case that might require the adjudication to be set aside. If this Court can accommodate an early fixture, in my view it should do so provided no prejudice is suffered by the defendants, particularly the second defendant. Mr Turner quite frankly acknowledged that he could not point to any prejudice or unfairness to Clearwater if an early fixture is granted.

[21] I am advised by the parties that the matter is ready for hearing, subject to the filing and exchange of submissions.

[22] In my view, therefore, it is appropriate to set this matter down for an early hearing on a date which can be accommodated by the Court, and which suits the convenience of counsel so far as that is possible. I am told that Mr Thorp, senior counsel for the second defendant, is counsel in a case which is due to begin in this Court on 15 August 2011 and which is likely to take some 20 weeks. I am told that in that case it is expected that counsel for the plaintiffs will open for at least a week, if not two. Mr Thorp, as I understand it, is counsel for one or more of the defendants.

[23] As I indicated earlier, this Court is able to grant a one-day fixture in this matter in the week beginning 8 August 2011. I understand that the preference is that the case not be heard on a Monday and, in those circumstances, I intend to set this matter down for hearing on **Tuesday, 9 August 2011**. I imagine that one-and-a-half days would be available if necessary, but it seems to me, given the relatively narrow focus of proceedings for judicial review, that counsel ought to be able to make their submissions without any disadvantage to their clients within one hearing day, particularly if they are allowed time to exchange submissions in advance. Any suggestion that one party, particularly an applicant or plaintiff, might take up more time than is reasonable can be dealt with by agreement between the parties as to the time within which oral submissions should be confined. I am aware that many cases involving important issues can be dealt with, for example in appeal proceedings, on the basis of a one-day hearing if counsel have provided the Court with adequate written submissions in advance.

[24] Having been assisted by counsel, I set this matter down for hearing on **Tuesday, 9 August 2011** and I make the following timetable orders:

[a] Any further affidavits by either party should be filed and served by **Thursday, 21 July 2011**.

[b] The plaintiff's submissions shall be filed and served by **Thursday, 28 July 2011,** together with bundles of relevant affidavits and exhibits. I have indicated to counsel that the bundle already prepared would be sufficient for that purpose, together with a supplementary bundle containing any further affidavits filed in terms of the timetable.

[c] The second defendant's submissions should be filed and served by **Thursday, 4 August 2011**.

[25] The parties have leave to make further application to the Court if necessary.

[26] Costs on this application are reserved. The parties will file memoranda in relation to costs if necessary.

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Toogood J