

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

CIV-2004-463-825

BETWEEN CONCRETE STRUCTURES (NZ)
 LIMITED
 Plaintiff

AND MICHAEL D PALMER
 First Defendant

AND MONCUR ENGINEERING LIMITED
 Second Defendant

Counsel: W Lawson for Plaintiff
(by telephone) No appearance for First Defendant
 G J Thwaite for Second Defendant

Judgment: 6 April 2006

ORAL JUDGMENT OF BARAGWANATH J

Solicitors:
Lance Lawson, Rotorua for Plaintiff
Gregory J Thwaite, Auckland for Second Defendant

[1] Mr Thwaite applies for adjournment of the fixture for the hearing of Concrete Structures' application for judicial review brought against an adjudicator under the Construction Contracts Act 2002 as first defendant and his client Moncur Engineering Limited as second defendant.

[2] Concrete Structures operates pre-cast factories in Rotorua and Hastings and for that purpose operates gantry cranes. Moncur Engineering is a supplier of such cranes. In general terms the dispute between the parties relates to the nature of certain contracts for supply of such cranes to the respective premises, the performance of such contract by Moncur Engineering and the state of accounts between the parties.

[3] Moncur Engineering exercised its power under s 25 of the Construction Contracts Act to refer the dispute to adjudication. That engaged the application of that Act, the purpose of which stated in s 3:

...is to reform the law relating to construction contracts and, in particular,—

- (a) to facilitate regular and timely payments between the parties to a construction contract; and
- (b) to provide for the speedy resolution of disputes arising under a construction contract; and
- (c) to provide remedies for the recovery of payments under a construction contract.

[4] Section 26 of the Act provides:

26 Relationship between Part and other dispute resolution procedures

(1) To avoid doubt, nothing in this Part prevents the parties to a construction contract from submitting a dispute to another dispute resolution procedure (for example, to a court or tribunal, or to mediation), whether or not the proceedings for the other dispute resolution procedure take place concurrently with an adjudication.

(2) If a party to a construction contract submits a dispute to another dispute resolution procedure while the dispute is the subject of an adjudication, the submission to that other dispute resolution procedure does not—

- (a) bring to an end the adjudication proceedings; or
- (b) otherwise affect the adjudication.

(3) However, an adjudicator must terminate the adjudication proceedings on a dispute if, before the adjudicator determines the dispute, that dispute is determined under another dispute resolution procedure.

(4) Nothing in any other enactment or rule of law or any contract affects the application of this Part.

[5] The jurisdiction of adjudicators is set out in s 38:

38 Jurisdiction of adjudicators

(1) An adjudicator's jurisdiction in relation to any dispute that has been referred to adjudication is limited to determining—

- (a) the matters referred to in sections 48,... and
- (b) any other matters that are of a consequential or ancillary nature necessary to exercise or complete the exercise of the jurisdiction conferred by paragraph (a).

(2) However, the parties to an adjudication may, at any time, by written agreement, extend the jurisdiction of an adjudicator to determine any matters in addition to those mentioned in subsection (1).

[6] Section 48 insofar as is relevant provides:

48 Adjudicator's determination: substance

(1) If an amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine—

- (a) whether or not any of the parties to the adjudication are liable, or will be liable if certain conditions are met, to make a payment under that contract; and
- (b) any questions in dispute about the rights and obligations of the parties under that contract.

Subsection 5 provides as to the effect of an adjudicator's determination.

[7] By s 58(1) an adjudicator's determination under s 48(1)(a) is enforceable in accordance with s 59 which includes empowering the party entitled to payment to recover the amount of the award as a debt in any court. By s 60:

60 Effect of review or other proceeding on adjudicator's determination under section 48(1)(a)

An adjudicator's determination under section 48(1)(a) is binding on the parties to the adjudication and continues to be of full effect even though—

- (a) a party has applied for judicial review of the determination; or
- (b) any other proceeding relating to the dispute between the parties has been commenced.

[8] Section 61 provides:

61 Consequence of not complying with adjudicator's determination under section 48(1)(b) or (2)

(1) If a party to an adjudication fails to comply fully with the adjudicator's determination under section 48(1)(b) or (2) about the parties' rights and obligations under the relevant construction contract, any other party to the adjudication may bring proceedings in any court to enforce that other party's rights under that contract.

(2) In any proceedings under subsection (1), the court must have regard to, but is not bound by, the adjudicator's determination.

[9] Section 73 provides generally for the enforcement of adjudicator's determinations.

[10] In this case the adjudicator on 22 October 2004 directed that Concrete Structures pay Moncur Engineering (a) \$105,029.74 in respect of the Rotorua claims and (b) \$55,639.69 in respect of the Hastings claim. Moncur Engineering filed a summary judgment proceeding in the District Court claiming payment of these amounts. Concrete Structures paid the former amount but declined to pay the latter and brought the present proceeding for judicial review in this Court to challenge the validity of the adjudicator's determination.

[11] On 17 February 2005 Concrete Structures sought interim relief pursuant to s 8 of the Judicature Amendment Act 1972 prohibiting Moncur Engineering from taking steps to enforce the adjudication pending determination of the substantive issues. In her judgment of the same date Courtney J declined the application. Counsel advise that the outstanding amount of \$55,639.69 was thereafter paid by Concrete Structures to Moncur Engineering.

[12] I am told by Mr Lawson that settlement was effected by an agreement to discontinue the District Court proceeding and payment of the outstanding amount plus an element of District Court costs.

[13] Subsequently on dates which are not recorded in the papers before me Concrete Structures issued two further sets of District Court proceedings to which Moncur Engineering filed a counter-claim. Those proceedings are the subject of a forthcoming settlement conference in the District Court.

[14] By joint memorandum of counsel filed on 4 October 2005 a request was made for a fixture in this Court to determine the substantive judicial review proceeding. Such fixture was allocated for next Monday, 10 April 2006 by telephone conference minute of Winkelmann J of 4 October 2005. Her Honour made timetable orders as to filing and serving any interlocutory applications and evidence. On 4 April 2006 Moncur Engineering filed by fax application for adjournment of the fixture and alternatively for leave to file amended statement of defence and supporting affidavits and it is that application with which I must now deal.

[15] The jurisdiction of this Court in judicial review is discretionary. It is not exercised to interfere with the conventional procedures of the District Court or of statutory tribunals in relation to which there are statutory appeal processes permitting access to this Court on appeal. This Court exercise its judicial review jurisdiction unless there is some residual risk of uncorrected illegality that cannot conveniently be dealt with by the District Court or the tribunal: see for example *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316, 329 [18] (PC). I asked counsel to identify what issues cannot be dealt with by the District Court and received the following responses.

[16] First there is the issue whether an estoppel of some kind arises as a result of the settlement of the summary judgment proceedings in the District Court. The competing arguments include the submissions that such was not the intention of the parties who were simply responding to the determination of this Court that the inexorable processes of the Construction Contracts Act should continue, so the

District Court has jurisdiction to continue with the litigation it has commenced. Moncur Engineering argues the opposite. I see no reason why that issue cannot be dealt with as a preliminary question in the District Court. It is not directly raised in the proceedings before this Court and I can see no reason to exercise this Court's residual authority to determine it.

[17] The next point is as to Concrete Structures' challenge to the adjudicator's inclusion in his determination of interest which Mr Lawson submits does not fall within his jurisdiction. Counsel are agreed that, subject to the earlier point of estoppel, the District Court is competent to give definitive decision which will supersede that of the adjudicator. I am of opinion that they are right in taking that position. It may be noted that s 61(2) expressly provides that in any proceedings to enforce an adjudicator's determination "The Court must have regard to, but is not bound by, the determination." That expression of Parliamentary policy is directed explicitly to proceedings for enforcement, like the original summary judgment proceedings in this case, rather than proceedings to determine the parties' rights otherwise than via the Construction Contracts Act procedure. But s 26 makes quite plain that such procedure does not exclude other procedures such as recourse to the District Court.

[18] The Construction Contracts Act procedure is usefully discussed by the Hon. Robert Smellie QC in [2004] NZLJ 251. He cited *Rupert Morgan Building Services v Jarvis* [2004] 1 WLR 1867 (CA) which makes plain that such legislation is essentially a cashflow measure implementing what has been colloquially described as a "quick and dirty" exercise to avoid delays in payment pending definitive determination of litigation. It is not the purpose of the Act to inhibit due process of securing by conventional methods a definitive decision. If the adjudicator erred in any respect including that of ordering interest for which there was no authority, that can be corrected and the whole of the dispute ironed out by the District Court. Any overpayment can be resolved by that Court's exercise of jurisdiction in relation to restitution.

[19] In these circumstances I can see no purpose in this Court's proceeding on Monday to substantive adjudication. I am indeed provisionally of the view that the

High Court proceeding should not be pursued although I do not give judgment to that effect without formal argument in court of the issues which I have discussed summarily at telephone conference. But I am sufficiently confident in the foregoing expression of opinion to see no advantage in retaining Monday's fixture. Instead that fixture will be vacated and the parties will be left to have their dispute resolved in the District Court in the event that pending settlement discussions prove unsuccessful.

[20] Counsel are agreed that with settlement negotiations pending it is undesirable that the issue of costs be argued at this stage.

[21] There will be leave to apply for substantive fixture and as to costs.

W D Baragwanath J