

**IN THE DISTRICT COURT
AT HAMILTON**

CIV-2008-019-1630

BETWEEN

**GRANT HAMILTON CONSTRUCTION
LIMITED
Plaintiff**

AND

**TRUSTEES OF THE JAPEK TRUST
Defendant**

Hearing: 25 March 2009

Appearances: V Whitfield for the Plaintiff
M Talbot for the Defendant

Judgment: 25 March 2009

ORAL JUDGMENT OF JUDGE T H EVERITT

[1] This is an opposed application to enforce an adjudicator's determination under s 73 Construction Contracts Act 2002. The determination was dated 7 October 2008 and it sets out the facts and the evidential matters.

[2] I am able to give an oral decision at the conclusion of this hearing as arguments and submissions made by counsel have been fully analysed by the court and counsel. Notwithstanding that I would have preferred to reserve my decision as the main point raised is novel. However, time and circumstances do not permit that course. I note that the plaintiff has not been paid, the determination since 7 October 2008. Time now being of the essence in my view with the sum of \$69,000 outstanding in terms of the adjudication.

[3] The defendant, Japek Trust, oppose the application, at first on the grounds set out in s 74(2) of the Act. Later the opposition developed on the grounds that if there

was a contract then it was a residential construction contract and by virtue of s 10(d) of the Act, Part 4 of the Act did not apply. Part 4 is concerned with matters such as the enforcement of adjudication determination by entry in the District Court as a judgment.

[4] Dealing with the first point, I am of the view that clearly there was a contract between the plaintiff and the defendant as is evidenced by the matters set out in the adjudicator's determination and by the very nature of the work, the invoices, and the fact that the defendant has made some payments, there was some form of offer, acceptance and consideration and the lack of precision complained of such as scope, prices, timeframe and the like do not necessarily mean that no contract existed between the parties. Uncertainty as to certain terms will be remedied by the court to ensure contracts entered into by the parties are upheld wherever possible.

[5] The arrangements, I am satisfied, that were made by the parties were clearly not so vague or uncertain as to be unenforceable as alleged by Mr Talbot in his submissions. I am satisfied that there was a clear contractual intention on the part of Grant Hamilton Construction Limited and the Trustees of the Japek Trust to carry out the work that was completed and participated in by the builder. So did the adjudicator, who used his experience at the request of the parties to ascertain, among other things, what was just and reasonable where detail was lacking. That is the normal procedure followed by a court. So I decide that first point that was in issue against the defendants and I accept that Mr Talbot does not rely on that primarily in his opposition, but I have dealt with that first merely as a matter of procedure.

[6] The second point that concerns the court was that it was raised that the court had no jurisdiction to hear the application along the lines that the adjudicator had no jurisdiction to determine the dispute. As I understand this argument I believe the court is not entitled to go behind the adjudication on such an application as this and search for possible lack of jurisdiction. This is not a review of the decision, it is an application to enforce, and the grounds of opposition are strictly limited as set out in s 74. The parties agreed voluntarily to the adjudication. They submitted to the adjudicator whom they chose. They agreed on that person, I assume because he had experience in the area of the dispute. They gave evidence before the adjudicator and

awaited his decision. Nothing in the adjudication can be referred to by counsel that clearly shows the adjudicator proceeded on the wrong basis. For example, that the construction work in the dispute was a residential construction contract. The provisions in the Construction Contracts Act are virtually identical as to adjudication involving a residential construction contract and a commercial construction contract, except that a residential construction contract requires certain special notices to be given allowed to protect the individuals concerned in those residential contracts.

[7] The plaintiff says that the argument raised by Mr Talbot, that in giving such notices the plaintiff must be deemed to have agreed that the adjudication proceeded on the basis of a residential commercial contract, is not accepted. That it was good tactical practice in such an adjudication to ensure such notices were served because if it turned out to be held against the plaintiff that it was a residential commercial contract and such notices had not been given then the adjudication would have been of no effect.

[8] I am therefore satisfied the adjudicator had jurisdiction to carry out the adjudication and hence the court can in my view look at the determination to see whether it is to be enforced under s 3 or other provisions.

[9] This raises the real point that is in issue I believe between the parties, and that is this, if the construction work relates to a residential construction contract then by virtue of s 10(d), Part 4 of the Act is excluded and any determination involving a residential construction contract cannot be enforced by the use of the provisions under Part 4 and that is the part that the plaintiff is seeking to use today. Section 10 of the Act refers to residential construction contracts and states, "to avoid doubt this Act applies to residential construction contracts except for the following provisions ...". One of those provisions is (d) Part 4 (which relates to other measures for securing payment under this Act). So that is the essential issue.

[10] Ms Whitfield on behalf of the plaintiff sought to develop an argument that the adjudication could proceed to be enforced in a residential commercial contract because of the provisions of s 59(2). Sub-section (c) is not excluded by s 10. I do not accept that argument is tenable in view of the plain words of s 10(d) and do not

propose to deal with it. Clearly that provision, sub-section (d) in s 10 is plain on the face of it and must mean what it says.

[11] The question underlying this is novel. Can the defendant Trustees be classified as an individual within the meaning of the definition of s 5, “residential construction contract” and “residential occupier”. Mr Talbot kindly referred me to the debate which has taken place on a relatively desultory level by textbook writers, the respected Bayley and Tomas Kenneay-Grant and comments by adjudicators in the Buildings Disputes Tribunal and a Guide to the Constructions Contract Act where there seems to be two approaches, one deemed to be the realist approach and the other the literal approach which is favoured by Ms Whitfield. She has submitted that the strict approach ought to be preferred and the court ought to look no further than the fact that the Trust entered into the construction contract and the trust does not occupy the property and that is the point that I regard as being somewhat novel, with little assistance available to counsel or to the court, and it is left to the court’s own devices with the assistance of counsel to try and resolve that novel point in this case.

[12] In the Construction Contracts Act a “residential construction contract” means a contract for carrying out construction work in which one of the parties is the residential occupier of the premises that are the subject of the contract. Section 5 goes on to further define “residential occupier”. Residential occupier means an individual who is occupying or intends to occupy the premises that are the subject of a construction contract wholly or mainly as a dwelling house. A commercial construction contract means a contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract. A construction contract is defined as meaning a commercial construction contract or a residential construction contract.

[13] In those definitions it can be seen that it is crucial to this case for the defendant to persuade the court that the defendant is “an individual” within the meaning of those definitions because if the court accepts that, then the construction contract becomes a residential construction contract and the enforcement by entry of

judgment in this court is not available to the plaintiff and that is the defence that is mainly relied on by the defendants.

[14] There is no issue that two of the trustees, Mr and Mrs Hodder, lived in the dwelling house subject to the construction contract. The remaining trustee, McCaw Lewis Trustees (No 2) Limited of course did not and could not, it being a limited liability company. Mr Talbot submitted that the court should adopt a purposive approach to the interpretation of the meaning of residential construction contract and that the court should find each of the individual trustee members a party to the contract and therefore an individual. The difficulty with this argument is that not all the trustees of the trust are individuals in this case as we have seen with the incorporation in the trustees of a member, namely McCaw Lewis Chapman Trustees (No 2) Limited. That company acting as one of the trustees cannot be an individual. The meaning of the noun used in the Act, "an individual", must be given its ordinary meaning. In my view an individual is a human being. It is not an entity such as a class as distinct from an individual person, human being, and that class can involve trustees, companies, partnerships. They are distinct from being an individual. They can of course be legal persons in law, but the Construction Contracts Act does not talk about persons, it talks about, "an individual".

[15] In my view trustees cannot act as separate individuals as Mr Talbot invited me to find and that in my view is plain from the nature of the concept of a trust. Where there are several trustees as in this case of the Japek Trust, they cannot act individually and nor has it been suggested by reference to the trust deed of Japek Trust that each of these trustees can act and bind the trust individually and make decisions. In most cases known to the court it is accepted that trustees usually act in unison with unanimity and I think Mr Talbot in his experience perhaps agreed with that, but that is my view of the activities of trustees.

[16] The defendant must be the residential occupier of the premises before the construction contract can be a residential construction contract. I do not accept that it is permissible to separate out the trustees, or one or two trustees who may be individuals and say that they are one of the parties. When I use the expression, "one

of the parties” I am using that in a particular way, as used in the definition of section 5, of “Residential Construction Contract”.

[17] In the contract between Grant Hamilton Construction Ltd and Japek Trustees I find there are only two parties. One, the plaintiff, Grant Hamilton Construction Ltd, and two, Grant Thomas Hodder, McCaw Lewis Chapman Trustees (No 2) Ltd and Melanie Jane Hodder, as trustees of Japek Trust. The defendant trustees are one of the parties within that special meaning as distinct from the other party which is Grant Hamilton Construction Ltd. Each of the trustees are not separately a party within the meaning of “one of the parties” as I specifically use that term. Particularly here in this case the parties are either the plaintiff or the defendants, not some individual members of the defendant. I do not accept that, there is a suggestion, that Mr and Mrs Hodder contracted as separate individuals with Grant Hamilton Construction Ltd. It is my belief and finding that the trust contracted with Grant Hamilton Construction Ltd through the trustees Grant Thomas Hodder and Melanie Jane Hodder, that the invoices received by that trust at its request and paid by the trustees, not by Mr and Mrs Hodder, as separate persons in a different capacity from their capacity as trustees.

[18] The purposes of the Act satisfy me that a trust structure restores somewhat any power imbalance that there may be between a builder construction company and individual occupiers of a residential premise in that a trust is an identity set up for many reasons but inter alia to safeguard and protect individual beneficiaries and assets and as such is a quasi-commercial or commercial entity which in most cases is empowered to invest in a wide variety of assets and carry out a variety of commercial and non-commercial activities. Unfortunately the full trust deed I do not think was annexed to the papers but Mr Talbot informed me that as far as he was aware the Japek Trust was no different from the standard form of trust deed that most of these family trusts have. I see nothing in the purposes of the Act in s 3 which requires the trustees to be treated as an individual, no more than say a farming company should be, organising a construction contract on the farm dwelling, be treated as an individual.

[19] Once individuals are incorporated into a company or into a trust structure the benefit of being an individual within the meaning of the Construction Contracts Act is lost and I would go as far as to also possibly include in that class, partnerships. Partnerships are not in my view “an individual” for the purposes of the Construction Contracts Act.

[20] The joint and several liability of trustees raised by Mr Talbot does not alter this position in my view being a different concept for application in different circumstances such as suing and being sued and I do not believe that trustees are empowered to act as individuals for the purposes of the trust deed.

[21] I do not favour the argument based upon *Dempsey & Wood Civil Contractors Ltd v Ajay Investment Consultants Ltd & Anor* DC, Auckland, [2008] CIV-2006-004-002083 Gittos J, referred to by both parties. I do not favour that reality type situation or argument which is advanced because it does not in my view apply a legal principle. Parties are entitled in my view to have a clear statement of legal principle in the law rather than to rely ad hoc on case by case basis on what is viewed as “the reality”. That is, perhaps to use my words, a feeling rather than a principle. There is no need to embellish the legal position with resort either to a purposive construction of the Act when the words used are clear and have a readily understood meaning. Everyone knows what an individual is as distinct from a class of other persons.

[22] I also do not favour the power imbalance argument when the defendants are trustees for a trust, the Japek Trust, which has a commercial basis, has professional trustees such as an accountant Mr Hodder, and indeed a legal firm, McCaw Lewis, in the form of McCaw Lewis Chapman Trustees (No 2) Ltd. That in my view tends to lean heavily against the argument that there is some power imbalance.

[23] In conclusion I confirm that the contract was not a residential construction contract. It was a commercial construction contract. The trustees are one of the parties to the contract and are not an individual within the meaning of the Act. Consequently Part 4 of the Act applies and the adjudication determination may be enforced pursuant to s 73. I order so accordingly, that the adjudication determination that the defendant pay the plaintiff \$69,182.53 be entered in this court as a judgment

of this court under its rules (unless there are matters that I have overlooked in quantifying that and counsel will no doubt tell me).

[24] That raises the issue that Ms Whitfield has brought up of costs in this opposed application. Counsel have discussed costs at my invitation and agreed on quantum. Accordingly the plaintiff is entitled to costs as successful party on this application in the sum agreed of \$2,176 together with any disbursements which can be fixed by the registrar.

T H Everitt
District Court Judge