#55

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2007-412-000861

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a determination of the Disputes Tribunal at Auckland
BETWEEN	BILL HAMILTON First Plaintiff
AND	W HAMILTON BUILDING LIMITED Second Plaintiff
AND	DISPUTES TRIBUNAL First Defendant
AND	SANDY KIMPTON Second Defendant

Counsel: R Kelly for Plaintiffs
E St John for Second Defendant

Judgment: 8 October 2008

JUDGMENT OF PANCKHURST J

Introduction

[1] Mr Bill Hamilton is a builder who trades as W Hamilton Building Limited. The company undertook work for Sandy Kimpton in Queenstown. A dispute has arisen concerning that work.

[2] Ms Kimpton filed a claim with the Disputes Tribunal in Auckland. Mr Hamilton and his company contested the jurisdiction of the Tribunal to entertain the claim. Following a telephone conference with the parties a referee issued an "Order of Disputes Tribunal" dated 26 September 2007. In the present application for judicial review Mr Hamilton and his company seek orders:

(a) that Ms Kimpton's claim to the Disputes Tribunal "be struck out for want of jurisdiction", and

(b) that "orders" of the referee concerning an extension of the monetary jurisdiction of the Tribunal by agreement and the transfer of a District Court proceeding to the Disputes Tribunal "be set aside".

The grounds advanced included allegations of error of law and that the telephone conference which preceded the so-called orders made by the referee was unfair in a manner which prejudicially affected the outcome.

[3] The Disputes Tribunal is named as the first defendant in this proceeding. Following service of the application for judicial review counsel for the first defendant filed a memorandum advising that the Tribunal intended to take no part in the proceeding and would abide the decision of the Court. Subsequently the case has been dealt with by way of telephone conferences and the filing of written submissions. This was agreed to in light of the spread of counsel (Dunedin and Auckland), my presence in Christchurch and on account of the modest sum at stake.

Some further background

[4] Ms Kimpton wished to make alterations to a rental property which she owned in Queenstown. A building consent was sought in mid-2006 with the likely cost estimated at $50,000-$60,000. The work was to be charged on a time and materials basis, although prior to the work commencing Mr Hamilton provided a spreadsheet of estimated costs which indicated an all-up figure of about $110,000.

[5] According to Ms Kimpton the job was to take about six weeks with completion to occur in late 2006. In order to minimise costs as much as possible she purchased many of the fittings herself and Ms Kimpton intended to spend November-December attending to painting and other aspects of the finishing work. To that end she allowed her employment contract as an accountant to end in October 2006, so that when she completed her part of the building work she would be in a position to commence new employment in Auckland in February 2007.

[6] The building work did not proceed as Ms Kimpton had expected. Mr Hamilton maintains that the working drawings were inaccurate and that it fell to him to, for example, arrange for an engineer to undertake work in relation to the foundation requirements.

[7] The work was not completed within the timeframe envisaged by Ms Kimpton. She remained in Queenstown (and perhaps Dunedin where she had been employed) into 2007. Payments were made to W Hamilton Building from time to time, until a payment claim was made under the Constructions Contracts Act 2002 seeking $18,050.34, being the amount outstanding under an invoice dated 15 March 2007. The payment claim was served on 21 May 2007. A week later Ms Kimpton made a part payment of $7,000, leaving an outstanding balance of $11,050.34. An exchange of correspondence ensued in which Mr Hamilton offered to accept a discounted figure, while Ms Kimpton proposed an even lesser sum. A compromise was not reached.

[8] On 2 August 2007 Ms Kimpton filed her claim to the Disputes Tribunal at Auckland, she by this time being resident there. She claimed a sum of $7,500, described in the claim form as "compensation for losses incurred due to the misleading way my building project was undertaken ...".

[9] On 24 September 2007 W Hamilton Building Limited filed a civil claim in the Dunedin District Court seeking payment of the balance due as particularised in the earlier payment claim. In the meantime Mr Hamilton's solicitors filed a submission with the Disputes Tribunal contesting its jurisdiction to entertain Ms Kimpton's claim. This precipitated the adjournment of a hearing scheduled before the Tribunal and, instead, there was a telephone conference on 26 September 2007 which culminated in the issue of the "Order of Disputes Tribunal", which is the subject-matter of the present application for review.

The Disputes Tribunal Order

[10] I need to refer to the terms of the order in some detail. The document refers to the Disputes Tribunals Act 1988 (the Act) in its heading and is termed an Order of

the Tribunal. The body of the document begins with the words "The Disputes Tribunal hereby orders". Then there is a heading to para 1 "The hearing is adjourned to be set before this DT Referee for three hours for the following reasons". Under sub-paragraph (a) Ms Kimpton was:

> granted leave to respond to the statement of claim belatedly lodged by W Hamilton Building Ltd. For example, she may wish to file a statement of defence form, as well as apply for the transfer of what is in effect the respondent company's counter-claim so that it can be heard along with her claim in the Disputes Tribunal division of the District Court.

Sub-paragraph (b) added that the 26 September hearing was confined to the jurisdictional dispute, so that the parties would have further time to prepare for the substantive hearing.

[11] Paragraph 2 of the document was headed:

> Having considered the parties' verbal and written submissions, this Tribunal makes the following points in relation to their jurisdictional dispute:

Then followed sub-paragraphs (a)-(e) which contained a number of observations concerning the jurisdictional challenge to Ms Kimpton's Disputes Tribunal claim. The referee pointed out that claimants were not expected to have a "grasp of the applicable law". After reference to the Fair Trading Act 1986, the Consumer Guarantees Act 1993 and the Construction Contracts Act 2002 the referee opined in sub-paragraph (e):

> A main issue in dispute appears to be whether the initial contractual negotiations and resultant agreements were clear enough to establish if any party breached the contract; and thus whether the respondents should pay contractual damages and consequential losses, or the applicant should pay the outstanding invoiced amount (plus interest).

[12] Paragraph 3 began "The parties are to note that within the next fourteen days:" and continued:

> (b) Both Ms Sandy Kimpton and Mr Bill Hamilton must liaise with Court staff in both the mainstream and Disputes Tribunal divisions of the District Court to ensure that W Hamilton Building Ltd's belatedly lodged District Court claim is transferred to the Disputes Tribunal to be heard as a counter-claim to Ms Sandy Kimpton's previously lodged Disputes Tribunal claim.

(c) Both Ms Kimpton and Mr Hamilton must liaise with the Disputes Tribunal Court staff to ensure that extended monetary jurisdiction forms are signed to cover both the claim and the counter-claim and that the quantum of each claim is amended to the chosen figure within the $12,000.00 limit. (*Note that Ms Kimpton has already acknowledged willingness to agree to extended monetary jurisdiction by way of legal correspondence dated the 1st August of this year. Also note that the monetary limit does not exclude the Tribunal's discretion to award interest, or in restricted circumstances to grant other costs pursuant to sections 20 & 43 of the Disputes Tribunals Act 1988*).

[13] Paragraphs 4 and 5 of the order dealt with the exchange of documentary evidence before the substantive hearing and the need for service upon the parties of "the amended claim and transferred counter-claim", together with notice of the hearing date.

[14] Arising from the terms of the order which I have highlighted three issues require determination, being:

(i) whether Ms Kimpton's claim falls within the jurisdiction of the Disputes Tribunal,

(ii) whether the referee ordered the transfer of the W Hamilton Building Limited civil claim to the Disputes Tribunal and ordered that Ms Kimpton, and Mr Hamilton and his company, agree to the extended monetary jurisdiction of the Tribunal to hear such claim; and, if so, whether the referee possessed power to make such orders, and

(iii) whether the hearing on 26 September 2007 was conducted in a manner that was unfair and prejudicially affected the result.

Depending upon the view I form in relation to these issues, it will also be necessary to consider whether discretionary relief is appropriate in all the circumstances of this case.

Is Ms Kimpton's claim within jurisdiction?

[15] In anticipation of the telephone conference with the referee Ms Kimpton filed a written submission as to jurisdiction. It began by stating that she sought compensation under the Fair Trading Act and Consumer Guarantees Act for losses incurred as a direct result of misrepresentations made by Mr Hamilton. She added:

> My action in the disputes tribunal is not seeking order as to how much I owe Mr Hamilton, instead seeking order as to how much Mr Hamilton owes me. It is to be noted that my claim is isolated from any further claim Mr Hamilton may make on me. My claim is firmly in relation to breach of contract and breach of both the Fair Trading Act and the Consumer Guarantees Act.

[16] Ms Kimpton then isolated two particular matters of complaint. The first was that the extensions to her property were to take six weeks and be completed by October 2006, whereas the actual timeframe was a period of months and the work was not completed until late March 2007. The second matter concerned cost in that the spreadsheet showed the project cost at $111,624 including labour of $23,100, whereas the total cost proved to be $143,000 with a labour component of $42,855. Her submission concluded on this note:

> Accordingly I am seeking compensation of costs and losses incurred by me as a direct result of the misrepresentations made to me. I am seeking such compensation under sections 9, 13 and 43 of the Fair Trading Act.

[17] The claim form which Ms Kimpton had previously filed with the Tribunal identified various losses including earnings (11 weeks at $1,600 per week from 5 February to 20 April 2007), accommodation costs in Queenstown and travel to Queenstown (presumably from Dunedin), storage costs, and interest incurred. As can be seen these heads of claim were for expenditure allegedly incurred as a result particularly of the delay and the need for Ms Kimpton to remain in the South Island beyond the time she had originally envisaged.

[18] In light of Ms Kimpton's submission Mr Hamilton's solicitors prepared on his behalf a written submission contesting the jurisdiction of the Tribunal. It referred to s10 of the Disputes Tribunals Act, which confers jurisdiction in respect of claims founded on contract or quasi contract and in relation to tortious claims in respect of

property damage. In addition the Tribunal has jurisdiction as conferred upon it by the enactments specified in the First and Second Schedules to the Act, including therefore the Consumer Guarantees Act 1993 and the Fair Trading Act 1986. However, in relation to the latter jurisdiction is confined to applications for orders under s43(2)(c)-(f) of the Act, but not in relation to contraventions of s9 of the Act.

[19] The exclusion of s9 from the jurisdiction of the Disputes Tribunal was highlighted, since it is that section which proscribes misleading or deceptive conduct in trade. Ms Kelly submitted that only pursuant to s9 could Ms Kimpton seek relief for an alleged misrepresentation as to the time of performance of the building work. Hence, the argument continued, the Fair Trading Act did not avail Ms Kimpton in this instance.

[20] More generally, the complaint that the job took much longer than anticipated was said to be of no moment, unless time was of the essence or the time for performance was unreasonable, neither of which were alleged by Ms Kimpton. There was no contention that her six week expectation was based upon a promise or that the company otherwise agreed to such a timeframe.

[21] With regard to the price of the work, attention was called to s13 of the Act which proscribes false or misleading representations as to the price of any goods or services: s13(g). But, counsel submitted, the absence of a "jurisdictional fact" was necessarily fatal to the claim. This being a cost plus contract, where Mr Hamilton supplied only a spreadsheet of estimated costs and, accordingly, there was no basis to found a misrepresentation as to price. This was said to be especially so because the disclosed cost of labour was $40.00 per hour and this figure was adhered to throughout.

[22] With reference to the Consumer Guarantees Act, Ms Kelly submitted that the claim referred to the Act "only in global terms". Hence, W Hamilton Building Limited did not know, nor could address a claim of "some unspecified liability … under that Act".

[23] In any event, counsel suggested that "the real claim" was necessarily one based on a tortious negligent misrepresentation. This, however, was a claim for pure economic loss and such losses are not within the Tribunal's jurisdiction: *Director-General of Social Welfare v Disputes Tribunal* [1999] 12 PRNZ 642 (HC) at 645, a decision of Anderson J. As s10(1)(c) makes clear tortious claims are restricted to property damage and s12(1) emphasises that loss or damage "of a consequential nature" is not recoverable before a tribunal.

[24] Finally with reference to this aspect Ms Kelly drew attention to decisions of this Court which have emphasised the availability of judicial review where a tribunal has exceeded its jurisdiction: *Southern Cross Building Society v Disputes Tribunal at Alexandra* [2001] 15 PRNZ 657 (HC) and *Mellow v Tsang* [2003] 17 PRNZ 343 (HC).

[25] Mr St John's submission in response did not seek to engage the detailed terms of the plaintiffs' argument. While acknowledging that Ms Kimpton's claim was not framed with the precision which might be expected of a lawyer, this was said to be unnecessary in relation to a Disputes Tribunal claim. Counsel stressed that Ms Kimpton simply sought damages up to $7,500:

> as a result of her being lured into a contract for which:
>
> (a) the plaintiffs have significantly charged over and beyond their initial representations and
>
> (b) which the plaintiffs declined to provide evidence of [the] charging.

This, it was submitted, indicated a perfectly valid claim. It was open to the referee to rule that the claim could proceed and there was nothing controversial about that ruling. Counsel stressed that the claim was yet to be heard and urged that it would be premature for this Court to intervene at this stage and effectively order a strike-out.

[26] In my view the terms of the order made on 26 September 2007 are somewhat unfortunate. While the document is formally headed as an Order of the Disputes Tribunal, its terms are somewhat discursive and not akin to the orders to be expected of a court or tribunal. Further, it seems to me that the order must necessarily be read

as a whole. Subject to some observations I am about to make in relation to the further issues in the case, it is clear enough that the referee did contemplate that both the company's claim for $11,050.34 and Ms Kimpton's claim for what he termed "contractual damages and consequential losses" would be before him in due course. That is he would be in a position to adjudicate upon both aspects and with reference to whether the contractual arrangements were "clear enough" to demonstrate that the company was not due to any further payment or was otherwise in breach of its contractual obligations. But, this anticipation was misplaced. The referee was in no position to require that the company's claim be transferred to the Tribunal, with agreements given to an extension of the Tribunal's monetary jurisdiction. It follows that absent a change of heart on the company's part (which appears unlikely), the only claim which will be before the referee is that of Ms Kimpton. And she has expressly framed her case on the basis she seeks relief "isolated" from the claim made by Mr Hamilton and his company. At another point she referred to compensation for costs and losses incurred by her as a direct result of the misrepresentations as to time and price. This suggests that the relief sought is in the nature of consequential loss.

[27] That said, I am still unpersuaded that the referee was wrong in ruling that the claim was within the jurisdiction of the Tribunal and should at least proceed to a hearing. Appropriately, the terms of the order are tentative in nature. For example, in paragraph 2(e) the referee said that the main issue "appears to be ..." whether there were contractual terms sufficient to support the claim. The ruling was made in advance of the substantive hearing and was, therefore, in the nature of a strike-out application. It was proper for the referee to proceed with caution and to resolve to hear the claim, unless it was plainly obvious that Ms Kimpton's claim was not within jurisdiction.

[28] I am also influenced by the argument that it is inappropriate to construe the claim itself and the claimant's submissions for the 26 September 2007 hearing as if they were pleadings in a civil context. Section 18(6) of the Disputes Tribunals Act provides that disputes are to be determined "according to the substantial merits and justice of the case" and, although "regard [is to be had] to the law", decision-makers are not "bound to give effect to strict legal rights or obligations or to legal forms or

technicalities". This is not to say that the jurisdictional requirements of the Act may be ignored, but nonetheless it remains the case that the Disputes Tribunal exists to provide a speedy, informal and inexpensive means of resolving minor disputes. Ms Kimpton's claim is in the minor category, she having limited the extent of the claim to bring it within the primary jurisdiction of the Tribunal.

[29] For these reasons I do not accept that the referee erred in at least provisionally assuming jurisdiction. Whether he will finally do so will no doubt depend on what emerges at the substantive hearing. Therefore, it is not necessary to consider the availability of discretionary relief, which in itself would have been a question of some moment in the present context.

"Directions" to transfer the District Court proceeding and for an extension of jurisdiction

[30] The starting-point in relation to these issues is whether directions, or orders, were made by the referee requiring a transfer and agreement to an extension of jurisdiction? Paragraphs 3(b) and (c) are set out earlier in this judgment (para [12]). Certainly the referee spoke in emphatic terms (the parties "must liaise ..."). However, it seems to me that the intent was to cajole particularly the plaintiffs to accept a practical approach which the referee saw as desirable. The words used by the referee do not constitute the making of formal orders, rather they require that the plaintiffs should take the steps necessary to transfer their civil claim and sign extended monetary jurisdiction forms.

[31] Mr St John accepts there was no jurisdiction for the referee to order a transfer and an extension of jurisdiction. As to the former s37(1) provides that a District Court Judge or Registrar may order that proceedings be transferred to the Tribunal. Such power is not vested in a Disputes Tribunal referee. Similarly, s13 of the Act provides that an extension of jurisdiction above $7,500 (to a limit of $12,000) must be based on the agreement of the party affected. It follows that even if the referee had purported to make orders, they were beyond jurisdiction and of no effect. Mr St John accepts this to be the case.

[32] It follows that the relief sought is not required. Orders for transfer and an extension of jurisdiction were not, and could not have been, made by the referee. The relief sought is redundant.

Was the 26 September 2007 hearing conducted unfairly so as to prejudicially affect the outcome?

[33] Ms Kelly submitted that if either of the first two issues were answered in favour of Ms Kimpton, a further issue arose, namely whether the 26 September 2007 hearing was fairly conducted. Mr Hamilton swore an affidavit in support of the application for judicial review. It included this:

> 15. The jurisdictional hearing commenced at 1:34 pm on 26 September 2007. I attended by telephone at the Dunedin District Court. The hearing was conducted as set out in paragraph 14 of the Statement of Claim.
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> 16. When the Referee asked me to put forward my statement, I explained that I understood that the purpose of the hearing was to decide the jurisdiction of the case, that is, whether or not the case could be heard in the Disputes Tribunal. I started to read out a short paragraph which I had prepared prior to the hearing which explained the reasons why the case was outside the jurisdiction of the Disputes Tribunal.
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> 17. The Referee responded by telling me that he was not there to hear me tell him about his job or how to decide jurisdiction but it was up to him to decide via the evidence from both cases.
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> 18. So I was forced to recount the job as best I could explaining that I had not come prepared to give evidence in response to Ms Kimpton's claim. I also said that I have been preparing a schedule of labour variations in support of my claim against Ms Kimpton for $11,000.00.
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> 19. The Referee asked Ms Kimpton if she was aware that W Hamilton Building Limited was a limited company. She responded by saying that she did not know. I explained back that she knew full well all about my business because she is an accountant who worked for my brother's accounting firm, and that all my invoices and letters are on my letterhead which states at the top, W Hamilton Building Limited.
>
> 20. The Referee said that Ms Kimpton's claims were not relevant to some sections under the Fair Trading Act or the Consumer Guarantees Act or under the Disputes Tribunal Act, but the Referee did not expect her to know all of these things correctly so was prepared to ignore some of these quoted sections, thus bringing the case within the Disputes Tribunal jurisdiction. He said her claim was not for pure economic loss because Ms Kimpton had receipts.

21. The Referee then said that Ms Kimpton could increase her claim to up to $12,000.00 and that he would hear my case as well.

22. The Referee also said that he thought W Hamilton Building Limited was attempting to sabotage Ms Kimpton's case by lodging its claim in the District Court.

There is no evidence to the contrary. Ms Kimpton has not sworn an affidavit. The Tribunal abides the decision of this Court.

[34] It is apparent that the hearing was conducted in a somewhat robust manner. On the other hand the situation required a pragmatic response. The circumstances of a disputes claim in Auckland, a civil claim in Dunedin and a fairly modest sum in dispute demanded as much.

[35] The real question is whether the manner in which the hearing was conducted was both unfair, and prejudicially affected the outcome in relation to the jurisdictional ruling. As to that I am most influenced by two matters. The first is the written submission which was provided to the referee in anticipation of the 26 September 2007 hearing. This had obviously been prepared by Mr Hamilton's solicitors and constituted a full argument in relation to the jurisdictional issues. The second matter is the order issued by the referee following the hearing. From its terms it is apparent that the written submission was considered by the referee in some depth.

[36] In these circumstances I am not persuaded that the hearing was unfair. In relation to the only issue where a ruling adverse to Mr Hamilton and his company resulted, a comprehensive written argument was before the referee and, I am satisfied, was considered by him. The circumstance that the referee dictated the terms of the hearing by telephone conference (as described in Mr Hamilton's affidavit) does not impact upon the worth of the prior written submission.

Conclusion

[37] For the above reasons the application for judicial review is dismissed. Given that this proceeding has been dealt with by a combination of telephone conferences and the filing of written submissions (without appearances), and given the subject-

matter of the dispute, I consider that costs should be dealt with on a general basis, not according to scale. I award Ms Kimpton the sum of $1,000 and any filing fee paid by her.

Addendum

[38] This dispute remains in a sorry state. The past 12 months have been spent pursuing the present application for judicial review and to no avail. The underlying dispute remains outstanding.

[39] Moreover, exactly how it is to be heard is still unresolved. It is hopelessly uneconomic for a building dispute involving just over $11,000 to be the subject of both a disputes claim and a civil claim, and in different cities. I also note that before this situation came to pass the parties were within a few thousand dollars of settling their differences. Since then matters have deteriorated to a marked degree. And, the proceeding in this Court has achieved nothing, other than extra cost.

[40] The need for a pragmatic solution is obvious.

Solicitors:
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