

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

CIV 2007-485-332

UNDER the Judicature Amendment Acts 1972 and
1977

IN THE MATTER OF the Construction Contracts Act 2002

BETWEEN HORIZON INVESTMENTS LIMITED
Plaintiff

AND PARKER CONSTRUCTION
MANAGEMENT (NZ) LIMITED
First Defendant

AND BARBARA HUNT
Second Defendant

Hearing: 19 March 2007

Appearances: K Johnston and S Galloway for Plaintiff
J Cleary for the First Defendant
Second Defendant abides the Decision of the Court

Judgment: 4 April 2007

JUDGMENT OF SIMON FRANCE J

Introduction

[1] Horizon Investments and Parker Construction are parties to a construction contract to build five apartments and two townhouses on a site that overlooks Wellington's Oriental Bay. The parties are in dispute over progress payments, with Horizon accepting only a portion of the amount claimed. As at November 2006 the difference between the amount claimed, and the amount paid, was \$1.133m. The parties submitted their dispute to an adjudicator appointed under the Construction

Contracts Act 2002. The adjudicator found in favour of Parker, and Horizon seeks to review that decision.

[2] The grounds of challenge are lack of jurisdiction, breach of natural justice and irrationality. In order for the challenge to be understood it is necessary to first give a brief overview of aspects of the Construction Contracts Act 2002.

Construction Contracts Act 2002

[3] The Act provides a mechanism for ensuring that cashflow occurs between the parties to a construction contract. The Act recognises that progress payments and cashflow are integral to these contracts, and provides a default schedule for such payments if the parties have not otherwise agreed. The Act provides that the payment process is to be begun by one of the parties, almost inevitably the head contractor, submitting a “payment claim” to the owner. There are formal requirements: it must be in writing, it must say it is made under the Act, it must contain sufficient detail to identify the particular work and period to which the claim relates, and it must indicate the amount claimed and how it was calculated. The claim is to be served on the owner or nominated agent.

[4] The nature of the owner’s response is equally prescribed. The response is termed a “payment schedule” and s21 provides:

21 Payment schedules

- (1) A payer may respond to a payment claim by providing a payment schedule to the payee.
- (2) A payment schedule must—
 - (a) be in writing; and
 - (b) identify the payment claim to which it relates; and
 - (c) indicate a scheduled amount.
- (3) If the scheduled amount is less than the claimed amount, the payment schedule must indicate—
 - (a) the manner in which the payer calculated the scheduled amount; and

- (b) the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and
- (c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.

[5] To indicate the significance of these requirements, it is to be noted that the Act provides that if a proper response is not provided within 20 days, the claim must be paid in full, and can be recovered by the claimant as a debt.

[6] Another feature of the Act is that a party to the construction contract may initiate an adjudication process. That is what happened here with Parker doing just that in order to recover the unpaid portion of its payment claims. Horizon responded by initiating its own adjudication, counter claiming for \$400,000 under the contract as liquidated damages for unjustified delay in finishing the project.

[7] An adjudicator was appointed and the parties submitted their cases. Under the Act the adjudicator has wide powers to thereafter control the procedure, seek more information and appoint an expert. The adjudicator must determine the dispute within 20 working days of receiving the final response submissions.

[8] Finally by way of overview it is necessary to note that an adjudicator's decision is not final in the sense that it does not determine ultimate liability. What it does is settle the cashflow issue – who must pay how much on an interim basis until the dispute is finally sorted out in whatever forum the parties choose. Thus, for example, a claim for breach of the contract can still be brought in the Courts about the same subject matter, concurrently or subsequent to an adjudication.

What happened here, and Horizon's complaint

[9] Parker succeeded essentially because the adjudicator concluded that the Payment Schedules provided by Horizon did not meet the Act's requirements and so were invalid. In terms of the Act, Horizon had therefore to pay the claim in full.

[10] The Payment Schedules ruled invalid by the adjudicator had put in issue all of the unpaid amounts, saying for example that some of the work had never been done or had been double counted. Because of her conclusion that the “form” of the Schedules was inadequate, the adjudicator did not determine any of these disputes advanced by Horizon. Nor were other matters advanced by the parties the subject of a ruling. In particular, the parties had also submitted:

- by Parker a request for a ruling that it was entitled to time allowances under the contract. Some but not all of these allowances were already part of the payment claim;
- by Horizon the claim for liquidated damages for delay. In effect, if the time allowances claimed by Parker were not given, there was inevitably delay by Parker that meant Horizon was entitled to liquidated damages under the contract.

[11] In refusing to decide these further matters, the adjudicator stated that she had insufficient material and that the format of adjudication was inappropriate for those disputes. For example viva voce evidence would be required.

[12] Against that background, Horizon complains first that whether its Payment Schedules complied with the Act was not a dispute of which the adjudicator was seized. Parker had not raised it and indeed both parties has expressly accepted that they were valid schedules. It is said that it was not therefore open to the adjudicator of her own motion to decide the matter on this basis. Alternatively, if an adjudicator was allowed to initiate an issue such as this, proper notice and an opportunity to make submissions had to be given, and was not.

[13] Second, Horizon submits that the adjudicator had a statutory obligation to determine the issues put before her. In particular, the validity of Horizon’s challenges to the claims had to be determined at the same time because by agreement the two claims had been consolidated under s40 of the Act. The liquidated damages claim was both a counter to aspects of Parker’s payments claims, and also a claim in its own right. It also had to be determined at the same time.

[14] Finally Horizon submits that the outcome of the adjudication was unreasonable and based on errors of law. The adjudicator misunderstood the Act and the authorities concerning it, and erred in her assessment of the requirements for a 'Payment Schedule'. The sum awarded was not the sum claimed and is a figure that neither party can explain. Whilst not a pivotal point, it is submitted that the unexplained figure is an indicia of a lack of understanding on the part of the adjudicator that casts doubt on the whole ruling.

[15] The respondent seeks to uphold the ruling. It is submitted that the payment schedules were in dispute in the sense that Parker's application was that its claims must be paid in full, and that this therefore inherently involved a challenge to the Schedules. If not, it is anyway submitted the adjudicator must apply the Act and so can initiate the issue. Concerning notice it is said that Horizon's schedules are plainly non-compliant and so an opportunity for submissions could have made no difference. Relief therefore should be declined.

[16] Concerning the correctness of the decision, Mr Cleary submitted that once the Payment Schedules were rightly held invalid the other matters fell away. A valid payment claim had been made and Parker was entitled to its money. This was required by the Act and was not affected by the decision of the adjudicator not to deal with the time allowances and liquidated damages.

[17] More generally Mr Cleary made submissions on the scheme of the Act which would support the right of the adjudicator not to determine the issues. Concerning the awarded sum, Mr Cleary sought to explain how the figure was reached, but submitted anyway that it was an error of fact that was not reviewable.

[18] For reasons that will become apparent I consider it is not necessary to go beyond the natural justice challenge. Consideration of the scope of the adjudicator's function, and the ability of an adjudicator to decline to rule on a matter, should await an occasion where it is decisive in a case.

The natural justice challenge

Issue one: to what extent was the payment schedule in issue?

[19] In my view it is beyond dispute that the parties did not contest the validity of the format of the Schedules and their compliance with the Act. Parker certainly queried whether they had been supplied in time, but not whether they were actually valid Schedules. There are several factors which establish that the form of the Schedules was not an issue.

[20] First, it was not advanced by Parker as an express ground of challenge. Parker challenged the timing of the schedules, but not their form.

[21] Second, at no point did Parker claim it did not understand the nature of the dispute or the reasons why Horizon was not paying the claims in full.

[22] Third, Parker's own adjudication sought a ruling that:

"The Owner pay the Claimant all the Claimant's outstanding claims or, if the adjudicator finds the Owner has lawful claims in opposition thereto, such amounts as remain owing after those Owner claims are taken into account."

[23] This adjudication was filed in advance of Horizon's. It illustrates that Parker knew there would be challenges in response to it adjudication. Any challenge to Horizon's compliance with the form requirements of the Act would surely have been made then.

[24] Fourth, Horizon had filed a statement of issues which were in these terms:

- (i) *Is PCM's claim for those items which Horizon has characterised as 'Work Not Yet Started' justified?*
- (ii) *Is PCM's claim for those items which Horizon has characterised as 'Work That Has Been Double Counted' justified?*
- (iii) *Is PCM's claim for those items which Horizon has characterised as 'Variations using excessive rates' justified?*

- (iv) *Is PCM's claim for those items which Horizon has characterised as 'Work which has not been completed' justified?*
- (v) *Is PCM's claim for those items which Horizon has characterised as 'Work in respect of which insufficient information has been provided' justified?*
- (vi) *Is PCM's claim for those items which Horizon has characterised as 'Claims for variations where there is no entitlement' justified?*
- (vii) *Has PCM proven, with sufficient evidence, that it is entitled to extensions of time due to one or more of the stated contractual grounds?*
- (viii) *If so, has PCM proven that it is entitled to an extension of time in excess of the 80 days already granted?*
- (ix) *If so, what is the number of days?*
- (x) *Is PCM entitled to claim for increased costs under clause 60 of the contract or is it precluded by clause 60.3?*
- (xi) *If PCM is not precluded by clause 60.3, is it limited to increased costs in respect of the period for which it has proven an entitlement to an extension of time?*
- (xii) *Is Horizon entitled to levy liquidated damages for late completion?*
- (xiii) *If so, for what number of days, taking into account any extensions of time to which PCM has proven an entitlement?"*

[25] Parker did not itself file a statement of issues but its response was set out in an affidavit of one of its witnesses:

"Generally Hazelton Law's summary of issues is very good and presents what needs to be decided. Items 1-4 these items probably don't need to be decided at this adjudication but can be worked through the normal process between PCM and Mallard Cooke as it has been stated it will take a "month of Sundays" to sort this out. But it is believed that Mallard Cooke will be unbiased and have generally been unbiased as far as Stephenson & Turner will let them. Item 5 this unfortunately has been used by Stephenson & Turner continuously to deny what PCM are entitled to and to hide their own inadequacies i.e. "insufficient information to assess" when the reality is they do not want to accept responsibility for their action or inaction. Items 7-13 are the real issues that need to be resolved. Who has caused the delays?"

[26] There is in that response no mention of a challenge to the form of the Schedules. Finally for completeness it can be noted that neither did the parties' submissions to the adjudicator made any mention of the validity of the form of the

Schedules. Horizon's documents were consistently referred to as Payment Schedules by both parties.

Issue two – was the adjudicator obliged to give notice?

[27] Section 41 of the Act sets out the duties of an adjudicator. Section 41(4) provides that an adjudicator must:

Comply with the principles of natural justice.

[28] It is plain, I consider, that if an adjudicator decides to determine an adjudication on the basis of an issue not submitted to her by either party, and concerning which the parties have provided no specifically focussed evidence nor had an opportunity to make submissions, adequate notice must be given and an appropriate opportunity afforded to do those things.

Issue three: was notice given?

[29] The adjudicator issued a Minute seeking further information. One question asked in the Minute was:

“Do the parties agree that each of the certificates issued by Stephenson & Turner, as identified in the table are payment schedules in form and substance in terms of the Act, apart from the question of timing?”

[30] Horizon responded:

“Horizon accepts that the certificates issued by S and T are payment schedules in terms of the Construction Contracts Act 2002”.

[31] Parker responded:

“The certificates from S and T [the architects] were proper payment schedules in form but not in substance where they did not make proper allowance for PCM time and allowance claims.”

[32] If question 10 was intended by the adjudicator to put in issue the form of the Schedules, and whether they were Act compliant, it palpably failed. Horizon read

the question as it needing to confirm that the “Certificates” were the Payment Schedules contemplated by the Act.

[33] Parker’s response perhaps better anticipated the future direction of the adjudication by commenting of the form of the Schedules, but it did so only to say they were compliant from its viewpoint.

[34] It can I consider be stated at this stage that:

1. the parties at no time put the form of the payment schedules in issue;
2. there was an obligation on the adjudicator to give notice of her intention to look at the form of the Schedules as a potentially decisive point;
3. no adequate notice was given.

[35] Two consequent issues arise – was it open at all to the adjudicator to look at the issue. If so, would notice have made any difference such that a remedy on review could properly be denied?

Issue four: was the adjudicator permitted to consider the validity of the Schedules?

[36] If the parties did not put in issue compliance with statutory requirements, could the adjudicator do so of her own motion? The starting point is s38 of the Act which sets out the jurisdiction of adjudicators. It provides:

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, 49(1)(c), and 50(1)(c);
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).

[37] Also relevant is s48:

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.

(2) If no amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine any questions in dispute about the rights and obligations of the parties under that contract.

(3) If an adjudicator determines under subsection (1)(a) that a party to the adjudication is liable, or will be liable if certain conditions are met, to make a payment, the adjudicator—

(a) must also determine—

(i) the amount payable or conditionally payable; and

(ii) the date on which that amount became or becomes payable; and

(b) may determine that the liability of a party to the adjudication to make a payment depends on certain conditions being met.

[38] In the present case the matters that were referred to the adjudicator were:

- Parker's claim to be entitled to receive the "payment claim" sums that had been withheld. This claim and Horizon's response inevitably involved assessment of the reasons why Horizon had withheld payment;
- Parker's claim to time allowances to the extent that they were not already dealt with by its payment claims;
- Horizon's claim to liquidated damages.

[39] The jurisdiction of an adjudicator is defined in s38 in terms of the dispute that has been referred. Dispute is in turn defined as a dispute or difference that arises under a construction contract. Bayley and Kennedy-Grant (A Guide to the Construction Contracts Act, Rawlinsons Media Ltd, 2003) cite at paragraph 10.2.2 an English decision *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168. That case discusses the concept of dispute, and the Court emphasises it is a factual matter as to what was referred to the adjudicator – what claim, head of claim, issues, contentions or causes of actions have been referred.

[40] In one sense the answer depends upon the level of specificity with which one describes the dispute. At its broadest, the approach urged by Mr Cleary, in this case it is whether the payment claims must be paid in full. However, I consider such an approach pays too little regard to the purposes of the Act. It is to provide the parties with a means of quick decisions that facilitate cash flow pending more final determination by whatever means the parties choose. It makes some sense then to respect the capacity of the parties to identify what points of dispute they would like an answer on. Here not only was the form of Schedule not in issue, Parker expressly disclaimed any such challenge when asked.

[41] It is true that the Act does not allow contracting out, but that does not mean the parties must put in issue the form of the Payment Schedule if they prefer not to. The dangers in moving outside the dispute submitted by the parties is apparent here; a matter they did not want decided has been. If considered by a proper process, delays were inevitable in order to allow preparation by the parties of further submissions and evidence. Further, all this may perhaps have been to get to the point the parties were at anyway, namely that the Schedules were valid. At the same time the matters that were submitted have been left unresolved.

[42] I consider it was not open to the adjudicator on the dispute that was referred to her to consider the validity of the form of the Schedules.

Issue five: if notice had been given, would it have made a difference?

[43] In the event that I am wrong in my conclusion on the last issue, which is otherwise determinative, I move on to consider whether the giving of proper notice would have made a difference. The defendant submits that if the adjudicator was legitimately seized of the issue, there could only be one answer, namely that Horizon's Payment Schedules were non-compliant and invalid. Notice would have made no difference.

[44] Mr Johnston for Horizon accepted that no single document met the Act's requirements but submitted that if one looked at the process followed for each claim, the documents exchanged in relation to each claim, and the discussions had between the parties, it was plain that the spirit of the Act's requirements were met. He drew support for this approach from *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA).

[45] In *Canam* the issue was whether the Payment Claim, as opposed to the Payment Schedule, met the requirements of the Act. The specific issues were whether a monthly claim could include work done outside the period; if so, did that work need to be itemised; and could the claim include non physical work, namely a claim for an extension of time. The overall issue was whether the payment claim met the Act's requirements so as to trigger the Act's processes.

[46] The Court began its discussion by noting that although the requirements are mandatory, technical quibbles will not raise concerns. The Court stated:

[43] We acknowledge that the approach of this appellant was not as pedantic as those confronting Windeyer J, but the general observation that technical quibbles should not be allowed to vitiate a payment claim that substantively complies with the requirements of the Act is critical and needs to be weighed alongside the "technocratic" interpretation advanced by George.

[47] In determining whether compliance had occurred, the Court placed weight on the fact that the owner as recipient of the claim had options to seek clarification, and had not in that case complained about the format or comprehensibility of any of the previous claims. Generally, it is fair to say the Court focussed on whether the

purpose underlying the Act's requirements were met rather than on whether there was a direct correspondence between a particular document and the Act's requirements.

[48] Turning to the present case, it is convenient to focus on claim 28 which is a cumulative claim incorporating the then current month plus previously unpaid sums. Parker's document is intitled Payment Claim 28, and is stated to be a Payment Claim under the Construction Contracts Act 2002. It states reasonably plainly on its face that it is a claim for \$1,258,925.11 (GST inclusive). There then follows a line item formula, the structure of which no doubt relates to equivalent line items in the contract.

[49] Concerning the Payment Schedule, there is no document so intitled. There is a document called a Payment Certificate which takes its name from the term used in the contract, and which sets out the final response to the payment claim. It describes itself as comprising "part or all of a payment schedule under the Construction Contracts Act 2002" but analyses the monthly claim as a percentage of the whole contract price rather than considering only the specific month. On this single page there is no figure that corresponds to the monthly Payment Claim.

[50] However, other documents are more informative. There is, for example, a version of Parker's Payment Claim which has had a column added that sets out Horizon's variations to each line item, together with a brief description of why there is a difference: e.g. – "overclaimed", or "no work completed". There then follows a series of detailed sheets setting out further information in a very detailed way.

[51] The Court's role at this stage is to respond to the defendant's proposition that proper notice would have made no difference. I am far from reaching that viewpoint. Submissions have not explained all the documents in detail, nor whether they were provided to the other party, when that happened and what each other's knowledge was. However, it seems plain that there is material on which Horizon could have mounted an argument that the documentation met the requirements of the Act as interpreted in *Canam*. That conclusion is reinforced by the reality that Parker never complained of the lack of proper form. It may be that it never occurred to

them or it may be that the reality was that the parties knew exactly each other's position.

[52] In saying that Horizon should have had an opportunity to present its argument, I am not to be taken as endorsing the proposition that as long as the material can be found somewhere in the paperwork, the Act's requirements are met. I consider that the bench in *Canam* would be surprised to see its decision used for that broad a proposition. Whether the present information is sufficiently gathered in a reasonably comprehensible form that explains clearly "the dispute" between the parties is an issue that need not be determined by this Court on this occasion. What this judgment is saying is that I am satisfied it cannot be said Horizon must have failed in its endeavour to establish that there was a legitimate Payment Schedule. It should have had the opportunity to make out its argument and it was not given that. I am accordingly satisfied the determination was reached in breach of natural justice and cannot stand. If there are valid Payment Schedules then the parties were entitled to a determination in relation to the matters in dispute. They have not had that.

Conclusion

[53] The award must be set aside. Mr Cleary advanced an argument that is plain that some further money is owing and consistent with the purposes of the Act the award should stand. However, the merits of the dispute are not a matter for this Court on these proceedings. Probably through misunderstanding there has been a clear breach of natural justice. That occurred in relation to the very basis on which the award was made, and cannot be ignored. There is no reason not to give the plaintiff its appropriate remedy which is to quash the award.

[54] The adjudications remain undetermined. I consider given the scheme of the Act, and the elapsing of time, that the best course is to allow the parties to determine whether the claims will be referred back to the adjudicator.

[55] The plaintiff is entitled to costs on a 2B basis, with reasonable disbursements to be fixed by the Registrar if necessary. Since no express submissions were made on costs, leave is given to either party to file a memorandum within two weeks if it

contends for a different costs outcome. The other party has one week to file a response.

Simon France J

In accordance with r540(4) I direct the Registrar to endorse this judgment with the delivery time of 4.45pm on the 4th day of April 2007.

Solicitors:

Hazelton Law, Wellington for the Plaintiff

R Williams, Petone for First Defendant

