#93

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-00106

UNDER	the Judicature Amendment Act 1972
AND UNDER	the Declaratory Judgments Act 1908
BETWEEN	ORIGIN ENERGY RESOURCES (KUPE) LIMITED Plaintiff
AND	TENIX ALLIANCE NEW ZEALAND LIMITED First Defendant
AND	JOHN GREEN Second Defendant

Hearing: 19 January 2010

Counsel: M D O'Brien and T M Horder for the plaintiff
B Keene QC and C J Booth for first defendant

Judgment: 19 January 2010

(ORAL) JUDGMENT OF POTTER J

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Introduction

[1] By an interlocutory application dated 18 January 2010 the plaintiff Origin Energy Resources (Kupe) Limited ("Origin") seeks an order from the Court:

> Pending further order of the Court, prohibiting the defendants from proceeding with any adjudication under the Construction Contracts Act 2002 in respect of any disputes under or in connection with the first defendant's subcontract with the plaintiff (as disclosed agents for the Kupe Joint Venture Parties) and Technip Singapore Pte Limited and dated 4 March 2008.

[2] The application is opposed by the first defendant, Tenix Alliance New Zealand Limited ("Tenix") in a notice of opposition dated 19 January 2010 filed in Court today.

[3] In submissions this morning Mr O'Brien for Origin raised a further issue, namely that Origin claims a conflict of interest by Kensington Swan, solicitors for Tenix, in respect of which Mr O'Brien advised that proceedings will be filed forthwith. Mr Keene QC, representing Tenix, had no details of that proposed proceeding. It is an issue I cannot advance today. Mr O'Brien, in fairness to him, raised the issue simply to explain to the Court this additional complexity in the background to the application.

The issue

[4] As I have discussed with counsel this morning, the issue for the Court is whether to grant the order sought on an interim and short term basis to enable the jurisdictional dispute that gives rise to the application to be heard and determined in this Court at some date in February 2010, or whether the Court should decline the application so the processes under the Construction Contracts Act 2002 ("the Act") which have already been commenced and are in train, can proceed to determination by the adjudicator who has been appointed and is the second defendant named in the interlocutory application.

Background

[5] I shall briefly summarise the background that gives rise to the matter now before the Court.

[6] The dispute between the parties arises in relation to the Kupe Gas Project for development of the Kupe field located offshore from Taranaki.

[7] Origin operates a Petroleum Mining Licence 38146 issued by the Crown in respect of the Kupe field and is the agent for the eight joint venture parties (including Origin) involved in the Kupe Gas Project.

[8] Origin as agent for the Kupe joint venture parties has entered into a Project Alliance Agreement dated 7 September 2008 ("the Alliance Agreement") with:

a) Technip Singapore Limited of Singapore as contractor;

b) Technip Geoproduction of Malaysia as guarantor; and

c) Technip Oceania Pty Ltd of Australia as nominated subcontractor.

[9] The Alliance Agreement relates to the design, engineering and commissioning of the facilities to produce the Kupe field.

[10] Origin, Technip Singapore and Tenix are parties to a subcontract dated 4 March 2008 ("the subcontract") pursuant to which Tenix agreed to install mechanical piping for gas and related products for the Kupe Gas Project.

[11] Disputes have arisen between the parties under the subcontract.

[12] The statement of claim alleges that Tenix purported to submit on or about 28 October and 3 December 2009 the last two Monthly Financial Status Reports ("MFSR's") respectively claiming payment of some $33m and $61m. Validity of those MFSR's and the underlying sums claimed are disputed by the Alliance (Origin and Technip Singapore). It is alleged in the statement of claim that amounts in

excess of period payment claims which total roughly $4m, cannot properly form part of a payment claim under the Act and are not in the nature of a progress claim contemplated by the Act. Nevertheless Mr O'Brien accepted in submissions that this is an adjudication issue.

[13] Article 7.2 of the Particular Terms and Conditions of the subcontract sets out the process for resolving disputes, differences or questions. Article 7.2(b) provides for a 60 day process for the attempted resolution of disputes. Article 7.2(c) provides for any dispute not resolved by that process to be settled by an arbitration under the Arbitration Act 1996 and the Rules of Arbitration of the International Chamber of Commerce.

[14] Section 25(1) of the Act provides that any party to a construction contract has the right to refer a dispute to adjudication, which is the process invoked by Tenix in this case. Sections 25(3) and (4) of the Act provide an exception to the right of a party to a construction contract to refer disputes to adjudication without the consent of the other party, if the parties have agreed to refer disputes to arbitration and the arbitration is an international arbitration as defined in article 1(3) of Schedule 1 of the Arbitration Act 1996.

[15] Origin contends that the dispute in this case is governed in accordance with the agreement between the parties in the subcontract, by the Arbitration Act 1996 because this is an international arbitration as defined in Schedule 1 of the Arbitration Act 1996. Accordingly in the two causes of action pleaded in the statement of claim, Origin alleges illegality and error of law in Tenix initiating and the adjudicator entering into and exercising, adjudication jurisdiction under the Act.

[16] It is unnecessary for me to detail the precise bases upon which the allegations are made. However, they include an allegation that there is no "construction contract" between Origin and Tenix as Origin is acting only as agent for the joint venture parties to whom the notices of adjudication are not addressed and who have not been served.

Submissions

[17] Mr O'Brien in oral submission, submitted that the adjudication process that has been invoked and has led to the appointment of an adjudicator, Mr Green, the second defendant, provides pressure which is unhelpful to the proper determination of the present issues before the Court. He notes there is no express power under the Act for the adjudicator to determine his jurisdiction, which is in contrast to the position of an arbitrator under the Arbitration Act who is vested expressly with that power. He submitted that it is a waste of time and cost for this matter to proceed via the adjudicator; the adjudicator will have to interpret the construction contract; that will raise the question: Is there an arbitration agreement?; the answer, he said, is clearly yes, and the issue becomes one of interpretation of the relevant provisions of the Arbitration Act.

[18] He referred to the judgment in *Patel v Pearson Group Limited* HC WN CIV 2008-485-2571, as did Mr Keene, a judgment to which I shall refer further shortly.

[19] Mr O'Brien submitted that the issue of jurisdiction is expressly within the ambit of the Judicature Amendment Act 1972 under which the application for interim relief is brought, and that such an application can be made at any time. He submitted it is logical that this issue comes first to the High Court for determination rather than being left in the first instance for adjudication by the adjudicator whose determination could only be provisional. He submitted that Origin should not be subjected to that process which is not suited to the nature of this dispute, and that ultimately determination by the High Court of the jurisdictional issue will save both parties time and cost.

[20] Mr Keene submitted that the order sought by Origin will interfere with the adjudication process expressly provided by the Act. He submitted that Origin, following the adjudicator's determination on jurisdiction, can exercise its rights in respect of that determination, including the right to judicially review it. He submitted that the two matters raised by Origin, namely the jurisdiction issue and the conflict of interest issue are likely to significantly delay progress, and are unlikely to be resolved by a February hearing. Thus, the aim of the Act, which is a swift and

inexpensive process leading to prompt determination, will be denied Tenix and the purpose of the Act will be frustrated. He submitted that the adjudicator should first address the jurisdictional issues, leaving Origin with appropriate rights to review if it is dissatisfied with the adjudicator's determination.

Discussion

[21] Both parties, as I have said, referred to the judgment of Miller J in *Patel v Pearson*. That case concerned whether there was a construction contract made between the parties claimed. At [37] Miller J addressed the issue: can an adjudicator determine his or her jurisdiction? He noted at [38] that the legislation (the Act), does not prove explicitly that the adjudicator may determine jurisdiction, which distinguishes it from the Arbitration Act 1996 which, under article 16 of the First Schedule, provides that authority. He noted the Act contemplates that the adjudicator will interpret the construction contract and deal with ancillary matters. At [42] he referred to a number of English decisions.

[22] Mr O'Brien referred specifically to this paragraph and also to the extract from *Keating on Construction Contracts* 8th ed (Sweet & Maxwell, London, 2006) to which Miller J referred at [42]. *Keating* states at 17-019:

> As a matter of practice where the adjudicator's jurisdiction is contested it is submitted that the appropriate approach is for the adjudicator to enquire into his jurisdiction and if he is satisfied that he has jurisdiction he should continue the adjudication unless and until the court orders otherwise.

Deviating slightly from consideration of the judgment in *Patel v Pearson,* I note that Mr O'Brien's emphasis was on the words "unless and until". He submitted that it is appropriate for the High Court to intervene at any stage of the process which will arrest the process to adjudication under the Act if the determination of the High Court is that the adjudicator lacks jurisdiction.

[23] At [44] Miller J noted that the approach to jurisdiction taken by the English Courts is consistent with the decisions in *Stellar Projects Limited v Nick Gaja Pluming Limited* HC AK CIV 2005-404-6984 10 April 2006 and *LSB Limited v Loader* DC HAM CIV 2008-019-1041 26 September 2008. He said it recognises

that an adjudicator's powers under the legislation depend on the existence of a construction contract and a dispute under that contract that has been referred to adjudication. If those prerequisites have not been met, there can be no lawful adjudication. That is recognised in ss 73 and 74 of the Act.

[24] At [45] he said:

> ... the legislature contemplated that adjudicators will determine matters going to jurisdiction, and that the District Court will become involved only after the adjudication has been completed. The entire point of the legislation is prompt and inexpensive dispute resolution.

For those reasons, he said:

> I accept that an adjudication and resulting determination are provisionally binding until this Court on judicial review, or the District Court under s 74, determines otherwise.

[25] While I accept Mr O'Brien's submission that there is no reason why the High Court should not intervene at any stage of the process on an application to determine an issue of jurisdiction under a contract which is subject to the Act, the Act provides a process for adjudication and does, inferentially, accept that the adjudication will determine issues of jurisdiction in the first instance.

[26] In this case the matter has been progressed to the point where an adjudicator has been appointed, the parties being unable to agree upon one, and Mr Green has indicated that he will determine the issue of jurisdiction. He has made timetable orders to place the matter before him for adjudication within the tight timeframe contemplated by the Act.

[27] I consider the appropriate procedure is for the matter to proceed to adjudication before the appointed adjudicator, for the parties to make their submissions to the adjudicator and for him to determine the issue of jurisdiction as he thinks fit. Depending on the outcome of that determination the matter may well come back to the High Court on an application for judicial review by Origin or possibly by Tenix. The High Court will then be asked to review the determination of the adjudicator and will have the benefit of his adjudication and the reasons for it.

[28] I accept that in the long run this process may prove more time consuming than the one Origin seeks to implement by means of the order it has sought from the Court in its interlocutory application, but I consider it is the appropriate process given the purpose and intent of the Act.

Result

[29] Accordingly the application by Origin is declined.

[30] Having reached that decision, I commend to the parties a co-operative response to agreeing amendments to the timetable orders made by the adjudicator to ensure that both parties have reasonable opportunity to place their submissions and the factual aspects of this matter, which are important, fully and properly before the adjudicator. Otherwise his determination will not have the value I consider it should.

[31] Costs are reserved. Costs should follow the event. If the parties cannot agree costs, memoranda may be filed for my consideration and determination.