

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

CIV 2008-485-2571

UNDER the District Courts Act 1947
IN THE MATTER OF an appeal against a judgment of the District
Court at Wellington dated 24 October 2008
BETWEEN KALPANA PATEL
Appellant
AND PEARSON GROUP LIMITED
Respondent

Hearing: 25 March 2009

Counsel: R Poutawera for the Appellant
B Sheehan and J Pulla for the Respondent

Judgment: 24 April 2009

JUDGMENT OF MILLER J

Introduction

[1] Construction contracts often lead to disputes. In the Construction Contracts Act 2002, the legislature created a mechanism allowing parties to such contracts to have their disputes determined quickly and inexpensively by adjudicators, whose determinations may be entered as judgments of the District Court.

[2] A defendant who wishes to oppose entry of a determination as a judgment must apply for an order that entry be refused. One of the available grounds is that the contract to which the adjudicator's determination relates is not a construction contract to which the Act applies.

[3] In this appeal from a District Court decision that a determination should be entered as a judgment, Ms Patel argues that entry ought to have been refused because there was no contract, of any sort, between her and Pearson Group Limited. Rather, the builder was Mr Andrew Pearson, the director and principal shareholder of Pearson Group Limited.

The narrative

[4] Ms Patel owns the Ngaio Supermarket and Discount Liquor Store, at 1 Khandallah Road, Ngaio. She lives upstairs. In early 2007 she decided to extend the liquor shop and have some alterations done to the dwelling areas. In June she entered a contract with Andrew Pearson to carry out the work on a time and materials basis. Mr Pearson was leaving his employer and setting up his own business at the time.

[5] Mr Pearson began work on 16 July 2007. He delivered five invoices, on 29 July, 23 August, 23 November, 3 December 2007, and 10 January 2008. All of these invoices were headed "Pearson Group Building Contractors". They contained no reference to a company.

[6] On 24 October 2007 Mr Pearson incorporated Pearson Group Limited. He is the sole director and owns 99 of the 100 shares.

[7] Mr Pearson stopped work on 20 December. By that time Ms Patel had paid \$58,661.97, but she and Mr Pearson had fallen out. She complained about the cost and quality of the work. He says she confessed she lacked the money to pay the invoice of 3 December 2007.

[8] On 17 April 2008, Pearson Group Limited launched an adjudication under the Construction Contracts Act. It is common ground that the summary of claim which doubled as a notice of adjudication under s 28 of the Construction Contracts Act contained the first mention of the company. Paragraph 1 of the claim claimed that at all material times, Andrew Pearson was the director of the claimant, Pearson Group Limited, and was acting on its behalf.

[9] John Adam of Structon Group Limited was appointed adjudicator by agreement.

[10] Ms Patel filed a response to the claim through her then solicitor, Mr Langford. In paragraph 1 she accepted that Mr Pearson was the director of the claimant and was acting for and on behalf of the claimant. In paragraph 2, she admitted that she “contracted the Claimant” to complete the alterations.

[11] The adjudication did not proceed as quickly as the adjudicator and the claimant would have liked, partly because Ms Patel did not pay her share of a deposit that Mr Adam had sought on his fees. Eventually the claimant paid her share.

[12] Mr Adam decided to hold a conference with the parties, and it was agreed that lawyers would not be present. The conference was arranged for 10 July. Mr Adam specified that the conference would deal only with evidence already submitted. However, Mr Langford sought a postponement to allow Ms Patel to present further information. Mr Adam reluctantly agreed, and the further evidence was filed. The conference was held on Thursday 17 July.

[13] Ms Patel changed solicitors shortly before the conference. She appeared with a written submission prepared by Hazelton Law, and tried to present it towards the end of the conference. The submission asserted there was no contract between Pearson Group Limited and Ms Patel, because the company had not been incorporated until 24 October 2007. The adjudicator considered the submission and decided it was a last minute attempt to ambush proceedings. He refused to receive it.

[14] Hazelton Law immediately complained, saying the adjudicator was without jurisdiction. Mr Adam responded that the points were not raised in Ms Patel’s original response, and before the conference he had made it clear to both parties that discussions would be based on the documents already submitted.

The determination

[15] In his determination, which was dated 28 July 2008, Mr Adam stated that Pearson Group Limited and Ms Patel were parties to an oral contract entered on or about 27 June 2007 for alterations to a shop in Khandallah. The total value of claims was \$102,142.40, including GST. The contract was a cost plus contract using an hourly charge out rate of \$40 for labour with a margin of 10% on labour and materials. He found that the true cost of the works was in the order of \$110,000.00, including GST. Accordingly, the claimant succeeded.

[16] Mr Adam recorded that he had given scant attention to the assertion that the oral contract was invalid. The fact that the builder was not a registered company at the time of the agreement was irrelevant. There was no attempt to deceive Ms Patel, who was not disadvantaged in any way whatever. She was fully aware that she was dealing with the company, and all progress claims were issued as tax invoices in its name.

[17] It is common ground that Mr Adam was in error. Ms Patel did not know she was dealing with the company until she received the notice of adjudication, and progress claims were not issued in its name.

The District Court decision

[18] Pearson Group Limited applied to have the determination entered as a judgment. Ms Patel filed an opposition, which the Judge treated as an application under s 74. Ms Patel contended there was no contact with Pearson Group Limited, so the contract to which the determination related was not a construction contract to which the Act applied.

[19] The Judge accepted for purposes of the decision that the contract was made between Mr Pearson personally and Ms Patel. But s 74(2)(b) required no more than the identification of the subject matter of the contract, with the proper parties to that contract being a different issue. It was not for the District Court to, in effect, sit on appeal or judicially review an adjudicator's decision as to who the parties were. That would be against the general scheme and purpose of the Act, which is aimed at swift dispute resolution.

The legislation

[20] The purpose of the Construction Contracts Act is to facilitate regular and timely payments between the parties to a construction contract, to provide for the speedy resolution of disputes arising under a construction contract, and to provide remedies for the recovery of payments under a construction contract. The term “construction contract” is defined to mean a commercial construction contract or a residential construction contract, which terms are further defined, and “construction work” is also defined. “Dispute” means a dispute or difference that arises under a construction contract. “Claimant” means a party to a construction contract who refers a dispute to adjudication, and “respondent” means a party to a construction contract against whom a claim is made in an adjudication. “Adjudication” means an adjudication under the Act.

[21] Under s 28, an adjudication is initiated by the claimant serving written notice of its intention to refer a dispute for adjudication. The notice must be served on the other party or parties to the construction contract, and the owner if the owner is said to be liable or at risk of a charging order. (Under s30 a claimant may seek a determination that an owner who is not a respondent is jointly and severally liable with the respondent to make a payment to the complainant.)

[22] The notice having been served, an adjudicator is appointed by agreement or, in default, by an authorised nominating body chosen by the claimant. The claimant must then refer the dispute in writing to the adjudicator under s 36, subsection (2) of which provides:

- (2) The adjudication claim—
 - (a) must specify the nature or the grounds of the dispute and, to the extent that it remains relevant, be accompanied by a copy of the notice of adjudication; and
 - (b) may be accompanied by any other documents.

[23] Under s 37, a respondent may serve a written response, which may be accompanied by any other documents.

[24] The adjudicator's jurisdiction "in relation to any dispute that has been referred to adjudication" is limited under s 38(1)(a) to determining the matters referred to in ss 48, 49(1)(c) and 50(1)(c), and under s 38(1)(b) to "any other matters that are of a consequential or ancillary nature necessary to exercise or complete the exercise of the jurisdiction conferred" by s 38(1)(a). Jurisdiction may be extended by the parties at any time, by written agreement, to determine any matters in addition to those mentioned in s 38(1).

[25] Under s 48 the adjudicator must determine the parties' rights and obligations "under the relevant construction contract":

(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.

(4) Despite subsections (1) and (2), an adjudicator is not required to determine a dispute that has been withdrawn in accordance with section 39.

(5) If a dispute is settled by agreement between the parties before the adjudicator's determination is given, the adjudicator—

- (a) must terminate the adjudication proceedings; and
- (b) if requested by the parties, may record the settlement in the form of a determination on agreed terms.

[26] Sections 49(1)(c) and 50(1)(c) deal respectively with the issue of charging orders over land owned by the respondent and the determination of the liability of an owner who is an associate of the respondent. They anticipate that the adjudicator may determine that the owner or the respondent is liable to pay a sum of money claimed in the adjudication.

[27] The adjudicator's procedural powers are found in s 42:

- (1) An adjudicator may—
 - (a) conduct the adjudication in any manner that he or she thinks fit; and
 - (b) request further written submissions from the parties to the adjudication, but must give the relevant parties an opportunity to comment on those submissions; and
 - (c) request the parties to the adjudication to provide copies of any documents that he or she may reasonably require; and
 - (d) set deadlines for further submissions and comments by the parties; and
 - (e) appoint an expert adviser to report on specific issues (as long as the parties are notified before the appointment is made); and
 - (f) call a conference of the parties; and
 - (g) carry out an inspection of any construction work or any other thing to which the dispute relates (as long as the consent of the owner or occupier is obtained before entry to any land or premises is made and, if the owner or occupier is a party to the adjudication, that party's consent must not be unreasonably withheld); and
 - (h) request the parties to do any other thing during the course of an adjudication that he or she considers may reasonably be required to enable the effective and complete determination of the questions that have arisen in the adjudication; and
 - (i) issue any other reasonable directions that relate to the conduct of the adjudication.
- (2) The parties to the adjudication must comply with any request or direction of the adjudicator made or given in accordance with this section.

[28] Under s 41, adjudicators must act independently, impartially, and in a timely manner, and must comply with the principles of natural justice.

[29] Section 45 limits the material and information that an adjudicator may consider:

In determining a dispute, an adjudicator must consider only the following matters:

- (a) the provisions of this Act:
- (b) the provisions of the construction contract to which the dispute relates:
- (c) the adjudication claim referred to in section 36, together with all submissions (including relevant documentation) that have been made by the claimant:
- (d) the respondent's response (if any) referred to in section 37, together with all submissions (including relevant documentation) that have been made by the respondent:
- (e) the report of the experts appointed to advise on specific issues (if any):
- (f) the results of any inspection carried out by the adjudicator:
- (g) any other matters that the adjudicator reasonably considers to be relevant.

[30] The legislation accordingly anticipates that the adjudicator will determine the dispute on the basis of the adjudication claim and response, together with all submissions (including documentation) by the claimant and respondent. No distinction is drawn between pleadings and evidence, and it is not necessary that submissions be filed. The Act envisages that supporting documents may be filed as part of the claim or response, or with submissions. There need not be a conference of the parties, and there is no provision for an oral hearing in the sense of a trial. The adjudicator is given broad discretion to conduct the adjudication as he or she thinks fit.

[31] There is no right of appeal for the claimant and respondent, although an owner who is not a respondent may apply to the District Court for review of a determination as to the owner's liability.

[32] Sections 73 establishes which determinations may be entered as judgments. It provides so far as relevant:

(1) This section applies if an adjudicator determines that a party to the adjudication is liable, or will be liable if certain conditions are met, to pay another party either or both of the following:

- (a) an amount of money under the construction contract:
- (b) any costs and expenses incurred in the adjudication (including any amount of contribution to the adjudicator's fees and expenses that the adjudicator has determined is payable by one party but that has been paid by another party).

(2) If this section applies, a plaintiff may apply for the adjudicator's determination in respect of the matters referred to in subsection (1) to be enforced by entry as a judgment in accordance with this subpart.

[33] The application must be served on the 'defendant'. It is implicit in s 73 that the defendant is the party liable to pay under the determination. Section 74 allows the Court to order, on the defendant's application, that a determination not be entered as a judgment on specific grounds:

(1) If the defendant wishes to oppose the application under section 73, the defendant must, within 15 working days after the date on which the defendant is served a copy of the application, apply to the District Court for an order that entry of the adjudicator's determination as a judgment be refused.

(2) The application for an order referred to in subsection (1) may be made only on the following grounds:

- (a) that the amount payable under the adjudicator's determination has been paid to the plaintiff by the defendant:
- (b) that the contract to which the adjudicator's determination relates is not a construction contract to which this Act applies:
- (c) that a condition imposed by the adjudicator in his or her determination has not been met.

(3) If the District Court is satisfied that any of the grounds set out in subsection (2) applies, the District Court must—

- (a) refuse the application under section 73 to enforce the adjudicator's determination by entry as a judgment; and
- (b) make an order accordingly.

(4) If the District Court is not satisfied that 1 or more of the grounds set out in subsection (2) applies, the District Court must—

- (a) accept the application under section 73 to enforce the adjudicator's determination by entry as a judgment; and
- (b) enter the adjudicator's determination as a judgment accordingly.

The authorities

[34] Mr Poutawera referred to *Stellar Projects Limited v Nick Gjaja Plumbing Limited* HC AK CIV 2005-404-6984 10 April 2006, which concerned adjudication by an unqualified person who had not been appointed, as the Act contemplates, by agreement or by a nominating body with the power to do so. The District Court entered the adjudication as a judgment, but an appeal was allowed, Venning J holding that as there was no adjudicator appointed for purposes of the Act, there was no basis for the entry of judgment in the District Court.

[35] Counsel also referred to *LSB Limited v Loader and Others* DC HAM CIV 2008-019-1041 26 September 2008, which was also an application under s 74. An adjudicator had been properly appointed, but neither the adjudicator nor the defendant realised the builder had changed its name and a new company had adopted the former name. The new company assumed the role of party to the adjudication. Judge Maze described the issue as whether or not the adjudication sufficiently identified the parties to a contract. The Judge referred to the definitions of claimant and adjudication, holding that there was no adjudication under the Act because the named claimant was not a party to the construction contract with the defendant. Alternatively, there was no contractual relationship between plaintiff and defendant, such that the contract to which the determination related could never be said to be a construction contract.

The issues

[36] I begin by deciding whether an adjudicator may determine his or her own jurisdiction under the Act, at least provisionally. That leads to the second issue; whether the District Court may refuse to enter the determination as a judgment where the adjudicator has asserted jurisdiction although the parties were not in any

contractual relationship. The third issue is whether the parties may confer jurisdiction on the adjudicator by referring a dispute to him on the factually incorrect footing that they were parties to a construction contract.

Can an adjudicator determine his or her jurisdiction?

[37] An adjudicator's jurisdiction rests ultimately on agreement between the parties, because it requires a construction contract as defined. If such a contract exists, and there is a dispute under it, a party to it may compel an adjudication against another party, (and an owner if a determination under s 30 is sought.). Jurisdiction further rests, as Venning J held in *Stellar Projects*, on the adjudicator being qualified and appointed in terms of the legislation. Having been appointed, the adjudicator can determine only those matters provided for in s 38(1)(a) or which are ancillary to those matters, or which have been submitted by written agreement. The matters referred to in s 38(1)(a) centre upon the rights and liabilities of the parties under the construction contract, including obligations to pay money under it. The particular issues in any given adjudication are defined by the adjudication claim and response and any other submissions or documents provided.

[38] The legislation does not provide explicitly that the adjudicator may determine jurisdiction. That distinguishes it from the Arbitration Act 1996; under article 16 of the First Schedule to that Act, the arbitral tribunal may rule on its own jurisdiction with respect to the existence or validity of the arbitration agreement, being the agreement by the parties to submit disputes to arbitration.

[39] However, the Construction Contracts Act contemplates that the adjudicator will interpret the construction contract under which jurisdiction was ultimately conferred, and deal with ancillary matters. The terms and scope of the contract are matters of jurisdiction. Adjudicators require the power to determine such questions if the legislative purpose of swift and inexpensive dispute resolution is to be achieved.

[40] My attention has not been drawn to any New Zealand case addressing this question. Nor did the Law Commission deal with it explicitly in *Protecting*

Construction Contractors NZLC SP 3, November 1999, the report which led to the legislation.

[41] *Parist Holdings Pty Limited v WT Partnership Australia Pty Limited* [2003] NSWSC 365 was decided under corresponding New South Wales legislation (the Building and Construction Industry Security of Payment Act 1999). Counsel for the respondent argued that the adjudicator exceeded his powers, by making findings of law in deciding the existence or otherwise of oral or implied terms of the contract. Nicholas J held at [43]:

It is impossible to accept that the proper exercise of power and discharge of function would not ordinarily require an adjudicator to interpret contractual documents and/or evidence as to the existence of an oral contract or oral terms, and/or to make findings as to the existence and effect of contractual provisions whether express, implied, written or oral. ... It seems clear enough from the Minister's statement referred to in para 32 above, and as a matter of plain common sense having regard to the terms of s 22, these are likely to be necessary steps to be taken in the course of deciding a dispute the ambit of which is evidenced by the payment claim and the payment schedule. Acceptance that the process is not judicial and that there is no power to call for witnesses or to give evidence under oath provides no support for the Plaintiff's submissions.

[42] The issue has also arisen under the corresponding United Kingdom legislation, the Housing Grants, Construction and Regeneration Act 1996. That legislation does not deal explicitly with the adjudicator's power to determine jurisdiction. As in New Zealand, that distinguishes the legislation from arbitration legislation, the Arbitration Act 1996 (UK), s 30. The Courts have held that an adjudicator may inquire into and determine jurisdiction provisionally, so that the determination is provisionally binding and a party cannot avoid adjudication by denying jurisdiction: *Homer Burgess Limited v Chirex (Annan) Limited* [2000] BLR 124 (Outer House); *Thomas-Fredric's (Construction) Limited v Keith Wilson* [2003] EWCA Civ 1494. But where jurisdiction was wrongly assumed the determination is not enforceable unless the parties have agreed to be bound by it under s 108(3) of the Act. In *Thomas-Fredric's (Construction) Limited v Keith Wilson*, Simon Brown LJ acknowledged that this approach undermines a principal objective of the legislation, the prompt resolution of disputes. *Keating on Construction Contracts* (Sweet and Maxwell, London, 2006) suggests at 603-4 that the adjudicator should inquire into jurisdiction and if satisfied that it exists, continue until the Court orders otherwise.

[43] The facts of *Thomas-Fredric's (Construction) Limited v Keith Wilson* were similar to those of this case. One party claimed throughout that the contract was made not with him personally but with a company. The adjudicator ruled against him, but the Court of Appeal held that the adjudicator lacked jurisdiction. His provisional determination was unenforceable. It would have been enforceable had the parties agreed to be bound by it, or had the adjudicator been plainly right.

[44] The approach to jurisdiction taken by the English Courts is consistent with *Stellar Projects* and *LSB v Loader*, although the issue was not addressed explicitly in those judgments. I adopt the same approach. 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. An application may be made for entry of a determination as a judgment only if an adjudicator determines that a party to the adjudication is liable to pay money under the construction contract, or costs and expenses. The District Court is given jurisdiction to refuse to enter the determination if the contract to which the adjudication relates is not a construction contract to which the Act applies. A fortiori, a determination must be unenforceable if there is no contract between the parties, unless they have nonetheless agreed to refer a dispute to the adjudicator.

[45] At the same time, 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 these reasons, 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.

Can the District Court refuse to enter a determination where there was no contract?

[46] The next question is whether the District Court may refuse to enter a determination as a judgment if the defendant shows there was no contract at all.

[47] The District Court's jurisdiction under s 74 is much narrower than this Court's jurisdiction on judicial review. It may intervene "only" on the grounds in s 74(2). However, s 74(2)(b) confers a power to inquire into the adjudicator's jurisdiction, where the defendant alleges the contract to which the determination relates is not a construction contract to which the Act applies. The subsection presumes the determination was made under a contract. I consider that it further requires that the determination was made under a contract between parties to the adjudication.

[48] It follows that the Judge in this case erred by finding that the District Court cannot inquire into the question whether there was a contract between parties to the adjudication, but is confined to examining whether the contract was a construction contract as defined.

Ms Patel's concession

[49] Ms Patel conceded Pearson Group Limited was the other party to the contract, and the adjudication proceeded on that basis until the point was taken at the conference of the parties.

[50] Mr Poutawera argued that her concession was irrelevant, for it could not confer jurisdiction. He relied on *LSB v Loader* (above). I observe that in that case neither the adjudicator nor the defendant knew of the substitution of the plaintiff for the original builder under the construction contract until after the adjudication had been completed. Here Ms Patel knew she had entered a contract with Mr Pearson, but nonetheless admitted that Pearson Group Limited was the contracting party.

[51] Again, the authorities under the Act do not address the question. Returning to the UK authorities, the Court of Appeal in *Thomas-Fredric's (Construction) Limited v Keith Wilson* held at [33] that the parties may confer on the adjudicator power to determine his own jurisdiction. That case arose in very similar circumstances to this one, and the Court contemplated that the adjudicator would have had jurisdiction if the parties had agreed to be bound by his determination. And in *Watson Building Services Limited v Harrison* [2001] SLT 846 (Outer House) it

was held that the parties, having put the question of jurisdiction to the adjudicator, could not then argue they were not bound by the determination.

[52] The Construction Contracts Act specifically contemplates in s 38(2) that jurisdiction may be extended by agreement in writing. The parties will be bound by the resulting determination. It would be contrary to the purpose of the Act to allow parties to submit a dispute to adjudication, then resile on jurisdictional grounds if the determination was unfavourable.

[53] In this case, the parties submitted the dispute to adjudication on the express basis that there was a contract between them. I acknowledge that Ms Patel tried to withdraw her concession at the conference, but it does not alter my conclusion that jurisdiction had been conferred on the adjudicator. Rather, it raises a different issue, whether by refusing to receive her submissions the adjudicator treated her unfairly.

[54] Ms Patel might have pursued judicial review, arguing that the adjudicator was obliged to consider her submission at the conference under s 45, or that he did not afford her natural justice. However, that was not done. I would not be prepared to entertain it now. In my view Ms Patel was indifferent to the identity of the claimant. She knew when the contract was entered that Mr Pearson was setting up in business on his own account. Pearson Group Limited is evidently his chosen vehicle. It is closely identified with Mr Pearson, its director and owner of all but one of its shares. Her argument that the adjudicator lacked jurisdiction was wrong. Lastly, to accept her submission at the conference would be to terminate the adjudication when it was near completion, and when Ms Patel may have begun to realise that it was not going well for her.

Decision

[55] Contrary to the conclusion reached by the Judge, the District Court has jurisdiction to refuse to enter a determination as a judgment on the ground that there is no contract between the parties to the adjudication. However, the Judge was right to enter the determination as a judgment in this case, for the parties had conferred jurisdiction on the adjudicator.

[56] The appeal is dismissed. The respondent will have costs on a 2B basis with provision for one counsel.

Miller J

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 11.30am on the 24th day of April 2009.

Solicitors:
Hazelton Law, Wellington for the Appellant
Avison Reid Lawyers, Lower Hutt for the Respondent