

IN THE DISTRICT COURT
AT WELLINGTON

CIV-2008-085-000962

BETWEEN PEARSON GROUP LIMITED
 Plaintiff

AND KALPANA PATEL
 Defendant

Hearing: 24 October 2008

Appearances: B Sheehan for the Plaintiff
 R Poutawera for the Defendant

Judgment: 24 October 2008

ORAL JUDGMENT OF JUDGE C N TUOHY

[1] The plaintiff has filed an application under s 73 of the Construction Contracts Act 2002 for an adjudicator's determination to be enforced by entry of judgment in this Court.

[2] The defendant has filed an opposition on stated grounds. Under s 74 of the Act, rather than an opposition, there should technically have been filed by someone who opposes the entry of judgment an application to the District Court for an order that entry of the determination as a judgment be refused. However, the opposition sets out fully its grounds and I have treated it as the equivalent of an application under s 74 by the defendant.

[3] The determination made by the adjudicator is attached to the plaintiff's application under s 73. It defines the parties as being the claimant, Pearson Group Limited, called in the determination "the builder", and the respondent, Kalpana

[9] The issue of who was a party was raised before the adjudicator but the defendant's argument that it was Andrew Pearson personally, not Pearson Group Limited which was the party to the contract did not find favour with the adjudicator.

[10] For the purposes of this decision I accept the defendant's proposition that in fact the contract, when made, was between Andrew Pearson personally and Ms Patel.

[11] In my view, whether the determination can be enforced by entry falls directly to be considered on a construction of the wording of s 74(2)(b). The first issue which arises under the paragraph is what is the contract to which the adjudicator's determination relates. The answer to that is that it was the contract entered into on or about 27 June 2007 for the alterations to an existing shop in Khandallah, Wellington.

[12] Section 74(2)(b) assumes that a determination is related to a particular contract. My view is that it requires no more than the identification of the subject matter of the contract. In other words, no more than an identification of the work to be done. That is the contract to which the adjudicator's determination related. The issue of who the proper parties were to that contract is, in my view, a different issue, and a more narrow issue than identifying the contract to which the determination related.

[13] The second issue is whether that contract is a construction contract to which the Act applies. A construction contract is not specifically fully defined in the Act. However, construction work is. It has a very lengthy definition. In my view, a ~~construction contract means simply a contract for construction work, as that is~~ defined in s 6 of the Act. There is no doubt that the contract in this case was a construction contract on that basis.

[14] The second sub-issue which arises on that point, is whether it is a construction contract to which the Act applies. It is clear, on a perusal of the Act, that there are several categories of contracts for construction work, that is, construction contracts, to which the Act does not apply. First, it does not apply under s 9 to contracts relating to construction work outside New Zealand, which

some do. It does not apply to construction contracts, or provisions in construction contracts, of the type set out in s 11 of the Act, which excludes one category of construction contracts from the Act and several categories of contractual provisions within construction contracts from the Act.

[15] At least for the purposes of s 74(2)(b), which is included in Part 4 relating to enforcement, it probably does not include residential construction contracts which are excluded under s 10 from the application of Part 4. It has not been suggested that the contract, which in this case relates, on its face, to a shop, is a residential construction contract.

[16] So, provided the Court, having identified the contract, is satisfied that it is a contract to which the Act applies, then absent any other ground under s 74, it must enforce the contract by entry of judgment; or, to put it more correctly, if it is not satisfied that any of the matters in s 74 are established, it must make an order under s 73.

[17] In my view, it is not for this Court to, in effect, sit on appeal or to judicially review the adjudicator's decision as to who the parties were, which is what the defendant's argument requires the Court to do. Mr Poutawera, in his vigorous argument, referred to a decision in that regard, the decision being an oral judgment in *Stellar Projects Limited v Nick Gjaja Plumbing Limited*, (HC Auckland, CIV-2005-404-006984, 10 April 2006, Venning J.) He argued on the basis of this decision, that an applicant under s 74 is able to attempt to satisfy the Court that the adjudicator had no jurisdiction to make the decision, because the person who sought the determination was not a party to the contract, and if he does establish that, can oppose entry of judgment on that basis. That case was an appeal from the District Court against the entering of judgment under s 74 so the District Court Judge in that case was in the same position as I am in now.

[18] The basis for the appeal, in that case, was that the adjudicator was not properly appointed and that argument was accepted by Venning J. He held that in the particular circumstance of that case, the adjudicator who made, or purported to

make an adjudication, had no standing under the Act to act as adjudicator.

Venning J went on to say in paragraphs 16 and 17:

The entry of judgment in the District Court proceeded on the mistaken premise that the adjudicator had standing to make the award which led to the entry of judgment. Given the defect in the appointment of the adjudicator and the fact that there was no adjudicator appointed for the purposes of the Act there was no basis for entry of judgment in the District Court.

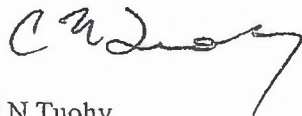
It follows that the appeal must be allowed ... The purported award the adjudicator made on 20 September 2005 can therefore have no effect in law or in equity. The appeal must be allowed and the entry of judgment in the District Court set aside.

[19] Mr Poutawera points out that the matter before Venning J was not an application for judicial review but an appeal. He argued that the case establishes that it is open to argue in the District Court on an application under s 74, that the determination of the adjudicator was made without jurisdiction. Venning J in his oral decision did not state the position as widely as that. The decision, in my view, can be explained on more narrow grounds, namely, that the Court found that the District Court Judge had entered judgment based on something which was not an adjudicator's determination. It was not an adjudicator's determination because it was not made by an adjudicator, and it is only an adjudicator's determination which can be entered as a judgment. That is not argued in this case. There is no suggestion that the person whose determination we are talking about here was not an adjudicator properly so appointed. There is no argument that what is sought to be entered is an adjudicator's determination. What is argued here is that that determination was made without jurisdiction.

[20] In my view, the case of *Stellar Projects Limited v Nick Gjaja Plumbing Limited* does not establish a proposition so wide as that, and it is not an authority which is against the interpretation which I have given to s 74(2)(b). I consider that the more narrow interpretation which I have reached is in accord with the scheme and purpose of the Construction Contracts Act. The purpose, as set out in s 3, is to reform the law relating to construction contracts and, in particular, to provide for the speedy resolution of disputes arising under a construction contract.

[21] To, in effect, confer on the District Court a jurisdiction to judicially review or sit on appeal on the determination of an adjudicator would be against the general scheme and purpose of providing speedy resolution of disputes. If indeed, an error of law going to jurisdiction has been made by the adjudicator, then, in my view, that is a matter for judicial review by the High Court and ought not to be decided under the fairly summary procedure for enforcing an adjudicator's determination in the District Court.

[22] I therefore dismiss what has been treated as an application by the defendant, under s 74 of the Act, and under s 74(4) I accept the application under s 73 to enforce the adjudicator's determination by entry as a judgment, and I enter that determination as a judgment accordingly.



C N Tuohy
District Court Judge
