#475

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-772

IN THE MATTER OF	the Construction Contracts Act 2002
AND IN THE MATTER OF	an application for review under the Judicature Amendment Act 1972
BETWEEN	PLIMMERTON COURTYARD LIMITED Applicant
AND	KEITH RICHARD HUNTINGTON First Respondent
AND	MARY ANNETTE FRANKLIN Second Respondent

Hearing: 9 July 2009

Counsel: S Brown for Applicant
No Appearance for First Respondent
J A Dean and D Calder for Second Respondent

Judgment: 14 July 2009

RESERVED JUDGMENT OF SIMON FRANCE J

Introduction

[1] This is an application for interim relief under the Judicature Amendment Act 1972. The primary proceedings concern judicial review of an adjudication decision under the Construction Contracts Act 2002. Interim relief is sought because the respondent has taken steps to enforce the adjudication in the District Court.

[2] The first respondent is the adjudicator, who took no part in this aspect of the proceedings.

Facts

[3] The applicant contracted to do a large landscaping job at Ms Franklin's home. Relations have broken down between them. The history and circumstances of that are irrelevant other than to the extent it emerges when discussing the issues.

[4] In March 2008 three progress payments (claims 13, 14 and 15) remained unpaid. The applicant gave notice of an intention to stop work, and commenced a claim under the Construction Contracts Act 2002. It was unopposed and Plimmerton Courtyard Limited obtained an adjudication for $22,202.33 (including interest to date) plus $14.83 per day thereafter. The amount remains unpaid. The adjudication was enforced in the District Court in accordance with the Act. That application was also unopposed. A charging order was placed on the property.

[5] Plimmerton Courtyard Limited next commenced bankruptcy proceedings. An initial attempt by Ms Franklin to set aside the bankruptcy application was unsuccessful. However, on 2 July 2009 bankruptcy was refused on the basis that Ms Franklin had shown she could pay her debts, and separately that it would not be just and equitable to bankrupt her. It was also noted the judgment debtor had a remedy under the charging order.

[6] The finding that bankruptcy would not be "just and equitable" serves to introduce the second dispute. Under the contract Ms Franklin has thus far paid in excess of $200,000. She challenges the work that underlies some of the earlier payment claims in two respects – she says either it has not in fact been done at all, or it has been done poorly. The payment claim numbers that are involved are numbers 2, 3, 4, 5 and 7.

[7] Unaware of the Construction Contracts Act 2002 regime, Ms Franklin had not countered those payment claims with any payment schedules challenging the work. Rather she made the payments, and then when finally too dissatisfied, stopped paying.

[8] Eventually with legal assistance Ms Franklin commenced a claim of her own under the Act. It was first served on Plimmerton Courtyard Limited on 23 June 2008. It was re-served on 18 September 2008, at which time Ms Franklin contemporaneously sought the appointment of an adjudicator. It was by then apparent the applicant would not agree to one being appointed.

[9] Plimmerton Courtyard's response to Ms Franklin's claim was somewhat unusual. It effectively accepted the correctness of all Ms Franklin's complaints but said it would not fix them until it was paid the outstanding money from claims 13–15. When it is understood that some of Ms Franklin's complaints are that she has been billed for, and paid for, work not actually done it is understandable why she baulked at paying across the money. Concerning Ms Franklin's request for adjudication, Plimmerton Courtyard said there should be no adjudication because there was no dispute since it agreed with all her complaints.

[10] Ms Franklin nevertheless pursued the adjudication and eventually obtained a ruling. It is this ruling which she now seeks to enforce in the District Court, and which Plimmerton Courtyard have challenged by way of judicial review.

[11] The interim orders that are sought request the Court to direct the respondent to take no further steps to enforce the adjudication pending hearing of the judicial review proceedings. Of primary concern to the applicant is that Ms Franklin has costed the remedial work at around $100,000 and seeks to make that figure part of the order made by the District Court. Mr Brown submits his client will be prejudiced if Ms Franklin obtains that order and then takes steps to enforce it.

[12] The history of this matter gives strength to that concern. Plimmerton Courtyard has itself doggedly pursued bankruptcy against Ms Franklin despite conceding it has charged her for work it has not done. It would not be surprising if Ms Franklin responded in like kind, and to date she has done so. The history of the matter so far reveals that a ridiculous amount of effort and presumably money has gone into unnecessary litigation on a matter that calls out for common sense and maturity.

[13] In declining the application to have Ms Franklin adjudicated bankrupt, Gendall AJ observed:

> And, in passing I need to record my concern too that the growing legal and other costs involved in the lengthy legal wranglings between the parties both in this Court and elsewhere may well be reaching the point where those actions are simply out of all proportion to the overall amounts at stake.

[14] I do not endorse that only because I consider it is too moderate an observation. Enough is enough and all those involved need to focus on setting upon a process that sees the work completed. It may be that some matters of dispute should be set to one side for later resolution if agreement on all matters is not possible but the persistent expenditure on litigation should stop. Whilst ultimately it is for parties to decide if they want to pursue litigation, it would be remiss if the Court did not counsel against that in the strongest of terms.

[15] In this regard I therefore make two further points:

a) Considerable thought needs to be taken before any further court time is required. The parties are on notice that any Court from now will make focussed inquiries into why the matter is again before a Court. If anyone involved is determined to be unreasonably responsible, there is a risk of full costs being directed that way;

b) I direct counsel to bring these comments, as well as paragraphs [10], [11] and [15] to the direct attention of the parties, and to explain the observation and risks concerning costs.

[16] For the avoidance of any doubt, I indicate that my assessment of the matter is that following this judgment there is no justification for either party to spend more money on any aspect of Court litigation. Using Mr White or some other independent party, and aided by sound advice from counsel who no doubt will have taken on board the comments of both Gendall AJ and myself, it is the case that a process forward can and must be found.

Interim Orders?

[17] So long as there is a reasonably arguable basis to challenge the adjudication, I consider the interim orders should be made. The risks to Plimmerton Courtyard are significant, and for reasons given, further litigation is undesirable. I therefore turn to that issue.

[18] Mr Brown advanced four bases:

a) there was no dispute within the meaning of the Construction Contracts Act 2002, so the jurisdiction for appointment of an adjudicator did not arise;

b) there was no proper adjudication notice;

c) the matters considered in the adjudication were not matters raised by the Notice;

d) the orders sought in the District Court do not reflect the adjudication.

[19] The first point appears to me to be unarguable. One cannot avoid the process by simply agreeing fault but refusing to fix it until other conditions are met. The adding of another condition – in this case payment of the last three payment claims – of itself creates a dispute. So does the refusal to work onsite, and to fix the errors.

[20] The second ground was shown at the hearing to be without any merit.

[21] The third ground has more substance. The complaints put in issue by the Notice relate to work covered by earlier payment claims. The allegations can be generalised as being either that work covered by those claims was not done, or that the work was done poorly. Because the claims by Ms Franklin were not disputed, the adjudicator accepted them as established. The next step in the process seems to have been for the adjudicator to cost the value of the work not done, and assess that as being about $50,000. The adjudicator then reasons that because this sum exceeds

the amount involved in the three unpaid claims, Plimmerton Courtyard had not been entitled to stop work.

[22] The complaint raised by the applicant is that the issue of entitlement to stop work was not raised by the Notice. The applicant had served a notice as required by the Act, and that notice relied on the three unpaid claims. Subsequently the applicant has an unopposed adjudication in its favour that those claims must be paid, and now has a judgment debt in relation to them.

[23] It is accepted by the respondent that the Notice issue by Ms Franklin does not flag the issue that the applicant was not entitled to stop work. Rather, it is said it is something inherent in the claims that are made. The relief sought is a determination ordering the respondent to rectify the defects. That necessarily involves a claim that Plimmerton Courtyard were not entitled to stop work.

[24] In my view the applicant's case is plainly arguable. The approach of the adjudication does not seem consistent with s 72 of the Act, which sets out when a party may cease work. The applicant's cessation, as least on its face, comes within that section. The "off-setting" approach adopted by the adjudicator can be argued to ignore the purposes of the Act when it established its system of payment claims and payment schedules.

[25] The adjudicator's ruling was that the applicant had suspended work contrary to the provisions of the contract. However, which provisions of the contract Plimmerton Courtyard were said to be in breach of were not identified. Nor could Mr Dean point to any. The adjudicator seems to conclude that the contract provides that the applicant's right to stop work over unpaid claims is superseded if earlier previously unchallenged claims are shown to include payments for work not done. As noted, there is in my view a credible argument available to the applicant that this approach was flawed in terms of the statutory scheme. Whether in the end that error, if it be one, undermines the adjudication can await the hearing of the full proceedings.

[26] More generally, I note that the adjudicator appears to be troubled about the extent of his powers given that the contract is not complete. This leads him to conclude that it would be premature to rule whether the work has been done in a competent and tradesman like way. Whilst that may be so as regards the work not done, some of the uncontested claims include such items as block work not being plastered properly and walls not being capped properly. Those defects are accepted by Plimmerton Courtyard and it is difficult to see why they are not an admission to untradesman like work.

[27] These general concerns with the adjudication lead into the final challenge brought by the applicant. It relates to the orders now sought in the District Court by Ms Franklin. In order to understand the challenge, it is necessary to set out what Ms Franklin sought, and what the adjudicator determined.

> 4. **In the event that the Respondent does not rectify the defects and/or omissions as set out in paragraphs 16.1 – 16.10 of the Adjudication Claim the Respondent pay the Claimant's costs of rectifying the defects and/or omissions as set out in paragraphs 16.1 – 16.10 of the Adjudication Claim, and as listed above.**
>
> There is no provision in the contract for a specific period of time in which the Contractor is required to complete any remedial work that arises after the completion of the work, nor is there specific provision for the contractor to pay the Owner's costs to have any outstanding omissions or remedial work undertaken by others. All remedial work should be completed within a reasonable time after the completion of the contract.

[28] As noted, the applicant has not taken any steps to remedy matters. At one point there was agreement between the parties that an independent third party would inspect the work and provide costings. That person has done so and his assessment is that if a different contractor were to complete the job, the cost would be about $100,000. Ms Franklin's application to the District Court seeks to incorporate that figure into the adjudication and in effect obtain a judgment debt for $100,000. Mr Dean says paragraph 4 of the adjudication, as quoted above, allows this.

[29] Ms Franklin's claim in the District Court has been formally opposed by Plimmerton Courtyard, and a date has been allocated for hearing. Normally my response would be to say that the proper forum for this particular challenge is that

District Court hearing. However, the concerns I have about the history of this matter cause me on this occasion to have regard to the District Court claim when determining whether to grant interim relief. No disrespect is intended to the Court scheduled to hear it.

[30] I am wholly unconvinced that the determination 4 of the adjudication would allow the District Court to make an order that Plimmerton Courtyard pay $100,000. Ms Franklin sought a determination that might have allowed the insertion into the claim of a quantified sum. However, the ruling she obtained does not do that. Exactly what it does is not, with respect, clear, because it talks of an obligation on the applicant to remedy defects once the contract is complete. However, the claims made by Ms Franklin, and the $100,000, appear to relate to what is required in order to complete the contract. What defects will exist after that work is not apparent. That uncertainty aside, I am of the view that Ms Franklin's claim for $100,000 to be included in the District Court order cannot succeed and that interim orders would not be delaying an available remedy.

[31] Before completing discussion of the adjudication, I note one other matter that I raised at the hearing. The independent assessor recently appointed by the parties appears to assess the difference between work done and money paid as $16,000. It is not clear if his "payments to date" figure includes the dispute payment claims 13–15. Assuming not, there is still a considerable discrepancy between this assessment and the adjudicator's as regards the value of billed but not done work. I am sure that the explanation for the discrepancy lies in the better information now available to the assessor, but it is another feature the parties should take on board.

Conclusion

[32] The application is granted. Pursuant to s 8 of the Judicature Amendment Act 1972 I direct that the respondent, Ms Franklin, is not to take further steps as regards enforcing the challenged adjudication until the applicant's application for review is heard.

[33] Plimmerton Courtyard should not see this outcome as in any way representing an assessment that right is on its side.

[34] I direct that two weeks from the issuing of this judgment counsel are to file a joint memorandum indicating what further steps if any are required in relation to the proceedings.

[35] Counsel are reminded of the direction in paragraph [15].

[36] It will not be surprising that I direct that the costs of this proceeding are to lie where they fall. That was the same order made by Gendall AJ in his ruling. The parties should see a message in this; both sides have had a success (Ms Franklin the bankruptcy, Plimmerton Courtyard in this application) yet neither side obtains the benefit of the costs award a successful party normally enjoys. The parties are also reminded of my observation in paragraph 15, which has the consequence that from now the costs attendant on any further litigation may be very significant for the party required to pay them.

Simon France J

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