IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-6843

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	a decision made pursuant to the Construction Contracts Act 2002
BETWEEN	BRAYSSE AND MAREN TAYLER Applicants
AND	CHRISTOPHER LAHATTE First Respondent
AND	NORTHSPAN CONSTRUCTION LIMITED T/A KIWISPAN RODNEY Second Respondent

Hearing: 24 June 2008

Appearances: J McLennan for the applicants
R Smith for the second respondent (given leave to withdraw)

Judgment: 24 June 2008

(ORAL) JUDGMENT OF STEVENS J

Solicitors/Counsel:
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Introduction

[1] This is an application for judicial review of a determination dated 3 August 2007 by Mr Christopher LaHatte (the first respondent) given in relation to an adjudication under the Construction Contracts Act 2002 (the Act). The first respondent, who is now practising overseas, filed a notice of appearance in the proceeding and indicated that he would abide the decision of the Court.

[2] The parties to the adjudication were the claimant Northspan Construction Ltd trading as Kiwispan Rodney (Northspan), who is the second respondent to the proceeding, and Mr Braysse Tayler. Mr Tayler and his wife, Mrs Maren Tayler, are the applicants in the application for judicial review.

[3] The defended hearing was to have taken place this morning. But, at the start of the hearing, the solicitors for Northspan sought leave to withdraw. After hearing from Mr Smith, as counsel for Northspan, I granted him and his firm leave to withdraw. No notice of change of solicitor has been received from Northspan. Further, there was no representative or officer of Northspan present in Court this morning, despite the fact that Mr Smith had given Northspan notice of the hearing and notice of the intention to seek leave to withdraw. The absence of any representative or officer of Northspan likely arises because it seems the company is facing an application for liquidation, which is due to be heard on Friday 27 June 2008. The application for judicial review therefore proceeded on a formal proof basis with Mr McLennan appearing as counsel for the applicants.

[4] For the reasons set out below, I propose to grant the orders sought. But because any further adjudication in respect of Northspan's claim cannot proceed before Mr LaHatte, I propose to reserve leave to Northspan, or the Official Assignee if an order for liquidation is made, to apply for further directions concerning the conduct of any adjudication in the future.

Background circumstances

[5] In May 2006, Mr Tayler and Northspan entered into a building contract whereby Northspan was to construct a farm shed on the applicants' property. Not long after Northspan began construction of the shed, the applicants noted various defects in the building work. They informed Mr Ensom of Northspan of their concerns. Northspan proceeded to render accounts to the applicants in respect of the work said to have already been completed. The applicants refused to pay the accounts because Northspan failed to rectify the defects in the building.

[6] Later in May 2007, the applicants sought to cancel their contract with Northspan by way of a letter from their solicitors to Northspan. The difficulties between the parties escalated. Thereafter the dispute became the subject of an adjudication lodged by Northspan under the Act, seeking relief including payment of the outstanding invoices. The first respondent was appointed adjudicator under s 35 of the Act. Mr Tayler opposed the claim and also filed a counterclaim.

[7] On 3 August 2007, the first respondent made his determination. In summary, the first respondent found the applicants liable to pay Northspan the sum of $34,536.46, being the amount of three out of the four invoices for which payment was claimed, plus GST and interest. The first respondent also directed that a charging order be issued in Northspan's favour over the applicants' property. The applicants' counterclaim for loss and damage caused by defects and the poor quality of the work by Northspan was dismissed.

[8] In September 2007, Northspan filed an application in the District Court seeking to enforce the first respondent's decision by entry of judgment. That application has not been proceeded with pending the outcome of this application for judicial review.

[9] The applicants' statement of claim seeking judicial review was filed in early November 2007. At the same time, the applicants filed an ex parte application for interim orders, pursuant to s 8 of the Judicature Amendment Act 1972, to restrain Northspan from taking any steps to enforce the determination of the first respondent.

This Court granted an interim order restraining enforcement of the determination by Northspan on the same day.

[10] Subsequently, an order was made during the interlocutory phases of the case requiring the applicants to pay into Court, for deposit in an interest bearing account, the sum of $34,536.46, being the amount in respect of which the adjudicator had ordered payment in the determination. The second respondents complied with that order and one of the orders sought is a release to them of that sum plus accrued interest.

Availability of judicial review

[11] Under ss 58-61 of the Act, a determination made by an adjudicator is enforceable in the Courts as a debt due or by entry of judgment. Counsel for the applicants submitted that a party to the adjudication proceedings may apply to the High Court for a judicial review of the determination on the basis that the decision of the adjudicator under the Act is a statutory power of decision which is susceptible to judicial review: see ss 3-4 of the Judicature Amendment Act.

[12] Any consideration of the availability of judicial review ought properly to start with the purpose and scheme of the Act. This topic was succinctly addressed by Harrison J in *Willis Trust Co Ltd v Green* HC AK CIV 2006-404-809 25 May 2006. That case also concerned an application for the judicial review of an adjudication under the Act. At [20] Harrison J stated:

> The Construction Contracts Act was enacted following a series of high profile financial collapses in the construction industry in the 1980s and 1990s, causing substantial and widespread losses. I accept Mr Williams' informed explanation that the statute was designed to protect a contractor through a mechanism for ensuring the benefit of cashflow for work done on a project, thereby transferring financial risk to the developer. The scheme of the Act is to provide interim or provisional relief while the parties work through other, more formal, dispute resolution procedures. This is because, as Mr Williams observed, an adjudicator cannot be expected to come to grips with the whole range of potential arguments, whether legal or factual, within the tight timeframes provided by the Act to achieve the objective of cashflow. The parties retain their rights to refer disputes to arbitration or litigation for final or binding determination.

[13] On the question of the jurisdiction of the High Court to interfere by way of judicial review when an adjudicator is exercising a statutory power of decision under the Act, Harrison J stated at [22] that it would normally include "what is traditionally understood to constitute a question of law in the nature of statutory misconstruction (*Joseph: Constitutional and Administrative Law* (2nd Ed, 2001) at para 21.4.2)". But in the absence of developed arguments from counsel, Harrison J considered that there was no need to decide the point of whether a decision is amenable to review for error of law by reference to particular or general factors, as in *Peters v Davison* [1999] 2 NZLR 164 (CA).

[14] The scope of review powers of the High Court has been considered in a helpful article by Mr Jason Ren entitled "Judicial review of construction contract adjudicators" (*New Zealand Law Journal* December 2005 at 461). The author refers to similar legislation in the United Kingdom and New South Wales. He notes that the Courts in those jurisdictions have held that an adjudicator's error of fact, law or procedure can form the grounds of an application for judicial review, but only if the error goes to jurisdiction. This is on the basis that, because of the error, the adjudicator acted without or in excess of jurisdiction (at 461). In support of this view the author cited a line of cases, including *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041 and *TQM Design & Construct Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSW CS 1216.

[15] The author recognised that this line of authority did not, however, deal with all possible grounds of judicial review of an adjudicator's determination (at 464). The author stated, at 461:

> As will be seen, the issue of whether a particular error goes to jurisdiction depends on a number of factors: whether the error is contrary to or consistent with the provisions of the Act, particularly its purpose and scheme, whether the error is inherently unfair to one party and whether the Act itself has a mechanism for rectifying the error.

[16] The author also describes the role of the adjudicator under the Act (at 563) in the following terms:

> Under s 41, an adjudicator must act independently and impartially, comply with the principles of natural justice and disclose any conflict of interests to the parties. It goes without saying that those requirements should go to the

> jurisdiction of an adjudicator. However, in considering whether the adjudicator has failed to observe those requirements, the Court should consider the purpose and scheme of the Act and the realities in adjudication.

[17] When discussing the question of breaches of natural justice, including the error of giving consideration to irrelevant materials and failing to consider relevant materials, the author states, at 464:

> Two points are worth noting. First…an adjudicator must make a good faith attempt to consider the materials in order to decide (wrongly or correctly) whether they are relevant or irrelevant. If the adjudicator does not consider the materials at all, it will be a jurisdictional error. Second, although the fact that the adjudicator has considered irrelevant materials or has not considered relevant materials is by itself not a ground for judicial review, a combination of that fact and other factors may be or may reveal a ground for judicial review.

[18] Section 60 of the Act recognises that a party may apply for judicial review or commence other proceedings relating to the dispute, despite any determination made by an adjudicator. However, as there are no appeal rights under the Act, the High Court will need to be cautious to ensure that such applications do not become vehicles for an attempted appeal on the facts.

[19] In this context, it is important to recognise that judicial review is not an alternative to an appeal. There are significant and appropriate limitations to such a remedy, as recognised in *Joseph Constitutional and Administrative Law* (3ed 2007) at para 21.4.1:

> There are limits to the scope of judicial review. In *Wellington CC v Woolworth (NZ) Ltd (No 2)*, Richardson P termed these limits "constitutional and democratic constraints". When Parliament entrusts decision-making functions to public bodies, it does not intend the courts to usurp or second-guess those functions. The larger the policy content of a decision, the less inclined the courts are to intervene. Specialist agencies ought not to fear the "judge over the shoulder" in their decision-making functions.

[20] I am satisfied that, in appropriate cases, an application for judicial review of an adjudicator's determination may be available pursuant to the Judicature Amendment Act. Whether suitable grounds can be established by an applicant, and whether relief should be granted by the Court in the exercise of its discretion, will depend upon all the circumstances of the particular case. It will, of course, be necessary for an applicant to demonstrate that the Court should intervene on the

basis of a breach of natural justice or fairness, procedural errors, or other errors usually associated with administrative review.

Statutory provisions

[21] The duties of an adjudicator and the matters to be considered as part of the adjudicator's determination can be found in ss 41 and 45 of the Act. Section 41 provides as follows:

> 41 Duties of adjudicator
>
> An adjudicator must—
>
> (a) act independently, impartially, and in a timely manner; and
>
> (b) avoid incurring unnecessary expense; and
>
> (c) comply with the principles of natural justice; and
>
> (d) disclose any conflict of interest to the parties to an adjudication; and
>
> (e) if paragraph (d) applies, resign from office unless those parties agree otherwise.

[22] Section 45 of the Act provides:

> 45 Adjudicator's determination: matters to be considered
>
> 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.

Applicants' submissions

[23] Mr McLennan submitted that this was an appropriate case for relief to be granted to the applicants because of a clear breach of natural justice, procedural deficiencies and certain mistakes of facts which occurred in the course of the adjudication. In particular, the adjudicator appeared to have relied, in making his determination, on matters arising from a site visit during the course of which he had indicated that no questions would be asked. However, it seems that, contrary to this prior indication, questions were asked and a discussion took place which the adjudicator placed considerable weight upon.

[24] Mr McLennan submitted that the errors involved were of the type which warranted intervention under administrative law. He argued that it would not be inconsistent with the purpose and scheme of the Act for the Court to intervene in the circumstances of this case. In particular, one of the duties of an adjudicator is to comply with the principles of natural justice: see s 41(b) of the Act. Where there is a demonstrable breach of such a requirement then it will be proper for the Court to intervene if such a breach would otherwise result in unfairness to one or both parties. Counsel submitted that the errors here plainly resulted in an inherently unfair procedure and a manifestly unjust determination. Accordingly, as the Act did not have any mechanism, in the form of any appeal rights to remedy the errors of the adjudicator, it was necessary for the applicants to seek relief from the Court by way of judicial review.

[25] The amended statement of claim detailed the particulars of the grounds for relief, including alleged mistakes of fact, failure to take into account relevant considerations and taking into account irrelevant considerations, error of law, unreasonableness, procedural impropriety and unfairness, and substantive unfairness.

Adjudicator's determination

[26] In order to assess the validity of such claims, it is necessary to summarise the approach that was taken by the first respondent. The adjudicator noted that the

purpose of the process in which he was involved under the Act was to "determine claims quickly so that the contract can continue until completion". However, in this particular case, he found that:

> In this claim, neither party wishes to continue with their construction contract. Effectively therefore, the claim becomes a form of final claim which will be determinative of the rights as between the parties. *Both parties have suggested that there should be an expert to determine the cost of completing the contract.* (emphasis added)

[27] After analysing the circumstances regarding the formation of the contract and the work carried out by Northspan, the adjudicator referred to the fact that the various alleged breaches and the failure of Northspan to complete the construction of the farm shed had resulted in the parties reaching a "stand off". Attempts to agree upon a list of defects and what was needed to remedy them failed. Therefore, the applicants had chosen not to make payment of the sums requested by Northspan in the various accounts by way of progress payments.

[28] The adjudicator then turned to consider the defects and stated:

> I cannot hold myself out as an expert on construction or quality issues. However my inspection of the shed was of considerable assistance. The maintenance issues required to complete the shed are of a minor nature. The work to improve the surface of the concrete slab is slightly more substantial. I also noted that a small part of the shed is being used for storage. I could not see any reason why the shed could not have been used at least in part from the 20th February, subject to access for the remaining items and maintenance. I discussed the scope of work remaining with both Mr Tayler and Mr Ensom, and importantly, both agreed that there was not a great deal remaining.
>
> It is clear on the evidence that the claimant is correct that there is only a minor amount of work required to reach completion of the contract.

[29] I pause to observe that this was not in fact the applicants' position. Rather, Mr Tayler and his advisors had made it clear that a considerable amount of work was required both to complete the contract and to remedy the defects in the work already carried out. I will return to the detail of Mr Tayler's estimate for remedial work later in this judgment.

[30] The adjudicator then referred to the quotations which had been presented by Mr Tayler and stated:

> These are the respondents' claims for the work required to bring the work up to standard, and effectively constitute their set off. The problem with these claims is that the respondents hae not given any evidence as to the mitigation of loss. If matters had reached an impasse where it was impossible for the claimant to complete the contract, and it was urgent to have the shed completed, there appears no reason why the respondents could not have obtained an alternative contractor to complete the work. Both parties agree that the time to complete the additional work is minimal. At my site meeting both Mr Ensom and Mr Tayler conceded this. Instead, the respondents chose to do nothing. Any losses which flow from the failure to mitigate must rest with the respondents. A party affected by breach of contract is unable to recover damages for any loss or damage which could have been avoided by taking reasonable steps to mitigate. The onus of proving a failure to mitigate is on the party in breach. …

[31] Later in his determination the adjudicator concluded:

> Whatever the position, it is clear that the parties no longer wish to have the claimant complete the shed. There is therefore no issue of specific performance. The dispute can therefore be resolved by a money adjustment as between the parties.

[32] In terms of such monetary adjustment, Mr Tayler had contended that the remedial work required was extensive and structural in nature. He had asserted that the costs would be significant. In this regard, the adjudicator stated:

> The cost of the items to complete the shed as described in the last list provided by the claimant cannot be large. It is obvious from inspection of the shed that the remaining work is largely cosmetic and addition of a few items such as down pipes. The respondent says that there is a major problem with the concrete slab which is likely to cost $17,000 and with the lean to concrete pad which they say will cost $8,000. They also estimate the building frame roof will cost $40,000.

[33] Later the adjudicator found that the "estimate of the building frame and the roof at $40,000 must be a considerable exaggeration". He went on to find as follows:

> In the end, the final payment Invoice No 644 due by the respondents to the claimant of $8000 appears to be roughly close to the money adjustment which should be made between the parties. Clearly the shed is not completed, but if the respondents do not have to pay the final payment, this should leave ample to complete the shed.

[34] Accordingly, the adjudicator determined that the three invoices claimed, being invoices 614, 625 and 631, were properly claimed. He determined that Mr

Tayler should pay these together with interest at the contractual rate of 15%. As noted, the issue of a charging order was approved over the applicants' property.

Discussion

[35] One of the key difficulties with the determination was the manner in which the site visit was conducted by the adjudicator. Mr McLennan submitted that the parties had been at considerable variance between their estimates in what was required to remedy the defects and complete the work. Northspan had suggested a figure of $4,500 whilst the applicants had submitted a figure of $65,000.

[36] Mr McLennan argued that, given the extreme variance between the two estimates, the adjudicator should have directed an independent engineer to make an assessment and accurately determine the extent of the work required along with the cost. It is unfortunate that the adjudicator did not follow this course. Early in his determination the adjudicator noted that both parties had suggested that there should be an expert to determine the cost of completing the contract. But, for reasons which are not explained in the adjudication, this course was not followed. In my view this resulted in considerable difficulties with the determination.

[37] With respect to the issue of obtaining an engineer's report, the evidence of the applicants makes it clear that at an early stage there was an agreement between Northspan and Mr Tayler for the obtaining of a joint report from an engineer. However, Northspan's solicitor subsequently declined to participate in that process and signalled to the adjudicator that it no longer wished to go ahead with the appointment of an engineer. Once that position had been reached, it seems that the adjudicator refused to allow the applicants the opportunity to obtain and pay for an engineer's report to substantiate their estimate for the repairs of $65,000. A request for such an opportunity was made in correspondence from the applicants' solicitor to the adjudicator.

[38] The adjudicator responded to this request by saying that he saw no point in obtaining an expert report. In an email to the parties on 17 July 2007 the adjudicator said, "I do not think there is any point in getting an expert." In another

communication on the same date the adjudicator said, "I would like an estimate of the amount to complete from each party. I do not need a calculation with quantity surveyor detail, but just each parties estimate. This will not need an expert."

[39] The adjudicator later advised the parties that he would proceed towards a determination on the basis that he would give whatever weight he considered appropriate to the respective figures given by the parties. This view was signalled in further correspondence with the parties. The adoption of this approach is somewhat surprising, given the adjudicator's observation in his determination that, "I cannot hold myself out as an expert on construction or quality issues."

[40] It is in this context that the site visit undertaken by the adjudicator assumes considerable importance. The adjudicator had indicated that he merely wanted to look at the building. He said that he could do this on his own or with the parties, but that he did not want a large group. He clearly stated in correspondence with the parties on 3 July 2007 that, "all I want to do is look – I will not be asking any questions. Then I will have a conference." I understand from counsel that this refers either to a conference with the lawyers who were representing the parties or to a possible settlement conference.

[41] It seems that there was then a visit by the adjudicator to the site. In his determination he indicated that on that occasion he "discussed the scope of work remaining with both Mr Tayler and Mr Ensom…". Later in his adjudication he proceeded to outline the views which he had formed as a result of such discussions. The adjudicator also seems to have assumed that the parties in the course of these discussions agreed on certain matters pertaining to the time that completion of the additional work would take.

[42] Mr McLennan submitted that these discussions were outside the scope of the basis for the site visit. Certainly Mr Tayler never anticipated that there would be discussions or questioning involving the adjudicator. Yet it seems, on the face of the determination, there were significant discussions and that matters to the prejudice of the applicants emerged from these discussions.

[43] Even putting to one side the evidence relating to what was said and agreed upon at the site inspection, it was clear that the parties were poles apart in terms of their assessments for the remedying of the defects in the construction of the shed. As noted, Mr Tayler had considered that the sum of $65,000 would be required to rectify the defects and complete the building. Northspan's position was that this figure amounted to $4,500.

[44] In terms of resolving this wide difference in the evidence, I consider that it would have been eminently suitable to instruct an expert, as is contemplated in s 45(e) of the Act. Rather, the adjudicator chose not to pursue this course and seems rather to have followed his own instincts, by allowing an adjustment of $8,000, notwithstanding the fact that he stated that he did not hold himself out as an expert on construction or quality issues. The resulting unexplained figure gives rise to considerations similar to those determined by Simon France J in *Horizon Investments Limited v Parker Construction Management (NZ) Limited & Hunt* HC WN CIV 2007-485-332 4 April 2007. That case also involved the judicial review of an adjudication under the Construction Contracts Act. The Judge found that a breach of natural justice had occurred, stating at [52] 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.

[45] The applicants produced in evidence an affidavit from a consultant civil and structural engineer and licensed cadastral surveyor, Mr Thurlow. This affidavit contained a report, dated 9 October 2007, confirming that he had been to the site, inspected the building and found a number of defects. These were noted in the report. Having referred to such defects, Mr Thurlow stated:

> I would state for the record that this is the worse construction of this type of building that I have seen in my 25 years consulting as an Engineer and Surveyor.
>
> The building currently is not in a serviceable state nor will it perform adequately under high seismic or wind loadings. The building furthermore

> fails to meet the requirements in terms of weather tightness durability as required by the Building Code and the Building Act.

[46] Mr Thurlow went on to recommend various repairs be undertaken and his report concludes by setting out his conclusions. He considered that remedying these defects would involve repair costs of $44,600. This evidence demonstrates the importance of obtaining an expert report in the circumstances which presented themselves to the adjudicator. It also shows that a professional assessment would have established that the repair costs were well in excess of the $8,000 allowed by the adjudicator.

[47] I am satisfied that there are a number of significant errors that occurred in the course of the hearing of the adjudication and the determination itself. First, I consider that the way in which the site visit was conducted involved a breach of natural justice and a want of fairness. Secondly, the conclusions drawn from the site visit involved considerable unfairness to the applicants and cast considerable doubt on the adjudicator's assessment of the evidence.

[48] With respect to the evidence, the key area of the nature and extent of the defects and the cost to repair them ought, in my view, to have led the adjudicator to instruct, or at least to direct the parties to instruct, a joint expert to report on those matters. Indeed, as already noted, this is precisely what both parties had initially suggested. Yet for reasons best known to himself, and which are not explained in the determination, the adjudicator did not seek expert guidance on this issue.

[49] Rather, the adjudicator seems to have used his own lay assessment, again drawn from the site visit, to conclude that the sum of $8,000 would be sufficient to allow the defects to be repaired and the building completed. I am satisfied that this process involved breaches of natural justice to the applicants and led the adjudicator into procedural and other errors.

[50] In conclusion, I am satisfied that such breaches warrant the intervention of the Court on an application for judicial review. I am satisfied that, in the light of these breaches and errors, this is an appropriate case where the Court should exercise its discretion to grant relief in terms of the orders sought.

Result

[51] The applicants sought orders setting aside the adjudicator's determination, orders preventing enforcement of the determination and consequential orders relating to any future determination by another adjudicator. The reference to another adjudicator is deliberate because the first respondent now resides in Almaty, Kazakhstan. Hence, he will not be available to carry out any further adjudication in this matter.

[52] A further complicating factor is that Northspan may possibly be placed into liquidation within a short time. If this is the case then it would be a matter for the Official Assignee to determine whether there should be any further adjudication of claims relating to this project by Northspan. This is a matter which really must await developments and consideration by the Official Assignee as to whether he wishes to take the matter further.

[53] Accordingly, I make the following orders:

a) An order setting aside and quashing the adjudicator's determination dated 3 August 2007.

b) An order preventing the second respondent from taking any steps to enforce the adjudicator's decision by entry of judgment in the District Court and preventing the second respondent from registering a statutory land charge over the applicants property at 333X Kaipara Coast Highway, R D 1, Helensville, Auckland (Certificate of Title NA119D/267).

c) As it is not possible to refer the matter back to the adjudicator, I grant leave to the second respondent to apply for further directions if the second respondent wishes to pursue a resumption of the adjudication. Such an application for leave must be filed within 21 days of service of the order.

d) An order releasing the sum of $34,536.46 plus all interest held on deposit by the Registrar.

e) The applicants are entitled to costs and disbursements against the second respondent on a category 2B basis.

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Stevens J