IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-3593
[2014] NZHC 304

BETWEEN	WAIORA TRADING LIMITED Plaintiff
AND	GREGORY LAURENCE O'SULLIVAN First Defendant
	IGOR ALEXANDROVICH MIKITASOV Second Defendant

Hearing: 26 February 2014

Appearances: R C Mark for plaintiff
No appearance for first defendant (abides decision of Court)
No appearance for second defendant

Judgment: 27 February 2014

JUDGMENT OF LANG J
[on application for judicial review]

This judgment was delivered by me on 27 February 2014 at 10.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

[1] Mr Mikitasov owns a house property in Paihia. In June 2009, he arranged for Mr John Nicholas to carry out urgent repairs to his property. Mr Mikitasov was not satisfied with the standard of workmanship of the repairs, and he also considered that he had been significantly overcharged in relation to them. This has led to a protracted dispute between Mr Mikitasov and Mr Nicholas that remains on foot nearly five years later.

[2] In May 2010, Mr Mikitasov issued proceedings in the District Court. He named both Mr Nicholas and the plaintiff, Waiora Trading Limited ("Waiora"), as defendants. Mr Nicholas and his wife are the directors of Waiora. Those proceedings became protracted, and on 30 May 2013 Mr Mikitasov changed tack. Rather than proceed to trial in the District Court, he issued an adjudication claim against both Waiora and Mr Nicholas under the provisions of the Construction Contracts Act 2002 ("the Act"). The first defendant, Mr O'Sullivan, was appointed to adjudicate the claim.

[3] Mr Nicholas and Waiora both defended the claim. Waiora contended that it has nothing to do with Mr Nicholas' building activities, and that it was therefore never a party to the construction contract between Mr Mikitasov and Mr Nicholas.

[4] Mr O'Sullivan released his determination on 21 June 2013. He held that Mr Mikitasov was entitled to be paid the sum of $30,362 inclusive of GST. He said that that sum was to be payable "by the respondent". The adjudicator did not address, however, Waiora's defence based on the assertion that it was not a party to the construction contract.

[5] Waiora now seeks judicial review of the adjudicator's determination. It contends that the adjudicator erred in law in several respects when he failed to deal with its defence to the claim by Mr Mikitasov. Waiora asks the Court to set the adjudicator's determination aside to the extent that it purports to render Waiora liable to Mr Mikitasov.

[6] The adjudicator abides by the decision of the Court. Mr Mikitasov took no steps to defend the application for judicial review, and the proceeding was

accordingly set down for hearing on a formal proof basis. Two days before the hearing, Mr Mikitasov filed an affidavit in opposition to the application, but he did not appear when the application was called on 26 February 2014.

Scope of judicial review in this context

[7] There has been some debate regarding the extent to which judicial review is available to challenge a determination made by an adjudicator under the Act. The issue was effectively settled, however, by the decision of the Court of Appeal in *Rees v Firth*.[1] In that case, the Court of Appeal held that judicial review is not restricted to situations where the applicant alleges that the adjudicator has acted outside his or her jurisdiction. The Court of Appeal emphasised, however, that Judges should be careful not to allow judicial review proceedings to cut across the scheme of the Act and thereby undermine its objectives. In this context the Court said:[2]

> [27] The courts must be vigilant to ensure that judicial review of adjudicators' determinations does not cut across the scheme of the CCA and undermine its objectives. But this does not mean that judicial review should be limited to instances of "jurisdictional error". In principle, any ground of judicial review may be raised, but an applicant must demonstrate that the court should intervene in the particular circumstances, and that will not be easy given the purpose and scheme of the CCA. Indeed, we consider that it will be very difficult to satisfy a court that intervention is necessary. As an example, given that an important purpose of the CCA is to provide a mechanism to enable money flows to be maintained on the basis of preliminary and non-binding assessments of the merits, it is unlikely that errors of fact by adjudicators will give rise to successful applications for judicial review. In the great majority of cases where an adjudicator's determination is to be challenged, the appropriate course will be for the parties to submit the merits of the dispute to binding resolution through arbitration or litigation (or, of course, to go to mediation).

Decision

[8] The adjudicator reached his decision in the present case based on the documents filed by the parties. These squarely raised the issue that lies at the heart of the present application. Mr Mikitasov's claim contained the following paragraphs:

---

1 *Rees v Firth* [2011] NZCA 668.
2 Ibid.

> 4. In early March 2009, Mr Mikitasov and his family intended to live in another part of New Zealand for a few months. During the time that Mr Mikitasov was to be out of the property, he appointed a property manager Mr SG Seed.
>
> …
>
> 6. On 14 June 2009, the Mr Seed informed Mr Mikitasov that he had engaged Mr Nicholas trading as J Nicholas Builders to carry out the investigations and provide the quote.
>
> 7. On 19 June 2009, after the investigation was completed, Mr Mikitasov received an estimate of costs from Mr Nicholas for repairs of around $30,000 (including materials). The estimate was in respect of the remedial works specified in the Report and included the cost for the additional repairs, investigated by Mr Nicholas.
>
> …
>
> 9. On 25 June Mr Mikitasov entered into a contract (the Contract) with Mr Nicholas. A cash advance payment of $5,000 was paid to Mr Nicholas through Mr Seed. The Contract indicated that Mr Nicholas was the builder who would do the required remedial work and any other work Mr Mikitasov requested of him as directed by Mr Mikitasov (the Work).
>
> …
>
> 14. Until this point, interim payments for the Work had been made through Mr Seed. Mr Seed now said that all future payments for the Work should be paid directly to Mr Nicholas' company and provided an encoded bank deposit slip for Waiora trading.
>
> 15. At this point Mr Nicholas told Mr Mikitasov that the work undertaken by him was undertaken on behalf of Waiora Trading Limited – his company and that his wife would deal with the accounting aspects.

[9] The response filed on behalf of Mr Nicholas and Waiora contained the following passage:

> 4. In the claimant's description of the dispute at the commencement of the adjudication claim, it is alleged that during the term of the contract Mr Nicholas variously represented himself as acting in his own right and trading as J Nicholas Builders, or as a director and shareholder of Waiora Trading Limited. Mr Nicholas has never represented himself to Mr Mikitasov as acting in the capacity as director and shareholder of Waiora Trading Limited. Waiora Trading Limited is an entirely separate business, providing tourist accommodation in Paihia and is operated by Mr Nicholas' wife. Mr Nicholas simply requested that Mr Mikitasov pay Mr Nicholas by depositing funds in the Waiora bank account. The reason for this was that Mrs Nicholas could then administer the payments and pay Mr Seed and suppliers for material.

Mr Nicholas also provided the adjudicator with copies of invoices he had rendered in respect of the repairs. These were rendered by "J L Nicholas Builder".

[10] Section 45(c) and (d) of the Act require an adjudicator to consider both the adjudication claim and any response filed in relation to it. As noted above, however, the adjudicator's determination made no reference at all to the issue of whether Mr Nicholas had entered into the construction contract on behalf of Waiora. An affirmative answer to that question was obviously required if the adjudicator was to impose liability on Waiora under the contract. If Waiora was not a party to the contract, it could not be liable to Mr Mikitasov under it.

[11] The adjudicator's failure to address this issue was obviously an error, and it could be described in a number of ways. First, it went to the question of jurisdiction. The adjudicator had no jurisdiction to find Waiora liable under the construction contract unless he first found that it was a party to that contract. It could also be argued that the adjudicator failed to take into account a relevant consideration, namely the facts raised by Waiora in support of its defence.

[12] One possible interpretation of the determination is that the adjudicator held that Waiora was a party to the contract. If that is the case, however, he gave no reasons for reaching that decision. Failure to give reasons in relation to a critical contested issue of fact may also render the decision amenable to review.[3] The fact that the adjudicator referred throughout his decision to Mr Nicholas and Waiora as "the respondent" suggests, however, that he never turned his mind to this critical issue. He appears to have proceeded on the basis that Waiora and Mr Nicholas were one and the same legal entity, when that was patently not the case.

[13] Regardless of how the adjudicator's error is described, it is potentially amenable to review by the Court. The only remaining issue to be determined is whether relief should be granted. This requires the Court to consider whether the granting of relief in the present context would undermine the objects and purposes of the Act.

---

[3] See *Canam Construction Ltd v La Hatte* [2010] 1 NZLR 848 for a discussion of the scope of the duty to give reasons under s 47 of the Construction Contracts Act 2002.

[14] Two factors are relevant in this context. The first is that this particular construction contract is now at an end. The cash flow considerations referred to in the passage cited above from *Rees v Firth* therefore do not arise.[4] The second arises out of the fact that a conclusion reached in an adjudication under the Act can properly be regarded as provisional, in the sense that both parties are free to challenge it through subsequent litigation or arbitration. As the Court of Appeal recognised in *Rees v Firth* in the same passage, the scheme of the Act anticipates that these will usually be the most appropriate means by which to challenge the preliminary and non-binding conclusions reached by an adjudicator.

[15] There is, of course, nothing to prevent Waiora from issuing a fresh proceeding in the District Court or High Court seeking a declaration that it was not a party to the construction contract with Mr Mikitasov. I do not consider, however, that it would cut across or undermine the objects and purposes of the Act if the Court was to make an order in the present proceeding requiring the adjudicator to determine that issue. This is particularly so given the fact that the adjudicator ought to have considered and determined it as part of his original adjudication.

[16] I have therefore concluded that the issue of Waiora's liability should be remitted to the adjudicator for determination. Counsel for Waiora agrees that this is appropriate. It would be wrong for the Court to go further and endeavour to decide a contested factual issue of this nature on the basis of the material on the Court file. That should properly be the task of the adjudicator, who has the ability to test and weigh the arguments for both parties. In particular, the adjudicator will need to reach a view one way or another as to whether Mr Nicholas told Mr Mikitasov that he was undertaking the work on Waiora's behalf. That issue cannot realistically be determined in the context of the present proceeding.

Result

[17] The application is granted. The adjudicator's determination is set aside to the extent that it purports to render Waiora liable to Mr Mikitasov. The issue of whether Waiora is liable to Mr Mikitasov is remitted to the adjudicator for determination.

---

4 *Rees v Firth*, above n 1.

Costs

[18] Counsel for Waioroa does not seek an award of costs in his client's favour. Costs will accordingly lie where they fall.

____

Lang J

Solicitors: