

BETWEEN

HEB CONTRACTORS LIMITED
Plaintiff

AND

**REDHILL DEVELOPMENTS
(NZ) LIMITED**

First Defendant

AND

ARJUN SAMI

Second Defendant

AND

**SONSRAM DEVELOPMENT
HOLDINGS LIMITED**

Third Defendant

Date of Ruling: 26 November 2009

Appearances: J Billington QC and K V Houtle for the Plaintiff
S Price and J Batchelor-Smith for the Defendants

PRE-TRIAL-RULING OF JUDGE M-E SHARP

Introduction

[1] Sonsram Development Holdings Limited and Arjun Sami have applied for a review of an Adjudicator's determination in respect of non-respondent owners pursuant to s 52 of the Construction Contracts Act 2002.

[2] Their application relates to Robert Green's determination dated 8 June 2009 that Redhill Development New Zealand Limited ("Redhill") was liable to pay HEB Contractors Limited ("HEB") \$2,039,307.13, that Sonsram and Mr Sami were associated owners of Redhill and that they too were jointly and severely liable with Redhill.

[3] A judicial review of the Adjudicator's determination was sought in the High Court by Redhill, Sonsram and Mr Sami. That application was unsuccessful and is under appeal. It will be heard in March 2010.

[4] The application on which I am to give a pre-trial ruling relates to the interpretation of s 54 of the Construction Contracts Act 2002. That is because the applicants for review in the District Court, under the relevant review provisions of the Construction Contracts Act 2002, argue that the substantive matter between Redhill and HEB must be aired before this Court in order to reach a proper determination about whether the Adjudicator's determination in respect of the non-respondent owners was a lawful one.

[5] The respondent in this proceeding argues to the contrary and says that the ambit of the powers of the District Court on review under these provisions is a much more narrow one and does not and cannot include the substantive dispute between Redhill and HEB which occupied a good amount of the Adjudicator's determination.

Sections 52, 53, 54 and 55 of the Construction Contracts Act 2002

[6] Section 52:

Owner who is not respondent may apply to the District Court for review of Adjudicator's determination

- (1) An owner who is not a respondent may apply to a District Court for a review of
 - (a) an Adjudicator's determination that the owner is jointly and severely liable with the respondent to make a payment to the claimant, and
 - (b) an Adjudicator's approval for the issue of a charging order in respect of the construction site.
- (2) A District Court has the jurisdiction to hear and determine an application for review under this section despite any limits imposed on District Courts in their ordinary civil jurisdiction by sections 29 to 34 of the District Courts Act 1947."

[7] Section 53 provides the procedure for seeking review. The all important section in regards to this particular application for a pre-trial ruling, s 54, has four parts.

[8] Section 54 provides that:

(1) For the purpose of hearing the application for review, the District Court—

- (a) must conduct the review as a hearing *de novo* of the relevant dispute; and
- (b) has all the powers, duties, functions, and discretions of the adjudicator in making the determination to which the application for review relates; and
- (c) has all the powers vested in a District Court in its civil jurisdiction.

(2) On hearing the application for review, the District Court may—

- (a) quash the determination, and substitute for it any other determination that the adjudicator could have made in respect of the original proceedings; or
- (b) refuse the application.

(3) A District Court's determination under subsection (2)(a)—

- (a) has effect as if it were a determination made by an adjudicator for the purposes of this Act; and
- (b) is not a final determination of the dispute between the claimant and respondent to the adjudication under review.

[9] Finally, with respect to s 54(3)(b):

“ ... does not prevent any proceedings between the claimant and the respondent to the adjudication under review from being heard and determined at the same time as the application for review under this section.”

The Scheme of the Construction Contracts Act 2002

[10] As Mr Billington said, and I adopt his submissions in this respect, the scheme of the Act provides that associate owner liability is a two-stage process:

- (a) liability of the respondent is determined by the Adjudicator;

(b) joint and several liability of the associates is then determined.

[11] It is well known that the Construction Contracts Act provides for a “quick and dirty” recovery of payment procedure. The principal focus of course is on the liability of the principal to the contractor, the principal having limited redress within the civil jurisdiction of the courts and being under a mandatory obligation to pay under the Construction Contracts Act.

The Substantive Dispute

[12] In the matter of the substantive Dispute, which was referred for determination to Mr Green, the substantive issue was whether Redhill was liable to pay a payment claim which had been served upon it by HEB and which had not been met within the statutory timeframe, by a payment schedule.

[13] Ancillary, of course, was the issue of whether there were non-respondent owners against whom liability under the Act must also be determined. I say must because that is what the Act provides for. So under the Construction Contracts Act the owner liability provisions of s 50 of the Act (determination of liability of owner who is not respondent and approval of charging order over construction site owned by that owner) will not be triggered until an Adjudicator has determined that the principal is liable to pay the amount claimed in the adjudication.

[14] Once that determination has been made, thus achieving the threshold, and there is a finding of liability against the principal and a finding that the owner is an associate (a purely factual matter) which derives from both the definition of associate and that meaning as fully described in s 7 pursuant to s 50(2)(a) the Adjudicator, as I say, must determine that the owner is jointly and severally liable with the principal (although this may be either in whole or in part).

The Applicants' Case

[15] The applicants submit that as the review is a hearing de novo of the relevant dispute, and the relevant dispute is the substantive merits of the entire dispute as it went before the Adjudicator; that on review under the s 52 to 55 provisions of the Construction Contracts Act this Court is enabled to hear what is in effect a re-litigation of the entire dispute that was referred to the Adjudicator.

The Respondent's case

[16] The respondent's argument, as I have said, is to the contrary. Mr Billington QC argues that the relevant dispute in this instance is only a matter of quantum in respect to the non-respondent owners. It could have been more had not certain findings been made by His Honour Lang J in the Auckland High Court on 5 August 2009 in his judgment on application for judicial review of the Adjudicator's determination.

Discussion

[17] In that case Lang J canvassed the scope of the Adjudicator's jurisdiction to make further determinations once he had concluded that a developer had lodged a payment schedule outside the time limit prescribed by the Act; the issue of whether and to what extent an Adjudicator can hold a land owner, who is associated with the developer, liable under the Act and the liability of an associated land owner who acquires part of the construction site after the contractor has completed his construction works on the site.

[18] Lang J, at paragraph 16, said there has never been any dispute that Redhill Sonsram and Mr Sami are associated persons in terms of the Act. Sonsram is an associated person because it owns the shares in Redhill, Mr Sami is an associated person because he is a director of both Redhill and Sonsram.

[19] At paragraph 86 Lang J said:

“During the hearing counsel for the plaintiff's advised me that Sonsram and Mr Sami have in fact filed an application for review of the Adjudicator's determination in the District Court as a backstop measure. I consider that that is the appropriate forum in which to consider whether Sonsram and Mr Sami should be required to pay a lesser sum than that which Redhill is required to pay.”

[20] From the foregoing I understand that the purely factual issues under s 50 of the Construction Contracts Act as to whether that section applied:

- (a) whether the claimant had referred to adjudication of dispute about whether an amount was payable under a construction contract;
- (b) whether the claimant sought in the notice of adjudication that a determination of the owner's liability and approval for the issue of a charge in order and;
- (c) whether the Adjudicator had determined that the respondent was liable to pay the amount claimed and was an associate of the owner

are now precluded from investigation by the District Court on review.

[21] They are precluded, it seems to me, by Lang J's findings but also by the fact that a concession appears to have been made that without shadow of a doubt the applicants before this Court were associates so that if the determination of the Adjudicator, as to the principal liability under the Construction Contracts Act, was a correct one then the finding as to liability against Sonsram and Sami, as associates, was a correct one. So it seems that the real issue between those parties for adjudication under the review procedures by the District Court is quantum only.

Discussion of s 52 and s 54

[22] Mr Price, who acts for the applicants in this proceeding, seeks to persuade the Court that one must read the provisions of s 52, s 53 and s 54 against the background of the Act and in particular of the fact that the word "dispute" is used throughout the Act in the sense of "any dispute under the Construction Contracts Act" or in this case all disputes under the Construction Contracts Act.

[23] Mr Price argues that if this Court is to so narrowly construe the meaning of the words "the relevant dispute" under s 54 it would be unjust to his clients because it would effectively deprive them of the ability to defend or litigate the finding of liability against them under those provisions of the Act relating to non-respondent

owners whereas in fact, says Mr Price, the other parties to an adjudication have the ability to issue separate civil proceedings.

[24] Mr Price also makes a valid point that to so narrowly construe the wording “the relevant dispute” under s 54, as Mr Billington QC would like, would also deprive the District Court of the power to hear anything but the most supplementary of matters such as, for example, the quantum of the Adjudicator’s determination in respect to non-respondent owners and indeed as to whether or not the procedural threshold issues, set out at s 50, had been achieved.

[25] Mr Price argues that the “relevant dispute” should be determined in a review under s 52 of the Act must be much greater. He argues that in order to find a non-respondent owner liable an Adjudicator must determine not just that the non-respondent owner is an associate of the respondent but also determine the dispute which is the subject of the adjudication in such a way as to find the contracting respondent liable to pay an amount to the claimant.

[26] Mr Price says that nothing in s 52 or s 54 supports the position that a District Court is not to go into the substantive dispute which underlies the finding of non-respondent owner liability and that clearly s 54 is wider than that so that those words “relevant dispute” can only mean the dispute which was before the Adjudicator and which formed the basis for the non-respondent owner’s liability.

Ruling

[27] I cannot uphold the argument which Mr Price advances on behalf of the applicants in this respect. It seems obvious and logical to me on a literal interpretation of the relevant provisions of the Construction Contracts Act that the “relevant dispute” must be the dispute in respect of an Adjudicator’s determination that the owner is jointly and severally liable with the respondent to make a payment to the claimant and an Adjudicator’s approval for the issue of a charging order in respect of the construction.

[28] Section 52 entitles an owner who is not a respondent to apply to a District Court for a review of exactly that. If the legislature intended to vest the District Court with a general power of review, so that the substantive dispute between the

principal and the contractor which was referred for adjudication could be re-litigated, then I would have expected the legislature to say so expressly rather than in fact, to the contrary, expressly limiting the matters which could be referred to the District Court for review.

[29] Section 54 and the term “relevant dispute” must refer to s 52. There is no other logical or reasonable manner of interpreting it. Were it otherwise and the District Court was vested by this Act with the power to rehear the entire dispute (that is enquire into its substantive merits) would open up the possibility of conflicting determinations. That is the Adjudicator’s determination on the substantive dispute between the contractor and the principal could quite conceivably end up being different from the judgment of the District Court in respect to non resident owners as to the substantive liability of the principal and contractor on the substantive dispute. That would be inconsistent with the purpose and scheme of the Act.

[30] I accept the argument of Mr Billington QC that once an Adjudicator has determined that the principal is liable there are only limited grounds of redress available. If the determination is upheld on judicial review, that determination is a final determination of the parties’ rights with respect to that payment claim and the principal must pay up or face enforcement proceedings so that the proper forum for opening up or re-investigating the principal’s liability under the contract must be through general proceedings under the whole contract.

[31] In addition, because Lang J has already determined (and this is conceded I believe) that there is no dispute that Sonsram and Mr Sami are associates of Redhill for the purposes of the Act, I concur with the argument of Mr Billington that the only issue to be determined in this s 52 review is whether Sonsram and Sami were properly found to be liable for the full amount claimed.

[32] It should be noted in this regard that s 50(2) requires the Adjudicator to determine that the owner is jointly and severally liable with the respondent to pay (whether in whole or in part) the amount claimed in the adjudication, should s 50(1) apply. That indicates surely that the issue of the quantum that the Adjudicator has determined that the non-respondent owners should meet, may be and is capable of review in the District Court under the procedures provided.

In Summary

[33] The review proceeding, which I understand is shortly to be allocated a fixture in this Court, will only traverse the quantum that the applicant should pay or, to put it correctly, whether the Adjudicator erred in finding that Sonsram and Sami were liable for the full amount claimed.

[34] Because this is a pre-trial ruling it will sit with any judgment ultimately handed down in respect of that review application so that both may be appealed should either party be unhappy with either this ruling or the subsequent judgment.



M-E Sharp
District Court Judge