

**IN THE DISTRICT COURT  
AT CHRISTCHURCH**

**CIV-22009-009-001314**

BETWEEN

I Q HOMES LTD  
Plaintiff

AND

GRAEME NEIL SMITH, RICHARD  
DOUGLAS FISHER AND BELINDA  
MAY FISHER (AS TRUSTEES OF THE  
FISHER FAMILY HOME TRUST)  
Defendants

Hearing: 28 July 2009

Appearances: G D Jones for Plaintiff  
A D Marsh for Defendants

Judgment: 31 July 2009

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**RESERVED DECISION OF JUDGE G S MACASKILL ON PLAINTIFF'S  
APPLICATION FOR ADJUDICATOR'S DETERMINATION TO BE  
ENFORCED BY ENTERING JUDGMENT**

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**The applications**

[1] The plaintiff has applied for an adjudicator's determination dated 27 April 2009 to be enforced as a judgment under Sub Part 2 of Part 4 of the Construction Contracts Act 2002. The defendants have applied to oppose entry of the determination as a judgment. The defendants' opposition is on the grounds that the construction contract to which the adjudicator's determination relates is a "residential construction contract" and, as such, cannot be enforced under Part 4 of the Construction Contracts Act 2002 by reason of s 10(d) of that Act.

### **The material facts**

[2] The background facts are not in issue and I substantially adopt Mr Marsh's summary.

[3] The defendants were the three trustees of a family trust known as the Fisher Family Home Trust. Richard Fisher and Belinda Fisher are both trustees and beneficiaries of that trust. Graeme Smith was a trustee at the time the contract was entered into but is no longer a trustee of the trust.

[4] On or about 11 March 2008, the trustees entered into a contract with the plaintiff for the construction of a residential home for Richard and Belinda Fisher. Building work commenced in March and continued until the plaintiff suspended work on 19 December 2008 as a result of disputes between the parties. The parties had agreed that the building contract was a residential construction contract and always proceeded on that basis. Richard and Belinda Fisher dealt with the plaintiff at all times. Mr Smith is a solicitor. He was not involved in the day to day dealings between the parties.

### **The adjudication claim**

[5] The plaintiff lodged an adjudication claim in relation to unpaid payment claims on 18 March 2009. At all times during the dispute and the adjudication claim process, all parties to the contract agreed that the contract was a residential contract under the Act.

[6] The adjudicator made his determination on 27 April 2009. In making his determination, the adjudicator found that the contract between the parties was not a residential construction contract. That had the consequence that two disputed invoices were held to be valid payment claims whereas, if the contract had been a residential construction contract, they would have been invalid payment claims.

## The relevant provisions in the Construction Contracts Act 2002

[7] In the following discussion, the key provisions in the sections quoted are shown in **bold**.

[8] The plaintiff's application for the adjudicator's determination to be enforced by entry as a judgment of this Court is made pursuant to s 73 of the Act, which provides:

### 73 Enforcement of adjudicator's determination

- (1) This section applies if an adjudicator determines that a party to the adjudication is liable, or will be liable if certain conditions are met, to pay another party either or both of the following:
  - (a) an amount of money under the construction contract:
  - (b) any costs and expenses incurred in the adjudication (including any amount of contribution to the adjudicator's fees and expenses that the adjudicator has determined is payable by one party but that has been paid by another party).
- (2) **If this section applies, a plaintiff may apply for the adjudicator's determination in respect of the matters referred to in subsection (1) to be enforced by entry as a judgment in accordance with this subpart.**
- (3) The application—
  - (a) may be made to a District Court; and
  - (b) must be made in the manner provided by the rules of that court (if any).
- (4) Either before or immediately after making the application, the plaintiff must serve on the defendant—
  - (a) a copy of the application; and
  - (b) a statement setting out the consequences for the defendant if the defendant takes no steps in relation to the application.
- (5) Despite subsection (2), a plaintiff (to whom an amount of money will be payable under an adjudicator's determination if certain conditions are met) may only apply for that determination to be enforced by entry as a judgment after those conditions have been met.

[9] The defendant opposes the plaintiff's application pursuant to s 74 which provides:

**74 Defendant may oppose entry as judgment**

- (1) If the defendant wishes to oppose the application under section 73, the defendant must, within 15 working days after the date on which the defendant is served a copy of the application, apply to the District Court for an order that entry of the adjudicator's determination as a judgment be refused.
- (2) **The application for an order referred to in subsection (1) may be made only on the following grounds:**
  - (a) that the amount payable under the adjudicator's determination has been paid to the plaintiff by the defendant:
  - (b) **that the contract to which the adjudicator's determination relates is not a construction contract to which this Act applies:**
  - (c) that a condition imposed by the adjudicator in his or her determination has not been met.
- (3) If the District Court is satisfied that any of the grounds set out in subsection (2) applies, the District Court must—
  - (a) refuse the application under section 73 to enforce the adjudicator's determination by entry as a judgment; and
  - (b) make an order accordingly.
- (4) If the District Court is not satisfied that 1 or more of the grounds set out in subsection (2) applies, the District Court must—
  - (a) accept the application under section 73 to enforce the adjudicator's determination by entry as a judgment; and
  - (b) enter the adjudicator's determination as a judgment accordingly.

[10] The defendant relies on subs (2)(b). Counsel agree that this provision must be read in conjunction with s 10 which provides:

**10 When Act applies: residential construction contracts**

**To avoid doubt, this Act applies to residential construction contracts, except for the following provisions:**

- (a) sections 15 to 18 (which set out default provisions that relate to progress payments); and

- (b) sections 23(2)(b), 24(2)(b), and 59(2)(b) (which relate to the serving of a notice to suspend the carrying out of construction work under a construction contract); and
- (c) sections 29, 30, 32, and 49 to 55 (which relate to the issue of charging orders in respect of construction sites); and
- (d) **Part 4 (which relates to other measures for securing payment under this Act).**

[11] Section 73 is within Part 4 of the Act. In consequence, if the contract the subject of this proceeding is a residential construction contract within the meaning of the Act, the plaintiff's application must fail. In that event, the plaintiff will not be able to enforce the adjudicator's determination as a judgment of this Court but must rely on the other remedies available and, in particular, s 59(2)(a), which would enable the plaintiff to recover the sum owing as a debt due.<sup>1</sup> Section 59 provides:

**59 Consequences of not complying with adjudicator's determination under section 48(1)(a)**

- (1) The consequences specified in subsection (2) apply if a party to the adjudication fails, before the close of the relevant date, to pay the whole or part of the amount determined by an adjudicator.
- (2) **The consequences are that the party who is owed the amount (party A) may do all or any of the following:**
  - (a) **recover from the party who is liable to make the payment (party B), as a debt due to party A, in any court,—**
    - (i) **the unpaid portion of the amount; and**
    - (ii) **the actual and reasonable costs of recovery awarded against party B by that court:**
  - (b) if party A is a party who carries out construction work under a construction contract, serve notice on party B of party A's intention to suspend the carrying out of construction work under the contract:
  - (c) apply for the adjudicator's determination to be enforced by entry as a judgment in accordance with subpart 2 of Part 4.
- (3) A notice referred to in subsection (2)(b) must state—
  - (a) the ground or grounds on which the proposed suspension is based; and

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<sup>1</sup> Perhaps subject to any adjustment to the adjudicator's determination that may be required.

- (b) that the notice is given under this Act.
- (4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of a party unless it is satisfied that the circumstances referred to in subsection (1) exist.
- (5) In this section, relevant date means—
  - (a) the date that occurs 2 working days after the date on which a copy of the relevant determination is given to the parties to the adjudication under section 46(3); or
  - (b) if the adjudicator determines a later date under section 48(3)(a)(ii), that later date.

**Was the contract a commercial construction contract or a residential construction contract?**

[12] The distinction between commercial construction contracts and residential construction contracts is a feature of the statutory scheme. It is unnecessary for me to review the scheme in this judgment. However, I observe that the Legislative policy considerations that apply to residential construction contracts would apply equally to the situation where the trustees of the family trust are contracting parties as to the situation where ordinary individuals are the contracting parties. To put it another way, the use of a family trust to provide a home for the family trustees/beneficiaries adds no element of commerciality.

[13] The issue whether the subject contract is a commercial construction contract or a residential construction contract must be determined having regard to the definition provisions in s 5 of the Act:

**residential construction contract** means a contract for carrying out construction work in which one of the parties is the residential occupier of the premises that are the subject of the contract

**residential occupier** means an individual who is occupying, or intends to occupy, the premises that are the subject of a construction contract wholly or mainly as a dwellinghouse

[14] As to the application of the definition of “residential construction contract”:

- a) The subject contract was undoubtedly a contract for the carrying out of construction work.

- b) Two of the parties, Richard Fisher and Belinda Fisher, are the “residential occupiers” of the premises the subject of the contract in that they intended to occupy the premises. It is irrelevant that they entered into the contract in their capacities as trustees of the family trust; it is sufficient that they are parties and are also the residential occupiers. They do not need to be residential occupiers in their capacities as trustees.

### **Grant Hamilton Construction Limited v Trustees of the Japek Trust**

[15] The adjudicator’s conclusion that the subject contract was not a residential construction contract turned on his decision to follow the judgment of Judge Everitt in *Grant Hamilton Construction Limited v Trustees of the Japek Trust*<sup>2</sup>. That case was decided after commencement of the adjudication. Mr Jones relied on Judge Everitt’s decision as correct and urged me to follow it. I shall briefly explain why I think that His Honour’s reasoning and his conclusions are wrong.

[16] Judge Everitt was dealing with facts similar to the facts of this case. His Honour held that the trustees could not be classified as individuals within the meaning of the definition of “residential occupier”. His Honour concluded that trustees could not act as separate individuals because that is the nature of the concept of a trust. They must act with unanimity. Furthermore, it is not permissible to separate out the trustees who might be occupiers and say that they are “one of the parties”.

[17] I respectfully disagree with Judge Everitt. Trustees must generally act unanimously but that is irrelevant. In the context of the statutory definitions under discussion, the status of the defendants as trustees simply does not affect the concurrent status of two of them as occupiers. It is not correct to describe the three contracting trustees as a single party. A trust is not a legal entity. It is a bundle of rights, powers and duties that are conveniently described as a trust but which, as a matter of law, actually attach to the individual trustees. Each of the trustees is a contracting party, although their legal relationships with the plaintiff are identical.

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<sup>2</sup> (Unreported), District Court, Hamilton, CIV-2008-019-1630, 25 March 2009

There is nothing legally objectionable in recognising the status of two of the three trustees as individuals who are occupiers of the premises. They are individuals and two of them are occupiers of the premises.

[18] Judge Everitt says at para [18]:

The purposes of the Act satisfy me that a trust structure restores somewhat any power imbalance that there may be between a builder construction company and individual occupiers of a residential premise in that a trust is an identity set up for many reasons but inter alia to safeguard and protect individual beneficiaries and assets and as such is a quasi-commercial or commercial entity which in most cases is empowered to invest in a wide variety of assets and carry out a variety of commercial and non-commercial activities.

[19] Again, I respectfully disagree. In the case of an ordinary family trust, a trust structure does nothing to restore any power imbalance that there may be between a builder construction company and individuals. Family trusts are most commonly created to protect family assets or for estate planning and that is almost invariably the case with respect to the vesting of the family home as a trust asset. Such a purpose is not “quasi-commercial” or “commercial”. Such an arrangement does not give the husband and wife trustees any additional “power”. The fact that the third trustee may be a professional will not alter the power imbalance in a construction contract. The situation is no different from that where a husband and wife, contracting in their own names and not as trustees, take legal advice on a professional basis. Where they contract as trustees and their lawyer is the third trustee, the legal advice is given in the lawyer’s professional capacity and not in his or her capacity as trustee. In reality, the involvement of a professional trustee is usually intended only to prevent the trust being challenged as a sham. The lawyer/trustee is usually not involved in decision making with respect to the building contract other than to provide legal advice.

## **Result**

[20] The plaintiff’s application for the adjudicator’s determination to be enforced by entering judgment fails. The defendant’s application to oppose succeeds.



[21] The plaintiff is ordered to pay the defendant's costs of and incidental to the applications on a 2B basis, together with costs, both as fixed by the Registrar.

**G S MacAskill**  
District Court Judge

Signed at 10 a.m on 31 July 2009.