JUDGMENT : Asher J. High Court New Zealand Auckland Registry. 13th December 2007

Introduction

[1] This is an appeal under s 72 of the District Courts Act 1947 against a judgment of Judge DM Wilson QC in the District Court at North Shore pursuant to ss 73 and 74 of the Construction Contracts Act 2002. The decision, dated 5 July 2006, entered an adjudicator's determination under the Construction Contracts Act in the District Court as a judgment of that Court under s 73(2) so that it could be enforced as a judgment of that Court.

[2] Three broad objections are raised to the decision to enter the judgment. First, it is submitted that the adjudication was entered in the District Court without jurisdiction because the amount of the judgment exceeded the District Court limit of $200,000. Second, it is submitted that the District Court Judge erred in entering judgment without there being an actual hearing in which the appellants had an opportunity to produce evidence and present submissions in support of their opposition to entry. Third, it is submitted that the Judge was in error in not finding that the debt had been paid.

Background

[3] The dispute arose from a building contract between the respondent, Holmes Construction Wellington Limited ("Holmes"), and a company known as Holmes & Willis Trust Company Limited ("Willis"). The present appellants, Ian Laywood and Gray Rees ("Messrs Laywood and Rees"), were directors of that latter company.

[4] In late 2005, Holmes referred a dispute with Willis and Messrs Laywood and Rees to adjudication under the Construction Contracts Act. The duly appointed adjudicator determined on 10 February 2006 that Willis was liable to Holmes for $1,324,165.22 inclusive of GST and that Messrs Laywood and Rees were liable to Holmes for $322,387.27 inclusive of GST. These amounts were never paid to Holmes.

[5] On 16 February 2006, Holmes applied for the adjudicator's determination against Willis and against Messrs Laywood and Rees to be entered as a judgment in the District Court pursuant to s 73 of the Construction Contracts Act.

[6] On 20 February 2006, Willis and Messrs Laywood and Rees applied to the High Court for judicial review of the adjudicator's determination under the Judicature Amendment Act 1972. Interim orders were made prohibiting Holmes from taking steps to enforce the determination until the application for judicial review had been determined. The interim orders were made on terms that prohibited Holmes from enforcing any determinations or orders made by the adjudicator, providing Willis paid the amounts owing under the determination to a nominated stakeholder. Willis failed to pay these amounts and as a result the interim order prohibiting Holmes from enforcing that part of the adjudicator's determination lapsed on 9 March 2006. Subsequently on 10 March 2006 the determination was entered as a judgment against Willis in the District Court. The interim orders remained in force, however, against Messrs Laywood and Rees.

[7] On 25 May 2006 Harrison J dismissed the judicial review application and upheld the adjudicator's determination, save for correcting a miscalculation in relation to GST and interest.

[8] On 6 June 2006 Holmes made an application to the District Court for the adjudicator's determination to be enforced by entry as a judgment against Messrs Laywood and Rees for the amount of $280,679.00 including GST, being the amount of the determination outstanding after correction for miscalculation.

[9] On 27 June 2006 Messrs Laywood and Rees filed a document opposing Holmes' application for entry of judgment on the grounds that:

a) The amount payable under the adjudicator's determination had been paid to Holmes; and
b) The contract was not a construction contract.

[10] On 28 June 2006 counsel for Holmes filed a memorandum responding to Messrs Laywood and Rees' notice of opposition.

[11] On 5 July 2006 the District Court gave the judgment that is the subject of this appeal. The judgment was given on the papers without an oral hearing.

The decision

[12] The decision the subject of the appeal was made on the basis of Holmes' application for entry of the adjudicator's determination, Messrs Laywood and Rees' application to oppose and Holmes' memorandum in reply. In a short 11-paragraph decision, the Judge entered the adjudicator's determination against Messrs Laywood and Rees for the sum of $280,679.00. He noted that the adjudicator's determination was unconditional and therefore there was no basis for not entering judgment on the grounds that there was an unfulfilled condition.

[13] He dealt more fully with the issue of whether the adjudicator's determination did not relate to a construction contract to which the Construction Contracts Act applied. He stated incorrectly that the sole ground relied upon in terms of s 74(2) was a submission that the contract was not one to which the Construction Contracts Act applied. This was an error in that the further ground that the plaintiff had been paid had also been specifically raised.

[14] The Judge proceeded to hold that he was bound by the judgment of Harrison J in the High Court, in the course of which decision it was determined that the contract was indeed a construction contract under the Construction Contracts Act. The Judge stated that in any event he agreed with that decision, and concluded that there was no

statutory bar to the respondent's application. He considered himself bound to enforce the adjudicator's determination, and ordered costs for the respondent on a 2B basis.

Is the District Court's jurisdiction limited to claims up to $200,000?

[15] The first issue raised by Mr Hucker for Messrs Laywood and Rees was that the District Court had no jurisdiction to enter the judgment because of the amount involved. He relied on s 29 of the District Courts Act 1947, which reads:

29 General jurisdiction in respect of proceedings

(1) The Courts shall have jurisdiction to hear and determine any proceeding where the debt, demand, or damages, or the value of the chattels claimed, is not more than $200,000, whether on balance of account or otherwise:

Provided that the Courts shall not, except as in this Act provided, have jurisdiction to hear and determine

(a) Any proceeding for the recovery of land; or

(b) Any proceeding in which the title to any franchise is in question.

(2) The Courts shall have jurisdiction to hear and determine any proceeding where the debt or demand claimed consists of a balance not exceeding $200,000, after a set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, being a set-off admitted by the plaintiff in the particulars of the plaintiff's claim or demand.

[16] Mr Hughes for Holmes submitted that s 29 of the District Courts Act was irrelevant as it did not limit the District Court's jurisdiction, because the enforcement of an adjudication determination was not a proceeding where there was a "debt demand or damages". I am by no means certain that s 29 can be so narrowly construed. An application to enforce an adjudicator's determination under s 73(1) must relate to an amount of money and any costs and expenses. Once an adjudicator makes a determination, the amount of that determination can be properly regarded as a debt, and viewed broadly, the proceeding can be seen as a proceeding for a debt.

[17] There can be no doubt that s 29 does not confer jurisdiction for the District Court to enter an adjudicator's determination in the sum of $280,679, as it exceeds $200,000. The jurisdiction of the District Court, being an inferior Court as defined in the Judicature Act 1908 is endowed and limited by statute. It has no jurisdiction beyond that which is so defined. The question, then, is whether jurisdiction to enter such a judgment has been conferred. Given that it cannot come from the District Courts Act, any jurisdiction must come from within the Construction Contracts Act. There is no other relevant provision.

[18] The Construction Contracts Act in its definition section at s 5 defines "Court" as meaning both the High Court and the District Court "in any proceeding which the amount claimed or in issue does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases." Thus there can be no doubt that where the Construction Contracts Act refers to "Court" s 5 applies and the monetary jurisdiction limit of $200,000 for the District Court is operative.

[19] The relevant section under which this judgment is enforced, s 73, states at s 73(2) and (3):

73 Enforcement of adjudicator's determination

(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).

(emphasis added)

[20] The drafters of the Act were careful to distinguish between Courts generally and the District Court. For instance, s 59(2)(a) gives a party who is owed an amount under the Construction Contracts Act the ability to seek that amount as a debt due "in any Court". In "any Court" presumably means that if the debt is under $200,000 it may be recovered through the District Court, and if it is more than $200,000 it can only be recovered through the High Court.

[21] This sort of language is not used in s 73(3). The subsection is specific that the application may be made to the District Court and there is no reference to the High Court or to the unqualified word "Court". In its original form, s 73 provided that application could be made "*to any Court of competent jurisdiction*" subject to "*the rules of that Court*", but this was changed by supplementary order paper to "District Court" only. I note that In Hon R Smellie Progress Payments and Adjudication (2003) at p 62 the learned author assumed that s 73(3)(a) restricted application to the District Court only.

[22] It is curious that the word "may" was used in s 73(3)(a) rather than a word such as "shall". The use of a non-directory word may simply reflect the fact that it is of course up to a plaintiff as to whether to make any application. It cannot, in my view, be construed as indicating that the High Court is an alternative to the District Court for the purpose of this sort of application.

[23] It is provided in s 73(3)(b) that the application must be made in the manner provided by the rules of that Court (if any). While detailed new District Court rules were enacted to deal with this procedure, no equivalent provisions were provided for in the High Court Rules. If it had been intended that the High Court have jurisdiction, it could have been expected that the equivalent provisions would have been inserted in the High Court Rules. The fact that

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved. [2007] HC AK CIV 2006-404-4152

they were not indicates that the legislature envisaged only the District Court receiving such applications, irrespective of the amount involved.

[24] Section 74 states that if a defendant wishes to oppose the plaintiff's application, the defendant "... must ... apply to the District Court." There is no reference to any other Court. Section 75 provides that if the defendant takes no steps within 15 working days "the District Court must ... enter the adjudicator's determination". Again, there is no reference to any other Court but the District Court. Those who drafted the section cannot have intended that there could be a right to oppose an application to enter a determination in the District Court, but no such right to oppose in the High Court. The clear intention is to confer jurisdiction for the District Court to enter all determinations, whether more or less than $200,000. The drafters cannot have intended to limit the power to only determinations of up to $200,000. Many claims of this sort will be over $200,000. It would undermine the rationale of the Act, which is to provide speedy short-term resolutions, to so limit the District Court's jurisdiction. It would mean that claims of over $200,000 could not be enforced.

[25] An interpretation of unlimited jurisdiction for the District Court is also consistent with the purpose of the Construction Contracts Act. The purpose as stated at s 3(b) "to provide for the speedy resolution of disputes arising under a construction contract; and (c) to provide remedies for the recovery of payments under a construction contract". The explanatory note to the supplementary order paper changing "any Court" in s 73 to "District Court" explained that "this amendment is intended to ensure consistency with the purpose of the Bill to provide for the speedy resolution of disputes". Such speedy resolution, by entry of adjudicator's determinations, is best fulfilled by the District Court having jurisdiction over the enforcement of all determinations.

[26] In conclusion, I construe ss 73-75 of the Constructions Act as giving jurisdiction exclusively to the District Court to hear applications to enforce adjudicator's determinations, whatever the amount.

Was the District Court required to give an oral hearing?

[27] Mr Hucker's second submission was that the District Court breached the principle of audi alteram partem ("hearing the other side") in that it did not provide an oral hearing for the contested application. He relied on s 27(1) of the New Zealand Bill of Rights Act 1990 and cases such as **Martin v Ryan** [1990] 2 NZLR 209, which stated that the giving of ex parte orders represented a fundamental denial of natural justice, and that the discretion to hear them should only be exercised in rare cases. I do not consider that the cases relating to ex parte hearings are of much assistance here because this is not a situation where a litigant is not heard at all. On the approach taken in the District Court, both parties may be heard but only on the papers. It is not necessarily a denial of the principles of natural justice to hear a matter on the papers only if both sides have the ability to make submissions and the issue can be fairly so determined.

[28] There are certain indicia in ss 73-75 as to whether an oral hearing is required. A defendant must be served under s 73(4). Under s 74(1) the defendant must, if the application is to be opposed, file within 15 days an application for an order that entry of the adjudicator's determination as a judgment be refused. That is what happened in this case. Such an application can be made on only three grounds set out in s 74(2):

(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.

Section 74(3) provides:

(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.

Section 74(4) provides:

(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.

[29] Sections 73 and 74 are silent as to what is to happen procedurally after an application to oppose is filed by a defendant. They give no indication of whether a hearing is required.

[30] Following the enactment of the Construction Contracts Act, new District Courts rules were enacted at rr 461ZZB-461ZZL to deal with particular procedural matters that would arise in the District Court. Rule 461ZZJ provides for how an application for an adjudicator's determination is to be enforced. Rule 461ZZL deals with an application to oppose and provides:

461ZZL Opposition to application for adjudicator's determination to be enforced

(1) If the defendant wishes to oppose the application for an adjudicator's determination to be enforced, the defendant must, within 15 working days after the date on which the defendant is served a copy of the application -

(a) file an application in the Court seeking an order that enforcement of the adjudicator's determination be refused; and

(b) serve a copy of the application and of any accompanying documents on:

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved. [2007] HC AK CIV 2006-404-4152

(i) the plaintiff; and

(ii) any other party to the relevant adjudication proceedings.

(2) The application must be in form 400.

[31] These rules follow s 74, and do not on their words give much indication as to whether it is anticipated that an oral hearing will follow the filing of the documents. The forms of the documents to be filed are set out at 40N in the First Schedule to the Rules (the application for an adjudicator's determination to be enforced by entry as judgment) and Form 400 (application to oppose entry of adjudicator's determination as judgment).

[32] The notes that are attached to the form of application to enforce state only that if the defendant wishes to oppose the application it must within 15 days of service of the application file an application for an order that this application be refused. Form 400 provides:

Take notice that -

1. *I, [full name, address, and description of defendant] intend to oppose the application for an order that the adjudicator's determination be enforced by entry as a judgment.*
2. *1 intend to oppose the application on the following ground(s) ...*

I note that there is provision for the application to be served.

[33] It is significant that neither application form provides for any hearing date. This is to be contrasted with other forms of application and objection throughout the Rules, which do provide for a date. I note that other application forms such as an application for a removal order under s 215 of the Local Government Act 2002 (Form 48) do not so provide at the outset of the application, although they do provide at the end for there to be an affidavit stating whether a party wishes to be heard in support of the application.

[34] The use of the word "intend" in the application to oppose may be more consistent with there being still further events to come following the filing of the document. Further, the fact that the application to oppose has to be served is something of an indication that a hearing is anticipated because if the process was limited to the application to enforce and the application to oppose with no hearing, there would be no need to serve the application to oppose. On the other hand, the obligation to serve may be seen simply as a way of ensuring that all parties are informed of what is happening.

[35] In fact in this case the plaintiff filed a memorandum in reply. It seems surprising that the plaintiff would have the first and last word without any hearing, although there are other areas of Court practice where this occurs. For instance, costs arguments, which can involve substantial issues, are often dealt with on the papers, with the applicant having the final right of reply.

[36] On an overview, I do not consider that there is any conclusive indication in the sections or rules themselves as to whether there should be any hearing.

[37] Having considered the text, I turn to the purposes of the Act in accordance with s 5(1) of the Interpretation Act 1999, and extraneous aids to interpretation. There is no general principle that a right to a hearing always equates to a right to an oral hearing. However, it is the case that matters of substance are usually given an oral hearing in the District Court.

[38] Section 3 states that the purpose of the Construction Contracts Act is to facilitate regular and timely payments between parties to a construction contract and to provide for the speedy resolution of disputes. The general theme of the Act is to provide a prompt and efficient scheme for the initial recovery of a sum by a contracting party (New Zealand Law Commission Protecting Construction Contractors NZLC SP3 1999 at para 31) without the delays that previously arose when there was orthodox contested litigation between contracting parties.

[39] Mr Hucker for Messrs Laywood and Rees argued that it must be the case that the legislature intended there to be an oral hearing of any application to enforce an adjudicator's determination because the determination, once enforced by the Court, would prevail over any later decisions according to the doctrine of res judicata. He submitted that once enforced through the s 73 process, the judgment must be final. There could be no such thing as a temporary or "B class" judgment.

[40] Mr Hughes for Holmes submitted that res judicata would not apply to any adjudication that was enforced through the District Court under the s 73 process, and that if it did so apply then the whole purpose of the Act, which was "pay now, argue later" would be defeated.

[41] I considered the issue of whether res judicata applied to adjudicator's determinations under the Act in **Marsden Villas Ltd v Wooding Construction Ltd** [2007] 1 NZLR 807 at [67]:

*Further, even if there had been some determination of the issues by the adjudicator, that determination does not preclude the party from pursuing its claims in a Court or by way of arbitration. Given the acceptance of cumulative claims by the Court of Appeal in **Canam,** it is difficult to see why a progress claim should be invalidated because a claim is included that has already been adjudicated. Res judicata would not apply.*

[42] Various statements confirm that it was the intention of the legislature that an adjudicator's determination under ss 73-78 not be determinative. It was stated at p 11 of the Law Commission study paper Protecting Construction Contractors, which led to the enactment of the Bill:

The affect of s 32 is that the adjudicator's determination is not intended to make any issue res judicata, a dispute finally decided. The adjudicator's decision is as to cashflow. The adjudicator determines the immediate payment to be made but issues relevant to that determination remain able to be reagitated at a later stage. This may mean in some cases that the payee has to make restitution.

Similar statements are made elsewhere in the report.

[43] In the select committee report into the Construction Contracts Bill, it was stated at 9:

The adjudication process does offer quick remedies and consequently requires both procedural simplicity and tight timeframes. However, it does not have the procedural safeguards or processes of Court proceedings or arbitration, and may be relitigated by parties in such a forum.

It is clear from the provisions of ss 26 and 27 of the Construction Contracts Act that adjudication does not affect the right of parties to have their contractual disputes decided through orthodox dispute resolution processes outside the Act. Section 26(1) specifically provides that nothing in Part 3 of the Act prevents the parties to a construction contract from submitting a dispute to another dispute resolution procedure, for example, to a Court or Tribunal or to mediation. The section specifically contemplates adjudication proceedings existing alongside other dispute resolution procedures. If those other dispute resolutions are determined, the adjudicator must terminate the adjudication proceedings: s 26(3). Section 27(1) specifically provides that nothing done under or for the purposes of Part 3 of the Act affects any civil proceedings arising out of a construction contract, and s 27(2) provides that allowances must be made for moneys paid under Part 3 when orders are made in the final proceedings. Section 59(2)(c) provides that an adjudicator's determination may be enforced by entry of the judgment in accordance with sub-part (2) of Part 4, which is the part of the Act containing ss 73 and 74.

[44] I conclude that the provisions of ss 26 and 27, which confirm the subservience of an adjudicator's determination to other dispute resolution procedures, apply to the enforcement process set out in later sections. A judgment enforcing a determination is subject to other dispute resolution procedures in the same way as the original determination. I note that an academic commentator has recently also taken the view that res judicata does not apply: J Ren "*Enforcing payment Obligations under the Construction Contracts Act*" (2002) 12 NZ Bus LQ 344, 345.

[45] The fact that the enforcement process is not intended to transform an adjudicator's determination into a final judgment, and is not intended to prevail over any other dispute resolution procedures, is confirmed by a reading of the select committee report. It was stated in relation to the insertion of the enforcement procedures in ss 73-75:

We recommend a faster and simpler remedy allowing the claimant to apply to the Court for the adjudicator's determination to be entered as a judgment, while giving the debtor an opportunity to file an objection.

[46] It was stated later in relation to the insertion of what is now s 79, which provides that devices such as a counterclaim cannot be used to prevent the adjudicator's determination from being treated as binding:

This only applies where the adjudicator's determination is sought to be enforced and does not affect the substantive case before the adjudicator or any other proceedings.

These remarks indicate that the select committee envisaged that the enforcement procedures would not change the subservience of the Construction Contractors Act process to any substantive determination.

[47] A conclusion that the legislature intended a quick determination on the papers is consistent with the relatively limited grounds for opposition set out in s 74(2). Those grounds focus on matters that are likely to be of record or law, and which will tend not to involve areas of disputed evidence, and therefore are amenable to resolution on the papers.

[48] The purpose of enforcement of the adjudicator's decision is therefore to provide a speedy mechanism for enforcing the determination and giving the plaintiff cashflow. It would be inconsistent with the streamlined, relatively inexpensive and temporary process created by the Act for there to be a full oral hearing of an application to enforce an adjudicator's determination, which would inevitably be time-consuming. It is more consistent with the purposes set out in the Act for the District Court's consideration of an enforcement application to be on the papers only. This does not, after all, deny the defendant a hearing. It does, however, limit the defendant opposing the decision to an expression of that opposition on paper.

[49] This approach is consistent with that adopted in the New South Wales Building and Construction Industry Security of Payment Act 1999 on which the New Zealand bill was modelled: see Law Commission report. Under s 25 of that Act, the amount of the adjudicator's determination could be recovered through the Court process without any hearing, or indeed notice.

[50] I have already considered the specific statutory and regulatory provisions relating to the process and noted that they do not provide in any specific way for an oral hearing. In the light of the purpose of the Act I conclude that the omission to refer to any oral hearing was deliberate. I conclude that it was not intended that there be any such hearing and that, therefore, the argument that the District Court Judge was in error in reaching his decision on the papers does not succeed. I record that I do not regard this conclusion as placing the procedure in ss 73 and 74 of the Act at odds with a defendant's rights to natural justice under s 27 of the Bill of Rights Act. The defendant is entitled to be heard, but in the context of this speedy procedure, a hearing on the papers is all that is required.

Adjudication Law Reports. Typeset by NADR. Crown Copyright reserved. [2007] HC AK CIV 2006-404-4152

Should the District Court have declined judgment on the basis that moneys were paid?

[51] Mr Hucker argued that the Judge was in error in entering the judgment as it was clear that the moneys due under the contracts had been paid. He submits that if the judge had actually heard submissions, he would have been persuaded that by applying the rule in Clayton's case as summarised in ***Re C & D Webster Ltd (in liquidation)*** [1995] 3 NZLR 590 that in fact the appellants had paid the debt in the course of payments during the course of the contract. The argument is based upon a calculation of the amounts paid to Holmes prior to the adjudicator's determination, and the submission that they should be interpreted as involving the payment of the particular debt of Messrs Laywood and Rees, rather than being credited to the debt owed by Willis. There was no suggestion that the amounts owing had been paid since the adjudication.

[52] I consider that s 74(2)(a), in putting forward as a ground of opposition that the amount payable under the adjudicator's determination has been paid, was referring to payment since the adjudicator's determination. This is the natural meaning of the phrase "the amount payable under the adjudicator's determination has been paid". I do not accept, as Mr Hucker submits, that it should be effectively interpreted as permitting an analysis of payments prior to the adjudicator's determination to see whether moneys paid earlier should be treated as a credit towards the amount to be paid. That would involve lifting the lid on all that had happened prior to the adjudication. That sort of issue would take evidence and time to hear and determine. That would be contrary to the clear intention of the drafters of s 74(2). That was to limit the grounds of opposition to easily justiciable issues arising from events since the adjudicator's determination, or the threshold legal question of whether the contract to which the adjudication relates is a construction contract to which the act applies.

[53] There being no suggestion that since the adjudicator's determination the amount determined to be payable has been paid, I conclude that no defence of payment being made was made out in any event. The judge did not consider that issue, but there is no basis for re-opening the Judge's conclusion. Further, the issue of the applicability of the Construction Contracts Act to the adjudicated contract had already been determined by the High Court in favour of Holmes.

Result

[54] The appeal is dismissed.

[55] The respondent is entitled to costs on a 2B basis together with reasonable disbursements.

Appearances: RB Hucker and A Cummings for Appellants D Hughes and J Nolen for Respondent

Solicitors:

RB Hucker, Hucker & Associates, PO Box 3843 Shortland Street Auckland

DM Hughes, Kensington Swan, Private Bag 92101 Auckland