

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CIV 2017-004-000194  
[2017] NZDC 14435**

UNDER THE CONSTRUCTION CONTRACTS  
ACT 2002

IN THE MATTER OF AN APPLICATION FOR  
ADJUDICATOR'S DETERMINATION  
TO BE ENFORCED BY ENTRY AS  
JUDGMENT UNDER RULE 20.86  
DISTRICT COURT RULES 2014

BETWEEN NAYLOR LOVE CONSTRUCTION  
LIMITED  
Plaintiff

AND BODY CORPORATE 200012  
Defendant

Hearing: 28 June 2017

Appearances: Mr CJ Booth and Ms EE Thode for the Plaintiff  
Mr TJ Rainey and Ms U Keller for the Defendant

Judgment: 5 July 2017

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**DECISION OF JUDGE G M HARRISON**

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**The application**

[1] By notice of application of 17 January 2017 Naylor Love Construction Limited (NLC) sought the entry as a judgment of this court the determination of Brian Keene Esq QC as an adjudicator appointed pursuant to the Construction Contracts Act 2002. The date of his determination as corrected was 1 December 2016.

[2] On 8 March 2017, at the request of NLC, and without opposition from the body corporate I entered judgment in favour of the plaintiff for \$905,085.67 which

represented that part of the adjudicator's determination which was not challenged by the body corporate. Interest on that amount was reserved for calculation when any final amount owing was determined.

[3] NLC now seeks the entry of judgment for \$2,469,730.44 (excluding GST) together with interest of \$163,592.97, for a total of \$2,633,323.10.

[4] Section 59(1) of the Act provides:

- (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:
  - ...
  - (c) apply for the adjudicator's determination to be enforced by entry as a judgment in accordance with subpart 2 of Part 4.

[5] The relevant date is the date that occurs two working days after the date on which a copy of the relevant determination is given to the parties to the adjudication and it is common ground that the balance of the amount determined by the adjudicator has not been paid.

[6] The relevant sections of subpart 2 are sections 73 and 74. Section 73 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 ...
- (2) If this section applies, a plaintiff may apply for the adjudicator's determination in respect of the matters referred to in subs (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) ...

[7] Section 74 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.

**The opposition**

[8] The work to be undertaken by NLC was the remediation of a residential townhouse development comprising 83 individual residential units located in

Mt Eden, Auckland. The remediation comprised of weathertightness works on four blocks on the site. The works were divided under the contract into four separable portions.

[9] The body corporate's opposition to the application was based upon the grounds:

- (a) That the contract was not a construction contract to which the Act applied;
- (b) That the adjudicator had no jurisdiction to determine claims which are not claims for money payable under the contract and that, therefore, the following parts of the determination are void and unenforceable:
  - (i) P&G thickening;
  - (ii) The claim for rate escalation; and
  - (iii) The Hope Construction claims.

[10] The further ground of opposition was that the adjudicator did not have jurisdiction to determine stated matters which had been the subject of formal engineers' decisions pursuant to the relevant part of the contract because they were not challenged within the time permitted by the dispute resolution clauses of the contract and therefore the engineers' decisions became formal determinations and could not be challenged.

[11] This ground of defence related to the P&G thickening and Hope Construction claims, and also an extension of time claim referred to as EOT3.

[12] Opposition to the interest awarded by the adjudicator was also based upon an alleged absence of jurisdiction to make the relevant awards.

[13] The body corporate now accepts that there was a construction contract. At paragraph 23 of his submissions Mr Rainey said:

- 23. The body corporate accepts that there was a construction contract between itself and Naylor Love and that Naylor Love was accordingly entitled to invoke s 25 of the CCA to refer "dispute" to adjudication under the CCA. The CCA defines "dispute" as:

A dispute or difference that arises under a construction contract.

24. The body corporate also accepts that several of the matters raised by Naylor Love in its notice of adjudication, and in its subsequent submissions in support of its adjudication claim were matters that were, at the time the adjudication was commenced, in dispute between the parties under the construction contract between them.

[14] The body corporate also acknowledged that it does not resist entry of judgment on any of the three grounds stipulated in s 74(2).

[15] At paragraph 46 of his submissions Mr Rainey said:

46. The body corporate does not resist the entry of judgment on the grounds provided for in s 74(2). It makes a more fundamental point relating to the determination. At (sic) it opposes entry of judgment for certain of the amounts awarded on the grounds that the adjudicator did not have jurisdiction to consider those claims or make an award of those amounts in exercise of the statutory jurisdiction conferred on the adjudicator pursuant to the CCA.

### **The purpose of the Act**

[16] Before considering the jurisdictional point raised by the body corporate it is necessary to outline the purpose of the Act according to the authorities.

[17] In *Wills Trust Company Limited v Holmes Construction Wellington Limited*<sup>1</sup> Harrison J said:

- [20] 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 a 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.

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<sup>1</sup> (HC Auckland, CIV-2006-404-809, 25 May 2006)

[18] This approach was confirmed by Mallon J in *Gill Construction Co Limited v Butler*.<sup>2</sup> She said:

[7] An adjudicator has the power to determine whether or not a party is liable to make payment under a construction contract (s 48 of the CCA). The adjudication is binding on the parties and is of full force and effect even where the other proceeding relating to the dispute has been commenced (s 60 of the CCA). The amount of the adjudication is recoverable as a “debt due ... in any court” (s 59(2)(a) of the CCA) or an application can be made for the adjudication to be entered as a judgment in accordance with the procedures for that in the CCA (s 59(2)(c) of the CCA). There are only limited grounds on which the entry of judgment can be resisted and they do not include that a party disagrees with the adjudicator’s view as to liability (s 74(2) of the CCA).

(underlining added)

[19] That approach had previously been stated by the Court of Appeal in *Laywood v Holmes Construction Wellington Limited*.<sup>3</sup> The court said:

[30] Finally, the role of the District Court under ss 73 and 74 is a restricted one. An application to oppose the entry of judgment may be made only on limited grounds (see s 74(2), discussed in more detail at paras [39]-[43] below). The District Court is confined to addressing those grounds and must either refuse (s 74(3)) or grant (s 74(4)) the application for the entry of judgment depending on whether the judge is satisfied or not as to the existence of one of the grounds.

[20] The court in that case also confirmed that this court has jurisdiction to enter all determinations under the Act as judgments, whether they relate to amounts below or above \$200,000, then the jurisdiction of this court, but now \$350,000.

### **The jurisdiction point**

[21] While acknowledging that it does not rely on any of the grounds specified in s 74(2), the body corporate nevertheless argues that if an adjudicator makes a determination without jurisdiction that determination cannot stand and so no judgment can be entered in this court based upon the determination.

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<sup>2</sup> [2010] 2 NZLR 229.

<sup>3</sup> [2009] 2 NZLR 243.

[22] That submission is in the nature of an appeal to this court against the adjudicator's determination in that this court is being asked to hold that the adjudicator erred in interpreting his jurisdictional limits. That topic was dealt with by the Court of Appeal in *Rees v Firth*<sup>4</sup> where the court concluded, as summarised from the headnote, that the Act did not require any application for judicial review to be limited to instances of jurisdictional error. It held any ground of judicial review might be raised, but it would be difficult to satisfy a court that intervention was necessary, given that an important purpose of the Act was to provide a mechanism to enable money flows to be maintained on the basis of preliminary and non-binding assessment of the merits.

[23] This court has no judicial review jurisdiction, nor is there any right of appeal to this court against an adjudicator's decision. Such a decision fixes the amount to be paid to the contractor, with the merits of any dispute to be contested either in Court or by arbitration.

[24] The body corporate relied upon two decisions in support of its contention that a lack of jurisdiction in an adjudicator arriving at a determination would not justify that determination being entered as a judgment of this court.

[25] The first is a decision of Venning J in *Stellar Projects Limited v Nick Gjaja Plumbing Limited*.<sup>5</sup> In that case, there was no agreement between the parties as to the adjudicator. Nor was there any agreement as to a nominating body to select a person to act as adjudicator. Nor was there a request directed to an authorised nominating authority to select an adjudicator. The judge found that the purported adjudicator was not an adjudicator within the meaning of the Act. He held the adjudication process did not comply with the provisions of the Act and therefore the purported award could have no effect in law or in equity. By contrast, there is no question in this case but that Mr Keene was properly appointed as the adjudicator. The decision is distinguishable on that basis alone. The effect of the decision can be understood by reference to subpart 3 of the Act which relates to the conduct of adjudication proceedings. It is quite clear that an adjudicator who has not been properly appointed

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<sup>4</sup> [2012] NZLR 408.

<sup>5</sup> (HC Auckland, CIV-2005-404-6984, 10 April 2006)

cannot acquire any jurisdiction whatsoever to determine the matters referred to in s 38. The *Stellar* case does not assist the body corporate.

[26] The second decision relied on by the body corporate is a decision of Miller J in *Patel v Pearson Group Limited*.<sup>6</sup>

[27] That case involved the existence or not of a construction contract between the parties to the appeal. The appellant had initially entered into a contract with Andrew Pearson, a director of Pearson Group Limited which was incorporated some months after the initial contract was entered into. The judge noted that the Act specifically contemplated that jurisdiction may be extended by agreement in writing and that the appellant had conceded that the company was the other party to the contract, and the adjudication proceeded on that basis until the appellant attempted to withdraw that concession. The parties in that case had conferred jurisdiction on the adjudicator by agreement and, having done so, it was held that that concession could not later be withdrawn to deprive the adjudicator of jurisdiction. That is an entirely different situation from this case, where the body corporate has accepted that a construction contract existed between it and NCL.

## **Conclusion**

[28] The opposition of the body corporate to entry of the adjudicator's determination as a judgment of this court fails.

[29] I rely particularly upon the statement of Mallon J referred to in [18] above where she said that entry of judgment cannot be resisted where a party disagrees with the adjudicator's view as to liability, and the statement of the Court of Appeal in *Laywood v Holmes Construction* quoted at [19] above.

[30] The body corporate does not rely on any of the grounds in s 74(2) to resist the entry of judgment. It merely disagrees with the determination of the adjudicator. That is not a ground specified by s 74(2). That means I do not have to consider whether

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<sup>6</sup> (Wellington High Court, CIV-2008-485-2571, 24 April 2009)



there was jurisdiction for the adjudicator to determine the claims specified in [9](b)(ii) of this decision.

[31] For those reasons, the application by NLC to enter the determination of the adjudicator as a judgment of this court in the sum of \$2,840,189.94 is granted. I did not understand the body corporate to dispute the accuracy of that amount.

[32] I reserve leave for memoranda to be filed in respect to what further interest should be added to the judgment sum, which hopefully the parties can agree upon.

[33] The question of costs is also reserved in respect of which memoranda may be filed. Mr Booth has heralded an application by NCL to recover its actual and reasonable costs of this proceeding which, again, hopefully, can be the subject of agreement between the parties.

G M Harrison  
District Court Judge