Construction Contracts: Enforcement of Debts Due and Mandatory Alternative Dispute Resolution Clauses

By Melissa Perkin

The recent High Court decision in *Hellaby Resources Services Limited v Body Corporate 197281* [2021] NZHC 554 is of particular interest in the construction sector for several key reasons:

- it is a rare example where a stay of enforcement of summary judgment for non-payment of a "debt due" under the Construction Contracts Act 2002 (CCA) was granted;
- it clarifies that the mandatory dispute resolution process set out in the NZS 3910:2013 construction contract ceases to apply one month after the final payment schedule is issued (unless the dispute is referred to adjudication); and
- a body corporate is not a "consumer" under s11 of the Arbitration Act 1996, meaning arbitration clauses will be binding on a body corporate.

Leave to appeal this decision was granted on 29 July 2021. We examine the key points from the decision and the reasons why leave to appeal was granted.

Background

TBS Remcon Ltd (**TBS**) and Body Corporate 197281 (**Body Corporate**) entered into a NZS 3910:2013 construction contract to undertake weathertightness remediation works.

As work progressed, new defects were discovered substantially enlarging the scope of works. Construction costs escalated accordingly from $8.4m to $35m.

Following Practical Completion, the Body Corporate refused to pay the balance of the agreed price on the basis that certain areas of work remained defective.

TBS applied for:

- summary judgment against the Body Corporate for payment of the balance as a debt due under the CCA. The Body Corporate opposed this on grounds it had a substantial counterclaim and

had already commenced litigation against TBS; and

- a stay of the counterclaim raised by the Body Corporate on the basis that the counterclaim for defective works had to be referred to arbitration under clause 13.4 of NZS 3910. The Body Corporate opposed this on the grounds the arbitration clause was unenforceable.

Summary judgment and stay of enforcement

The Court accepted the scheduled amount was a 'debt due' under s24 of the CCA and granted summary judgment to TBS on this basis. The fact the Body Corporate had a counterclaim was irrelevant given s79 of the CCA, which prohibited the court from taking into account counterclaims "*in any proceedings for the recovery of a [debt due under the CCA]*".

Nevertheless, the Court ordered a stay of execution of the summary judgment until the Body Corporate's counterclaim had been heard because forcing the Body Corporate to pay was likely to result in "*a substantial miscarriage of justice*". The following factors were relied on in exercising that discretion:

- the Court's "*impression*" the counterclaims were credible;
- the "*dramatic cost escalation*" for the project;
- there was a real risk that the Body Corporate would be unable to pursue the counterclaim due to a lack of funds, or if it was able, it would be fruitless because TBS had already sold its business and was now a shell company; and
- the Body Corporate had a credible counterclaim that the remediation work was defective.

Dispute process under NZS 3910

TBS applied for a stay of the counterclaim on the basis that the contract contained an arbitration agreement.

The Body Corporate opposed being forced to arbitrate its counterclaim on two grounds:

- the NZS 3910 Arbitration Clause no longer applied; and
- the Body Corporate was a "consumer" under s11 of the Arbitration Act 1996, rendering unenforceable any arbitration clause agreed before the dispute arose.

Arbitration clause

The Court noted that the Arbitration clause (clause 13.2.1 of NZS 3910) expired one month after the final payment schedule was issued (unless the dispute was referred to adjudication). As that time had passed, the clause was unenforceable and the Body Corporate was free to litigate its counterclaim.

The Court accepted that the NZS 3910 Arbitration Clause could be re-enlivened by first adjudicating the dispute, however unless and until that happened "*the door to arbitration is closed*" after the one-month period had expired. There was no intention or likelihood of the Body Corporate adjudicating here when it had already commenced litigation.

"Consumer"

Section 11 of the Arbitration Act 1996 provided that an arbitration agreement with a "consumer" was unenforceable unless the consumer agreed to be bound by it *after* the dispute had arisen.

Although it made no difference to the result in this case, the Court confirmed that a "consumer" must be a natural person for this purpose. Accordingly, a body corporate could not rely on s11 to avoid the NZS 3910 Arbitration Clause (or any arbitration clause).

Leave to Appeal

On 29 July 2021, SRG Global Remediation Services (NZ) Ltd (**SRG**) (previously TBS) was granted leave to appeal the decision.

Associate Judge Gardiner gave the following reasons for granting leave:

- There was at least an arguable case to be made that in staying enforcement of a judgment delivered under s79 of the CCA, an error of law was made. It could be perceived that in exercising its discretion the Court had, in the practical sense, given effect to the Body Corporate's counterclaim (which s79 precluded).

- On the arbitration clause issue the law was far from settled, with a "*dearth of authority on the subject*", and so SRG's view that the dispute resolution process could be re-enlivened was "*capable of serious argument*".
- Both points appealed by SRG were of general and commercial significance, and therefore a public interest existed in allowing the appeal to be heard.

ABOUT THE AUTHOR

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She has previously worked as a barrister in general civil, family and criminal litigation, in regulatory work and also as the Executive Director of an association of barristers.