And you think you may have problems with your construction contract?

Jo O'Dea

In the recent Australian case of *Gemcan Constructions Pty Ltd v Westbourne Grammar School* [2022] VSC 6, the Supreme Court of Victoria considered a number of issues concerning a construction payment dispute between the parties. Technically this case was the enforcement claim culmination of a number of problems.

NOTE: This case is an Australian case. It concerned two relevant pieces of legislation there, the Commercial Arbitration Act 2011 (**CCA**) and the Building and Construction Industry Security of Payment Act (2002), (**"SOP" Act**). The relevant equivalent law in New Zealand is the Arbitration Act 1996 and the Construction Contracts Act 2002, which are broadly similar but with some quite significant differences. For the purposes of both the legislation and the case law there are enough similarities to conclude that the outcome of the dispute would be similar in New Zealand.

Background

On 25 July 2016, Gemcan Constructions Pty Ltd (**Gemcan**) and Westbourne Grammar School (**WGS**) entered into a construction contract for various works at a WGS campus. Disputes about the work and payments occurred, and for this the parties sought a determination under the SOP Act. WSG then sought a judicial review of the determination.

Judicial review (2017)

WGS sought judicial review of the payment determination in the Supreme Court of Victoria and was successful in having it quashed. His Honour Robson J held that the adjudicator had committed a jurisdictional error in finding that a notice from WGS purporting to take works remaining to be performed under the Contract out of the hands of Gemcan (the take-out notice) was invalid because it had not been validly served on the Builder.

Shall we arbitrate? (2020)

In addition to payment disputes, the parties weren't even able to agree that they had a valid dispute resolution clause. Gemcan sought to refer the disputes to arbitration under the relevant clause of the contract. WGS opposed this, arguing that the contract did not constitute a binding agreement to arbitrate because it did not contain details of how the arbitrator would be appointed and which arbitration rules would apply.

In determining this point in favour of Gemcan, the Court found that the contract contained a valid arbitration agreement allowing the Court to decide on the appointment of an arbitrator pursuant to section 11 of the CAA. Gemcan then commenced arbitration proceedings against WGS.

The Arbitration (2021)

At arbitration, Gemcan obtained an award in its favour for the payment claim under the SOP Act. One of the arguments raised by Gemcan was that the take-out notice was invalid on the basis that Gemcan was not in substantial breach of the contract. WGS argued that Gemcan was precluded from making that argument ("estopped") because the validity of the take-out notice had already been determined by Robson J in the judicial review proceeding.

The arbitrator found that the decision of Robson J was limited to considering whether the adjudicator had erred in determining that the take-out notice had been validly served. Gemcan was not estopped from arguing in the arbitration that the notice was otherwise invalid on the basis that it was not in breach of the contract. The consequence of this was that the take-out notice was invalid in substance and that WGS had not, therefore, validly taken the work away from Gemcan.

The Supreme Court (2022)

Gemcan then applied for enforcement of the arbitration award and WGS applied to have the

award set aside on the basis that it was in conflict with public policy. WGS argued that the arbitrator was "estopped" from finding that Gemcan was not in substantial breach of contract. WGS argued that the principles of res judicata and issue estoppel applied.

Res judicata means that something has been adjudicated by a competent court and therefore cannot be pursued further by the same parties. Issue estoppel prevents a party attempting to relitigate an issue of fact or law previously determined in legal proceedings. WGS also argued that an Anshun estoppel applied. This type of estoppel is a form of issue estoppel which operates to prevent a party from bringing a claim in proceedings which should have been (but weren't) brought in earlier proceedings.

The two main issues were:

i. whether there was an issue estoppel (or an Anshun estoppel); and
ii. if so, whether the arbitration award should be set aside because the failure by the arbitrator to apply the issue estoppel or Anshun estoppel made it contrary to public policy.

Justice Riordan concluded that the issue considered in the judicial review case was whether the take-out notice was invalid because it was served after the WGS had already taken the work away from Gemcan. Robson J's decision that the adjudicator was mistaken to find that the take-out notice was invalid was only made in respect of the procedural requirements for service of the take-out notice. Robson J did not make any finding about the substantive content of the take-out notice – that is, whether Gemcan was in breach of the contract. In the circumstances, Justice Riordan found that there was no issue estoppel which prevented the arbitrator from determining that Gemcan was not in substantial breach of the contract and that the Take Out Notice was therefore invalid.

Justice Riordan also found that an Anshun estoppel did not arise because Gemcan's failure to allege before Justice Robson (in the judicial review proceeding) that there was no substantial breach of contract entitling WGS to issue the take-out notice was not unreasonable. To find otherwise would be contrary to the objectives of the SOP Act, which is designed to ensure prompt payment and cashflow through a quick adjudication process, subject to final determination of disputes at a later time. Requiring parties to raise complex substantive matters during adjudication or on judicial review of an adjudication determination would defeat the purpose of the legislative scheme.

Despite finding that an estoppel did not arise, Riordan J went on to consider whether an error by the arbitrator could result in the arbitration award being in conflict with the public policy.
He noted that that the public policy exception should be narrowly construed. In noting this, and having regard to the approach of minimum intervention in arbitral proceedings enshrined in the CAA, Riordan J found that a failure by an arbitrator to apply an issue estoppel was capable of engaging the public policy ground. BUT that ground would not be effective unless there had been a real practical injustice or unfairness in the making of the award.

His Honour concluded that even if he had found the arbitrator was in error, there had been no real practical injustice or unfairness.

Conclusion

Here, the Court seems to have followed the "spirit" of the legislation in reaffirming that where there is a payment dispute mechanism, this mechanism will operate to do just that. A determination (about payment) under the SOP Act does not finalise the rights between the parties, and in most cases the parties will have agreed a final dispute resolution mechanism under the relevant building contract – which they must use.

To decide whether or not there is any issue estoppel, the court will look at the facts of the case to decide whether there has been real unfairness or practical injustice. If there has been a judicial review of an adjudicator's determination under the SOP Act, it is unlikely a court will find there has been real unfairness and practical injustice in circumstances where matters outside the scope of the judicial review are not argued before the court.

In New Zealand, it is not uncommon for a claimant to bring an adjudication over a payment dispute on the basis of default liability (ie, technical non-compliance with the payment regime under the CCA) and on the merits in the alternative. Adjudicators have the power to determine any dispute arising under a construction contract (not just payment disputes) and since December 2015, determinations concerning the parties' rights and obligations are enforceable in accordance with section 59A of the CCA (see section 58(2)).

The question as to whether res judicata (an issue estoppel) arises in the context of successive adjudications is a different issue. The leading New Zealand authority on res judicata in the adjudication context is the decision of the High Court in *Body Corporate 200012 v Keene QC* [2017] NZHC 2953 at [81]-[83].

More recently in *Haskell Construction Limited v Ashcroft* [2020] 3 NZLR 113 (HC) at [77] Grice J stated that…*the focus should be on what was actually determined in the earlier adjudication decision. That determines how much or how little remains available for consideration by the subsequent adjudicator…Any analysis of commonality must be undertaken bearing in mind the robust and time limited process for adjudications. Unless it is clear the matters in the claim have all been uncontestably dealt with or should have been in the earlier adjudication this Court should be cautious about interfering with the adjudicator's decision. It should not undertake a fine analysis of the issues raised in the earlier adjudication. The adjudicator, not this Court, is in the best position to undertake that analysis and reach a decision informed by the information put before him and the parties' submissions.*

ABOUT THE AUTHORS

Jo O'Dea is a qualified lawyer, with a wide range of experience having worked as a member of NZDRC's Knowledge Management team providing technical support to the Building Disputes Tribunal. She has also worked as a contracts specialist for UNICEF, and as a solicitor in New Zealand and the United States.