A CAT AMONG PIGEONS

High Court soundly dismisses judicial review of adjudication determinations but may inadvertently have put the cat among the pigeons

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In *Sam Pemberton Civil Ltd v Robertson*,[1] the High Court considered applications for judicial review of two related adjudication determinations. In dismissing the applications, the Court underscored some of the key functions of the Construction Contracts Act 2002 (**CCA**) and made directions on how ongoing disputes should be resolved.

Background

In 2015, Sam Pemberton Civil Limited (**SPC**) entered into a construction contract (the **Contract**) with Lansdale Development Limited (**Landsdale**). The project was to be done in two phases, the first being earthworks and the second the balance of the civil works.

Clause 10.5 of the Contract enabled Landsdale to seek liquidated damages from SPC in the event of late completion of the works. The Contract also provided that in the event of a list of specified events, the engineer could grant an extension of time for completion of the works.

There was a substantial delay in

1 *Sam Pemberton Civil Ltd v Robertson* [2024] NZHC 272.

the works and when SPC issued a final payment claim, the engineer issued a progress payment schedule containing a deduction by Lansdale of liquidated damages.

In October 2022, SPC commenced adjudication proceedings seeking to review the engineer's decision on the sum owing to SPC. Landsdale sought to have the adjudicator consider its claim to liquidated damages. As part of that decision, the adjudicator found that Landsdale was entitled to set-off in the form of liquidated damages in the sum of $1.09 million.

In March 2023, Landsdale commenced its own adjudication proceedings to recover the liquidated damages. The second adjudicator adopted most of the findings of the first adjudicator, upholding Landsdale's claim to the liquidated damages.

SPC then sought judicial review from the High Court of the two adjudication determinations. A successful application would see the assessment of two key issues:

a. whether Landsdale's claim to LDs was time barred, as it had commenced its claim more than six years after the date of completion; and
b. whether the adjudicators failed to apply the correct threshold for costs in claims under the CCA.

Justice Whata takes a closer look at the adjudication determinations

Adjudication 1

Mr Stuart Robertson determined the first adjudication. He found SPC was largely responsible for the delays in completion of the project, that SPC failed to establish grounds for various variations, and that SPC only partially made out its claims for wet weather delays. The result was a significant reduction in the number of days extension of time awarded by the engineer in the final payment schedule, an adjusted due date for completion, and time related costs awarded by the engineer being wiped completely. Mr Robertson found SPC was liable to Landsdale for liquidated damages of $ 1.09 million and was entitled to set-off that amount against sums payable by Landsdale to SPC under the construction contract arising from the determination.

Landsdale had sought to expand the scope of the dispute referred to adjudication by SPC to include its claim for liquidated damages (rather than initiating its own adjudication claim for recovery of that amount). SPC

Adjudication claims

→ It is worth looking at how counter-claims are dealt with under New Zealand;s statutory adjudication regime.

declined to enlarge jurisdiction by consent. Mr Roberson found that section 38 of the CCA could not be used to enlarge jurisdiction to introduce a new dispute as sought by Landsdale. Rather, he held that section 38(1)(b) is limited to consequential or ancillary matters relating to the dispute as referred. In making this finding he noted that Landsdale could raise its claim for liquidated damages as a set-off in the current adjudication.

When addressing the issue of costs, Mr Robertson made orders (under sections 56(1)(b) and 57(4)(a) of the CCA) in the sum of $200,000 in favour of Landsdale.

Adjudication 2

Landsdale proceeded to bring its own adjudication in reliance on the finding that it was owed liquidated damages of $1.09million. Mr Graeme Christie determined the second adjudication. As part of the adjudication, Mr Christie determined that the relevant "act or omission" for the purpose of section 11 of the Limitations Act 2010 was either the date of the first adjudication, or, in the alternative, from the final account stage.

Should the determinations be subject to judicial review?

Justice Whata first outlined two core principles of judicial review within the sphere of the CCA:

a. Judicial review is not to be limited to instances where a jurisdictional error may have occurred;[2] and
b. A party that does not accept an adjudicator's determination should litigate, arbitrate or mediate the underlying dispute, rather than seeking judicial review to obtain relief.[3] The CCA looks to provide provisional relief and resolve cash flow problems while parties work through other, more formal, dispute resolution procedures. This is the basis of the CCA's "pay now, argue later" ethos.

Justice Whata also outlined the elements necessary for a judicial review to be successful. That is, the adjudicator must be shown to have:

- erred in law;

2 Applying *Rees v Firth* [2011] NZCA 668 at [22]. In Justice Arnold's view, the application of this limitation would result only in unproductive debate about what is "judicial".

3 Sam Pemberton Civil, above n 1, at [47]

- had regard to irrelevant considerations;
- failed to have regard to relevant considerations; and
- acted unreasonably or unfairly.

The costs arguments

In the present case, SPC had only attempted to argue that the adjudicators applied the wrong legal threshold test for costs.

However, the Court found that Mr Robertson had provided detailed reasons for awarding costs.[4] The decision had made specific references to the threshold requirements and applicable authorities. Mr Robertson had also made findings on relevant matters. These provided ample basis for the conclusion that SPC's overall claim lacked substantial merit. The findings related to:

- the substantial merits of allegations in respect of extension of time claims;
- the knowledge SPC had about the merits of the case;
- the lack of improvement of its claims;
- the amount of material contained in its reply in contrast to the amount contained in its claim; and
- the quality and quantity of SPC's evidence, including an assessment of the evidence provided by its witnesses.

Justice Whata also found that Mr Christie's adjudication determination referred to the relevant criteria for costs and applicable authorities. Mr Christie had correctly identified that he was to assess whether SPC's contentions were without substantial merit.

Ultimately, Justice Whata found that neither determination contained anything that would warrant judicial review.

Limitation Act 2010

Although Justice Whata declined the application for judicial review on the live grounds, namely in relation to limitation and costs, he nevertheless took the opportunity to explain his position in relation to the limitation issue.

Section 11 of the Limitation Act 1950 provides that it is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least six years after the date of the act or omission on which the claim is based. In the second adjudication, Mr Christie determined that the "act or omission" for the purpose of the Limitation Act was the date of the first determination or the final accounts stage. SPC argued that this was an error of law.[5]

Justice Whata disagreed that Mr Christie had applied the wrong test for assessing the date applicable for the Limitation Period. Relevant to Justice Whata's assessment were the changes made to the wording in the 2010 Act in contrast with the Limitation Act 1950.[6] The 1950 Act refers to "the date which the cause of action accrues" wheras the 2010 Act refers to "the date of the act or omission on which the claim is based".

The recommendation to change the wording came from the Law Commission who believed the date should promote certainty and finality in legislation. The Law Commission recommended that the date should be "objective and ascertainable" and "the last date of an event under the control of the defendant" which in "most cases…will be clear". This approach where the claim for breach of contract accrues on the date of breach, irrespective of whether the breach causes actual loss was endorsed by the Court of Appeal in *Gedye v South*.[7]

Counterclaims

What is perhaps the most noteworthy aspect of the judgment is an obiter comment made by Justice Whata at [44] in relation to counterclaims raised by Lansdale in response to SPC's adjudication claim. After recording his concern that Mr Robertson's refusal to consider Landsdale's counterclaim was an error (while noting that he had heard no argument on the point), his Honour referred to an adjudicator's power to hear "any other matters that are of a

4 *Sam Pemberton Civil,* above n 1, at [66].
5 *Sam Pemberton Civil,* above n 1, at [40].
6 *Sam Pemberton Civil,* above n 1, at [47].
7 *Geye v South* [2010] NZCA 207.

consequential or ancillary nature". Reference is then made to a counterclaim being "an ancillary claim" for the purposes of the Limitation Act 2010. However, the Limitation Act definition of a "claim" means a claim (whether original or ancillary) that may be made in a "court" or "tribunal" and does not include adjudications under the CCA.

The CCA makes no provision for counterclaims. An adjudicator may deal with an affirmative defence in a determination as to whether any moneys are payable by way of set-off or abatement which may go so far as to extinguish the claim completely.[8] However, if a respondent wants to bring a claim of their own, they must issue their own adjudication proceeding.

The matter has been considered by the learned authors of *A Guide to the Construction Contracts Act*[9] and *CCA Handbook: Making the Construction Contracts Act work*.[10]

In *A Guide to the Construction Contracts Act,* Geoff Bayley and Tómas Kennedy-Grant stated:

> *The adjudication response is not an opportunity for the respondent to make a counterclaim that does not also give rise to a set-off. If any such counterclaim is to be put the respondent must serve a separate adjudication notice and secure the appointment of an adjudicator to determine that dispute. If the same adjudicator is appointed to both adjudications it may be possible for the parties to the two adjudications to agree to have him or her determine the proceedings at the same time.*

This view was echoed by Peter Degerholm in *CCA Handbook: Making the Construction Contracts Act work*, namely:

> *A respondent may raise issues in the adjudication response which, if approved by the adjudicator, may be set off against or abate the claimant's claim. A respondent who wishes to pursue a separate matter that falls outside the dispute outlined in the notice of adjudication may need to treat the matter as a counter claim which would be a separate dispute.*

Conclusion

While a respondent may claim set-off or abatement to the extent that extinguishes the claim entirely, if the respondent seeks payment of any amount in respect of its affirmative defences, it must initiate its own adjudication claim, and where agreement can be reached, seek to have the two adjudication proceedings consolidated and determined by the same adjudicator to achieve a net financial result as between the parties.

The CCA reflects a "pay now, argue later" philosophy. While the CCA does not require that judicial review be limited to instances of jurisdictional error, the statutory context is such that a person who does not accept an adjudicator's determination should litigate, arbitrate or mediate the underlying dispute rather than seeking relief by judicial review of the determination as "such relief will only be available rarely".[11]

8 See paragraph 14.18 of Kennedy-Grant on Construction Law (2nd ed, LexisNexis, Wellington, 2012).

9 (Rawlinsons Media, Auckland, 2003) at page 110.

10 (Writes Hill Press, Wellington, 2016) at page 97.

11 *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [22] – [25]; *Sam Pemberton Civil,* above n 1, at [25].

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