

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-3117

UNDER the Judicature Amendment Act 1972

IN THE MATTER OF an adjudicator's determination issued
pursuant to the Construction Contracts Act
2002

BETWEEN DAVID ROSS PETTERSON AS
LIQUIDATOR OF KARA GROUP LTD
(IN LIQUIDATION)
Plaintiff

AND DAVID GATLEY
First Defendant

AND NORTH HOLDINGS DEVELOPMENTS
LTD
Second Defendant

Hearing: 9 November 2009

Appearances: Daniel Hughes and Katrina Van Houtte for Plaintiff
Rod Smith for Second Defendant

Judgment: 9 November 2009

JUDGMENT OF HARRISON J

SOLICITORS

Kensington Swan (Auckland) for Plaintiff
Knight Coldicutt (Auckland) for Second Defendant

COUNSEL

RA Smith

Introduction

[1] This application for judicial review of an award made by an adjudicator under the Construction Contracts Act 2002 (the CCA) arises in unusual circumstances.

Background

[2] In brief summary, Kara Group Ltd and North Holdings Developments Ltd were parties to a contract to remove and dispose of peat from the North Gate industrial subdivision project at Ruakaka, near Whangarei. Kara commenced its work under the contract in about March 2008. Towards the conclusion of completion of the contract a dispute arose about payment of retentions of \$33,099. The parties referred the dispute to Dr David Gatley for adjudication: s 33 CCA. On 5 March 2009, Dr Gatley gave notice of acceptance of appointment: s 35 CCA.

[3] The adjudication process commenced immediately afterwards. It was not necessary for the adjudicator to convene a hearing. The parties made written submissions. On 27 April 2009, before the award was issued, Kara went into liquidation. On 6 May 2009 its liquidator, Mr David Petterson, gave notice of this event to the adjudicator and requested him to release his determination. He appreciated at this stage that Dr Gatley's fee had not been paid, although both parties had lodged security for costs in the total of \$4,000 (\$2,000 each).

[4] Dr Gatley released his determination on 8 May 2009. It is appropriate to recite the terms of his covering letter:

I have released the determination not because of the threat of action from Kensington Swan ... which I found to be extremely objectionable, but in an attempt to conclude the matter and to save all parties having to spend any further time and costs on what would, in my view, be expensive and pointless litigation.

I trust that it is obvious from the Determination that, after ... North Holdings Developments have paid all of the outstanding balance of my fees (which are due by 5 pm on Monday 11 May 2009) that there will be nothing for either [parties] to pay as a result of this adjudication.

I trust that all parties will agree that the outcome is both fair and just.

[5] It is not unsurprising that neither party was satisfied with Dr Gatley's notion of fairness or justice, despite the contrary sentiment expressed in the final sentence of his letter. With respect, the parties had good reason to be dissatisfied. The adjudicator determined that North was liable to pay Kara a total of \$39,928 (the amount of the claim plus GST). Interest and costs were also awarded. However, the adjudicator determined that North's liability for the full amount payable was to be applied in payment of his fees. By coincidence he fixed them in exactly the same amount. As a result, as the adjudicator pointed out in his covering letter, Kara would receive nothing even though it was successful. The intemperate terms of that letter are inconsistent with the standard of objectivity expected of a person entrusted with performance of an adjudicator's powers vested by statute.

[6] The exact symmetry between the adjudicator's determination of the amount of North's liability and of the amount of his fees, and the offsetting effect of each, would raise questions with those whose familiarity with public law is limited to its most elementary principles. The liquidator has applied to review the determination. He has issued this proceeding seeking to quash the adjudication.

Judicial Review

[7] The liquidator's statement of claim, which is a model of concise pleading, is based on two causes of action. The first is that the adjudicator's determination erred in law in three principal ways: that is (1) in treating the parties' joint and several liability for his fee as part of the substance of the determination; (2) in making a finding based not on the rights and obligations of the parties but on the fact that Kara was now in liquidation; and (3) in treating payment of his fee and costs as part of the determination such that payment of the fee by North would extinguish its liability to pay Kara the amount which he found the company liable to pay under the contract. Accordingly, Mr Petterson alleges the adjudicator placed himself in the position of the successful claimant.

[8] The alternative cause of action pleads unreasonableness or irrationality. The liquidator alleges that the adjudicator took account of irrelevant considerations: namely, that (1) payment of his fee and costs was a matter relevant to the substantive

determination of the parties' rights and (2) Kara's liquidation had an impact on a substantive assessment of the parties' rights. The liquidator alleges that these considerations, which were material to the adjudicator's determination, did not fall within the exclusive mandatory considerations: s 45 CCA. In the result he alleges that the determination "is capricious or absurd". He notes, among other things, that in the event that a step was taken to enforce the award, it would be the adjudicator who would be seeking a judgment in the District Court rather than one of the parties.

[9] The adjudicator has not taken any active steps in the proceeding.

Decision

[10] Counsel have conferred. Mr Rod Smith for North responsibly and realistically accepts that either or both causes of action pleaded by Mr Daniel Hughes for the liquidator are unanswerable. Both counsel agree that the determination cannot stand.

[11] It is well settled that on review this Court has the power to set aside a decision where it is the result of an invalid or incorrect exercise of a statutory power: s 4 Judicature Amendment Act 1972. Like counsel, I am satisfied that the decision is invalid. By consent:

- (1) The determination is set aside, except to the extent that the adjudicator is entitled to payment of his costs, which I fix in the sum of \$4,000 as being reasonable (s 57 CCA), from the monies lodged by the parties as security;
- (2) Judgment is entered in favour of the liquidator against North for the sum of \$30,000, which is not payable before 9 December 2009.

There will be no order as to costs between the two parties.

[12] Mr Hughes seeks an order for solicitor/client costs against Dr Gatley. Mr Hughes is correct that Dr Gatley is a party to this proceeding. While Dr Gatley

has not taken any active steps, the liquidator is in principle entitled to an award. However, in the circumstances I decline to exercise my discretion. I am satisfied that the result mandated by this judgment will be sufficient to meet the ends of justice.

[13] I thank counsel for their assistance this morning.

Rhys Harrison J