Ross Keith Dustin v Weathertight Homes Resolution Service, Zhen Zhen Mao, Douglas McKay Howitt, Aukland City Council, Beverley Jones, Richard Lambert

RESERVED JUDGMENT OF COURTNEY J on application for Judicial Review. High Court New Zealand. Auckland Registry. 25th May 2006.

Introduction

[1] This is an application for judicial review arising from a claim brought under the Weathertight Homes Resolution Service Act 2002 (WHRS Act). The plaintiff, Mr Dustin, is an architectural designer who undertook design work on a house in Mount Eden, Auckland in the period March - May 1994. In June 2004 the owners of the house commenced a claim against the builder, the Auckland City Council (ACC) and the previous owners. In October 2005, at the instigation of the ACC, the adjudicator joined Mr Dustin as a respondent pursuant to s 33 WHRS Act.

[2] Mr Dustin applied under s 34 WHRS Act to be struck out of the claim on the ground that the ten year long stop period imposed by s 91(2) Building Act 1991 meant that he could not be sued by either the home-owners or the ACC. The homeowners accepted that they could not bring a claim against Mr Dustin for this reason. However, the ACC maintained that its claim for contribution under s 17(1)(c) Law Reform Act 1936 (LRA) was not affected by s 91(2).

[3] By Procedural Order No. 11 the adjudicator declined Mr Dustin's application, applying the decision in Cromwell Plumbing Drainage & Services Limited v De Geest Bros Construction Limited (1995) 9 PRNZ 218, in which John Hansen J held that a claim for contribution was not subject to the long stop period imposed by s 91(2) Building Act 1991.

[4] Mr Dustin seeks judicial review of the adjudicator's decision on the following grounds:

a) The WHRS Act is subject to the ten year long stop period in s 91(2) Building Act 1991 and Mr Dustin completed all of his work relating to the property more than ten years before the claimants commenced their claim in the WHRS;

b) Since the claimants themselves could not have sued Mr Dustin because of the long stop period in the Building Act 1991, on the proper interpretation of s 29(2) WHRS Act, the adjudicator has no jurisdiction to allocate liability between the ACC and Mr Dustin.

[5] While this case concerns the application of the long stop period under s 91(2) Building Act 1991 (as amended), the corresponding provision in the Building Act 2004, s 393(2), is virtually identical. Therefore, the views that I express apply equally to both.

Is there a reviewable error of law?

[6] Mr Judd, for the plaintiff, submitted that the rationale of Cromwell Plumbing was flawed and that, on a proper interpretation of s 91(2) Building Act 1991, claims for contribution under the LRA are subject to the long stop period.

[7] In response, Mr Robertson, for the respondent, contended that there could be no reviewable error by the adjudicator because:

a) The criteria to be applied under s 34 is whether it is "fair and appropriate in all the circumstances" to strike a party out of the proceeding. As the adjudicator had taken into account all the relevant considerations in reaching his decision, his decision satisfied the criteria and there could be no error of law.

b) The adjudicator was bound to follow Cromwell Plumbing and therefore could not have erred by doing so. He submitted further that, in any event, Cromwell Plumbing was correctly decided.

[8] After examining the adjudicator's decision, I am satisfied that the various factors that Mr Robertson said were taken into account were not, in fact, relied on by the adjudicator. They were:

a) The claimants objected to Mr Dustin's removal. However, at paragraph 1.3 the adjudicator recorded that he had given all other parties (apart from the ACC) an opportunity to oppose or support the application but none had done so. So it is incorrect to suggest that the claimants objected to his removal.

b) By retaining Mr Dustin as a party the adjudicator would be able to deal with the ACC's claim for contribution and, relevant to this consideration, was the absence of a statutory mechanism for determining third party claims. But the adjudicator specifically rejected the possibility of any factual dispute between the parties because Mr Dustin's affidavit as to the relevant facts was unchallenged. Nor did he refer to the absence of a statutory mechanism for determining third party claims. He did refer to the determination of the third party claim, but this was in the context of the limitation point, which I deal with in relation to Mr Robertson's second ground of argument.

c) Retaining Mr Dustin in the proceeding would avoid the risk of duplication of proceedings in another court by the ACC against Mr Dustin. This was not referred to at all in the adjudicator's decision and I do not accept that it was a matter that he took into account.

[9] Mr Robertson's second submission was that the adjudicator, presiding over a tribunal of inferior jurisdiction, was bound to apply the Cromwell Plumbing decision. Therefore, doing so could not amount to a reviewable error.

[10] It is clear from the adjudicator's reasons that the only basis for his decision was the Cromwell Plumbing case. Mr Judd submitted that if the decision of a superior court incorrectly states the law then that decision does not

represent the law and the adjudicator makes an error of law in following the wrongly decided case rather than applying the law correctly. Whether there is a reviewable error of law in this case depends entirely on whether the adjudicator was bound to follow Cromwell Plumbing, regardless of whether it correctly stated the law or not.

[11] It is trite that judicial review is concerned with the process by which a decision is made, not with the merits of the decision itself: ***Mercury Energy Limited v Electricity Corporation of NZ Limited*** [1994] 2 NZLR 385 at 389 per Lord Templeman (PC), citing Lord Brightman in ***Chief Constable of North Wales Police v Evans*** [1982] 3 All ER 141 at 154 (HL).

[12] However, not every decision is amenable to judicial review. What constitutes an "error of law" is described succinctly in Joseph Constitutional & Administrative Law in New Zealand (2 ed 2001) at para 21.4.2:

An administrative authority commits a reviewable error of law if it: (a) acts in bad faith; (b) makes a decision which it has no power to make; (c) breaches the rules of natural justice; (d) misconstrues its statute and "asks the wrong question"; (e) relies upon irrelevant considerations; or (f) disregards mandatory relevant considerations. An unreasonable finding of fact may also support a finding of error of law, as may inadequacy of reasons or a failure to make a finding of fact on a key issue for decision.

[13] Under the doctrine of stare decisis inferior courts (including statutory tribunals) are not entitled to disregard the decision of a superior court. This is the case even though the inferior court or tribunal may feel sure that the decision of the superior court is wrong: ***Chief Supplementary Benefit Officer v Leary*** [1985] 1 All ER 1061 at 1065 and Farrell v Alexander [1976] 2 All ER 721. This was applied in the New Zealand context in ***Motor Vehicle Dealers Institute Inc v Auckland Motor Vehicle Disputes Tribunal & Ors*** (HC AK M1485-SW99, 21 September 2000, Glazebrook J). It is clear that an adjudicator acting under the WHRS Act is to be treated as a statutory tribunal and is bound by the decisions of superior courts. As a result, following such a decision cannot constitute a reviewable error of law.

[14] I accept that this may create an unsatisfactory situation. Mr Judd points out that in order to reach a point where the Cromwell Plumbing decision could be reversed, Mr Dustin would have to proceed through the substantive adjudication of the claim and then appeal to the High Court. This would involve him in much cost and inconvenience. However, the doctrine of stare decisis serves to ensure certainty and predictability within our legal system. It is very unfortunate that some litigants will be put to the cost of defending proceedings because of a superior court decision that may, ultimately, be shown to have been wrongly decided. However, not to follow that course would result in confusion and uncertainty, which would be harmful to a greater number of litigants.

Application of s 91(2) Building Act 1991 to claims for contribution

[15] As a result of my conclusion that there is no reviewable error of law I do not need to consider Mr Judd's submission that Cromwell Plumbing was wrongly decided and s 91(2) Building Act 1991 does apply to claims for contribution. Nevertheless, I do so because of the likelihood that this issue will be pursued, either in this or some other case.

[16] Mr Judd's argument was very simple; in any civil proceedings relating to building work s 91(2) imposes a long stop period of ten years or more after the date of the act or omission on which the proceedings are based. The claim for contribution by the Council against Mr Dustin is a civil proceeding that falls within the definition of "building work" under the Building Act 1991 and has been brought more than ten years after the alleged act or omission. Therefore it is time barred.

[17] Section 91(2) (as amended) provided that: *Civil proceedings [relating to any building work] may not be brought against any person ten years or more after the date of the act or omission on which the proceedings are based.*

[18] The ACC's claim against Mr Dustin is one of contribution arising from their respective positions as several tortfeasors under s 17(1)(c) LRA, which provides:

(1) Where damage is suffered by any person as the result of a tort whether a crime or not)

(c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued [in time] have been, liable in respect of the same damage, whether it as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[19] The date on which a cause of action for contribution accrues is determined by s 14 Limitation Act 1950:

14 Accrual of cause of action on claim for contribution or indemnity.

For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.

[20] In Cromwell Plumbing home-owners (the Wards) sued Cromwell Plumbing & Drainage Services Ltd (Cromwell Plumbing) for negligence arising from building work. The appellant, De Geest Brothers Construction Ltd (De Geest) was joined as second defendant later. Cromwell Plumbing served De Geest with a notice of claim for contribution under s 17(1)(c) Law Reform Act 1936 (LRA). The Wards accepted that s 91(2) Building Act 1991 applied to preclude their claim against De Geest. However, Cromwell Plumbing maintained that s 91(2) did not affect its claim for contribution under s 17(1)(c) LRA.

[21] John Hansen J considered s 91(2) Building Act 1991, s 17(1)(c) LRA and s 14 Limitation Act 1950. He concluded that the statutory cause of action created by s 17(1)(c) LRA was to be viewed differently from the plaintiff's claim against the defendant in negligence and was not subject to the long stop period. At 222 he said:

In my view, s 91(2) does not override the provisions of s 17 of the Law Reform Act, and s 14 of the Limitation Act. The effect of s 17 is to give a right to contribution from another tortfeasor who would have been liable jointly, or otherwise, if sued in time. The statutory cause of action for contribution does not arise until judgment against the tortfeasor claiming contribution, or compromise by that tortfeasor. The tortfeasor claiming contribution then has 6 years to bring the proceedings for contribution. If s 91(2) had the effect contended for by Mr Logan, it could easily truncate the statutory period presently allowed for the claiming of contribution. In my view, if that was the intended effect of s 91 the statute would need to specifically say so.

As I said earlier, s 91(2) prevents proceedings 10 years or more after the date of the act or omission relating to the design, construction, alteration, demolition or removal of any building. That is the cause of action of the Wards against De Geest. The cause of action of De Geest against Cromwell Plumbing is created by the statutory provisions of s 14 of the Limitation Act. The right of contribution arises where the contributor is liable jointly, or otherwise, whether or not he has been sued in time. In my view, the interpretation of s 91(2) contended for by Mr Logan would effectively render s17(c) meaningless in all cases relating to buildings. For that to occur I consider it must be done specifically as it has been done in the Carriage by Air Act.

[22] It is clear from this passage that the learned Judge was influenced in his decision by the perception that if s 91(2) Building Act 1991 applied it would truncate the statutory period allowed for claiming contribution so as to render s 17(1)(c) LRA meaningless in all cases relating to buildings. It is, of course, true that the effect of s 91(2) Building Act 1991 is to truncate the period within which claims relating to building work can be brought. But this is not a valid reason for not applying the section to claims for contribution. The objective of a long stop period is to create finality by preventing claims being brought outside it. The inevitable result is that some, otherwise valid, claims will be precluded. However, that result is inherent in the concept and operation of the long stop period. Its purpose is to ensure fairness to all parties, given the effect of time on the freshness of memories and availability of witnesses. Further, it gives certainty for intended defendants so that they can plan such things as document destruction and liability insurance. These issues are just as relevant in the context of a claim for contribution as in a primary claim.

[23] It may be that the effect of the long stop period is more noticeable in claims for contribution because there can be a significant delay between the bringing of the plaintiff's claim and the commencement of the claim for contribution. This will be lessened where the claim for contribution is brought as a third party claim in the plaintiff's proceeding. However, as John Hansen J observed, a claim for contribution does not accrue until the defendant has had judgment entered against it or has compromised the claim. This means that the cause of action could easily accrue outside the long stop period. This is undoubtedly what John Hansen J was concerned about. However, even allowing for that fact, I respectfully think that it overstates the position to say that applying the long stop period to claims for contribution would render s 17(1)(c) LTA meaningless in relation to building claims. Many claims for contribution will remain unaffected and the fact that some may be precluded reflects the very nature of the long stop period. Further, in the context of claims brought under the WHRS Act, it is usual for all potentially liable parties to be joined as early as possible, thus minimising the time between the commencement of the plaintiff's claim and the claim for contribution.

[24] Nor can it be a valid objection to the application of s 91(2) Building Act 1991 to a claim for contribution that the section did not specifically state that it was intended to apply to such claims. Section 91(2) Building Act 1991 is as plainly worded as it is possible to be; the clear effect is that if the proceeding concerned is a civil proceeding and it relates to building work (as defined) then it is subject to the long stop period. I see no need for the Act to go further and specify that it applies to claims for contribution as well as to claims by plaintiffs.

[25] Although decided in the context of alleged concealment by fraud (the plaintiff asserting that the long stop period should be extended in such a case) the Court of Appeal's observations in ***Johnson v Watson*** [2003] 1 NZLR 626 at 629 as to the wording of s 91(2) are helpful and apt:

Section 91(2) is-concerned with the act or omission on which the proceedings are based. An act or omission occurs on a particular day. No question of extension of time can logically arise when the starting point is measured from the day of the occurrence of an act or omission. Furthermore, it is clear from the introductory words of s 91(2) that the provisions of the Limitation Act do not apply to subs (2) time limit of ten years. Subsection (2) is in this respect a statutory bar which is selfcontained, both as to the commencement of the period allowed and its duration. In short, s 91(2) means exactly what it says. A plaintiff cannot in any circumstances sue more than ten years after the act or omission on which the proceedings are based, if the case involves, as this one clearly does, building work associated with the construction of the building.

[26] I do not consider John Hansen J's comparison with the Carriage by Air Act 1967 (since repealed and replaced by the Civil Aviation Amendment Act 2004) to be helpful in considering whether the wording of s 91(2) Building Act 1991 is sufficiently clear. Presumably the learned Judge was referring to s 36 Carriage by Air Act 1967 (since replaced by a similar provision in s 91ZJ Civil Aviation Amendment Act 2004) which relevantly provided:

(1) The limitation on liability referred to in s 28 of this Act shall apply when proceedings are brought by a tortfeasor to obtain contribution from another tortfeasor if the tortfeasor from whom the contribution is sought is the carrier or a servant or agent of the carrier.

(2) No proceedings to which subsection (1) of this section applies shall be brought by a tortfeasor to obtain a contribution from another tortfeasor after two years from the time when judgment is obtained against the tortfeasor seeking to obtain the contribution.

[27] These provisions did no more than prescribe a different limitation period to that prescribed by the Limitation Act 1950, with the Carriage by Air Act 1967 prevailing by virtue of s 33 Limitation Act 1950. The effect is different to the long stop period, which operates as a final cut-off point by reference to the substantive act or omission complained of and which can occur either before or after the expiry of the relevant limitation period.

[28] Finally, although the Judge did not say so expressly, it is implicit that he did not regard the statutory cause of action for contribution as a civil proceeding, whereas he did regard the plaintiff's claim as such. At this point I note that the Judge wrongly referred to the cause of action for contribution as having been created by s 14 Limitation Act 1950 which is, of course, incorrect; the source of the right of contribution is s 17(1)(c) LRA. Section 14 Limitation Act 1950 simply provides the means of ascertaining when such a cause of action accrues.

[29] Mr Judd submitted, and I agree, that it was an error to focus on the statutory nature of the cause of action under s 17(1)(c). Whether a cause of action arises at common law, by statute or by virtue of contract, its nature as a civil proceeding does not alter. It is perfectly clear that a claim for contribution under s 17(1)(c) is a civil proceeding.

[30] Further, the present claim is properly regarded as one relating to building work as defined in s 2 Building Act 1991 i.e. ...*Work for or in connection with the construction, alteration, demolition, or removal of a building; and includes site work*.

[31] While the immediate subject matter of the ACC's claim for contribution is its own liability, rather than the building work itself, its liability does, in turn, relate to the building work as that is defined. It is well recognised that the phrase *"... in connection with... "* has a very wide meaning and requires merely a relationship between one thing and another: Drayton & Ors v Martin & Ors (1996) 9 ANZ Insurance Cases 61-322 at 76,597. In my view it easily accommodates a claim for contribution that is based on the claimant's own liability for building work. I therefore consider that the ACC's claim must be viewed as a civil claim relating to building work for the purposes of s 91(2) Building Act 1991.

[32] Mr Robertson approached his submissions on the basis that the interpretation of s 91(2) contended for by Mr Judd would effectively be an implied repeal of s 17(1)(c) LRA. However, for the reasons I have discussed, this argument is not tenable; the long stop period does not affect the substance of the right in any way. It merely confines the time within which it can be exercised.

[33] Mr Robertson further submitted that, as neither the Building Act 1991 nor the Building Act 2004 referred to the LRA or to claims for contribution, it must be presumed that Parliament did not intend to restrict this right. He pointed out that s 393(2) Building Act 2004 was enacted after both the decision in ***Cromwell Plumbing*** and the Law Commission's recommendation in its report Tidying the Limitation Act (NZLC R61 2000) of a two year period for claims for contribution following the accrual of the cause of action. Had there been any perception that Cromwell Plumbing incorrectly stated the law the position could have been remedied at that point.

[34] I do not accept this. There is no basis on which to assume that the legislature was conscious of the decision in ***Cromwell Plumbing***. In any event, the Court of Appeal's subsequent very clear statement as to the meaning of s 91(2) Building Act 1991 in ***Johnson v Watson*** would have made it clear that there was need to alter the wording of the section so as to make it more specific.

[35] Nor is reference to the New Zealand Law Commission's report helpful in determining this issue. The Law Commission's recommendation was not made in relation to the long stop period under the Building Act 1991. The focus of the report was on limitation periods running from the accrual of a cause of action. The recommended change would affect all claims for contribution, whether brought in respect of building work or not. There is no indication that the effect of the long stop period was specifically considered and in the absence of any such indication there is no reason to think that the Law Commission was concerned about its effect on claims for contribution.

Adjudicator's jurisdiction to consider claims for contribution

[36] Section 29 WHRS Act provides:

29 Jurisdiction of adjudicators

(1) In relation to any claim that has been referred to adjudication, the adjudicator is to determine

(a) the liability (if any) of any of the parties to the claimant; and

(b) remedies in relation to any liability determined under paragraph (a).

(2) In relation to any liability determined under subsection (1)(a), the adjudicator may also determine

(a) the liability (if any) of any respondent to any other respondent; and

(b) remedies in relation to any liability determined under paragraph (a).

[37] Mr Judd submitted that s 29(2) only provides the adjudicator with jurisdiction to make determinations between respondents once liability has been determined in respect of both respondents. It is only once the adjudicator has determined the respective liabilities of the respondents to the claimant that the adjudicator can then go on to

consider the liability of the respondents to one another under s 29(2). It is accepted by all parties that the respondent can have no liability to the claimants because any claim by them against him is time barred; therefore there can be no jurisdiction to determine liability as between the ACC and Mr Dustin.

[38] Mr Judd did not say that the Council should be prevented from pursuing the claim for contribution altogether (subject, of course, to the limitation issue just discussed) but he submitted that any such claim cannot be dealt with under s 29(2) and would need to be brought separately in the District Court pursuant to s 17(1)(c) LRA.

[39] Mr Judd relied on ***Auckland City Council v Weathertight Homes Resolution Service & Dennerly*** (HC AK CIV-2004-404-004407, 28 September 2004, Harrison J) and the decision of another WHRS adjudicator, Mr Dean, in the ***General Trust Board of the Diocese of Auckland v Bryant Builders Limited & Ors, Claim No. 02979*** (Procedural Order No. 5, 12 January 2006). In Dennerly, Harrison J was considering a judicial review application in respect of an adjudicator's refusal to add parties to the claim. In considering the exercise of the adjudicator's power to join parties Harrison J commented at [29]:

The adjudicator will also have to take into account the absence of a statutory mechanism for determining third party claims but where it authorises him or her to determine liability between respondents inter se (s 29(2)).

[40] I do not view the decision in Dennerly as relevant to the present case. No issue arose there about the jurisdiction of the adjudicator under s 29(2) where one of the respondents could not be liable to the claimant. In the absence of the issue actually having been argued I cannot view Harrison J's observation as providing any basis for the argument now being advanced.

[41] If Mr Judd's submission were right then it would have the effect of preventing the single determination of all issues relating to a particular building under the WHRS Act. This would cut across the policy reasons in favour of having all aspects of a claim dealt with in the same jurisdiction and the stated purpose of the WHRS Act in s 3, which was to provide:

...owners of dwelling houses that are leaky buildings with access to speedy, flexible and cost-effective procedures for assessment and resolution of claims relating to those buildings.

[42] Nor do I consider Mr Judd's argument reflects the proper construction of s 29(2). His submission depends on viewing the words "any liability" in s 29(2) as referring to the liability of the time barred respondent. However, in the context of a claim for contribution it would be more natural to construe these words as referring to the liability of the respondent claiming contribution, that being the liability in respect of which contribution is sought. Mr Judd accepted that this was a construction open on the wording of s 29(2). I consider it to be the more natural construction and one that accords with the obvious policy intentions behind the WHRS Act.

[43] I therefore reject the submission that the adjudicator has no jurisdiction under s 29(2) to determine liability between respondents where one respondent is time barred in respect of the primary claim.

Conclusion

[44] I hold that:

a) The adjudicator was bound to follow Cromwell Plumbing. Therefore there was no reviewable error of law arising from his decision, notwithstanding that, in my view, Cromwell Plumbing was wrongly decided;
b) The adjudicator does have jurisdiction under s 29(2) to determine the liability of one respondent to the other even though the second respondent could not be directly liable to the claimant because of the limitation period.

[45] The application is therefore dismissed. Costs are reserved. Counsel may apply by memoranda as follows:

a) On behalf of the first and fourth defendants by 9 June 2006.
b) On behalf of the plaintiff by 18 June 2006.
c) On behalf of the first and fourth defendants in reply by 23 June 2006.

Appearances:
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No appearance for Second Defendant
No appearance for Third Defendant No appearance for Fifth Defendant
No appearance for Sixth Defendant
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