

ORAL JUDGMENT OF VENNING J : High Court. New Zealand. Auckland Registry. 10th April 2006.

- [1] This is an appeal against a decision of the District Court under the Construction Contracts Act 2002 (the Act). In particular it is an appeal against the entry of judgment under s 74 of the Act. The appeal is pursuant to a general right of appeal under s 72 of the District Courts Act 1947.
- [2] As a preliminary matter the appellant has made application for an order granting leave for further evidence to be filed on this appeal. That application is not opposed and I have granted the application. The further evidence is necessary to put before this Court sufficient documentary material to enable it to determine the appeal.
- [3] The respondent's position as advised by counsel is that it does not oppose the appeal and will abide the decision of the Court but Mr Bates has addressed the Court on the issue of costs in the event the appeal is allowed.
- [4] There is an unfortunate procedural history to this matter. It has led what should have been a relatively simple contractual dispute to escalate and to require the appellant to seek the intervention of this Court at the appellate level.
- [5] In summary the position is that the appellant subcontracted work to the respondent for a project the appellant was involved in. An issue arose between the parties as to the performance of the contract by the respondent and the payment by the appellant for the respondent's work. The respondent submitted a final claim for \$5,688.61. That was rejected by the appellant. That engaged the adjudication processes of the Act. The respondent gave notice dated 7 September 2005 that it wished to have the matter adjudicated. The notice was given in accordance with the provisions of the Act using the standard form supplied for those purposes. The notice was given in accordance with s 28 of the Act.
- [6] The process that the Act prescribes thereafter is for the appointment of an adjudicator. The adjudicator is appointed under s 33 of the Act. The adjudicator can be agreed to by the parties. If no person is agreed upon, then a nominating body again chosen by agreement between the parties may select the adjudicator. Finally, if the nominated adjudicator is unable to act or if there is no person agreed upon then a party can request an authorised nominating authority to select a person to act as adjudicator.
- [7] In the present case there was no agreement between the parties as to the adjudicator. Nor was there any agreement as to a nominating body to select a person to act as adjudicator. Nor, for the reasons which will follow, was there a request directed to an authorised nominating authority to select an adjudicator.
- [8] What happened in this case is that, one day after the notice of adjudication a Mr Terry Bradshaw of Adjudication Trade Services Limited wrote to the appellant by letter dated 8 September 2006 and advised that he was acting as adjudicator. The appellant took advice. The appellant's solicitors took issue with the process adopted as to the appointment of the adjudicator.
- [9] The adjudicator ignored the objection and made an award in favour of the respondent for the sum claimed. The respondent then took proceedings under the Act to enforce that award in the District Court in accordance with s 73 of the Act.
- [10] In passing I note that s 73 (3)(b) provides that the application: "*Must be made in the manner provided by the rules of that court (if any).*"
- It does not appear that any rules have been made although a form is prescribed. The form is very much a pro forma document. There is no need for instance to confirm by way of affidavit evidence that the process of appointment of adjudication has been followed.
- [11] In any event, in this case application was made to the District Court and whilst the appellant opposed entry of judgment the District Court Judge felt constrained by the provisions of s 74 of the Act and entered judgment. The application for an order that entry of the determination as a judgment can only be opposed on the limited grounds set out in s 74 (2):
- (a) that the amount payable under the adjudicator's determination has been paid to the plaintiff by the defendant:
 - (b) that the contract to which the adjudicator's determination relates is not a construction contract to which this Act applies:
 - (c) that a condition imposed by the adjudicator in his or her determination has not been met.
- [12] The Judge considered none of those grounds was made out, and did not feel able to find against the application for entry of judgment. He entered judgment accordingly. The Judge also declined to review the matter despite further submission from the appellant's solicitors. It is from that entry of judgment that the appellant appeals.
- [13] The basis for the appeal is that the adjudicator Mr Bradshaw, Adjudication Trade Services Limited, was not properly appointed as adjudicator. It is apparent from the evidence before the Court that there was no agreement as to his appointment as adjudicator by the parties. Indeed the timing of his involvement following one day from the notice of adjudication would suggest that there was no time for such consultation. In any event, the evidence satisfies me that there was no agreement that Mr Bradshaw was to be appointed nor was there any agreement as to any nominating body that might have nominated Mr Bradshaw as adjudicator. The short point is that the parties did not ever discuss that issue following the notice of adjudication on 7 September.
- [14] That leaves the only possible basis upon which Mr Bradshaw and Adjudication Trade Services Limited could have properly been appointed as an adjudicator if they had been appointed pursuant to s 33 by an authorised

nominating authority. In relation to that the appellant has obtained confirmation from the senior legal adviser to the Department of Building and Housing, the department administering the provisions of the Act, that the Arbitrators and Mediators Institute of New Zealand is the only approved nominating authority under the Act. That advice is confirmed by letter of 1 June 2005.

- [15] Further, the appellant has obtained confirmation from the Arbitrators and Mediators Institute of New Zealand that neither Terry Bradshaw nor Adjudication Trade Services Limited has been nominated by the Institute as an adjudicator for the purposes of the Act. Mr Bradshaw is not a member of the Institute.
- [16] In those circumstances Mr Bradshaw and Adjudication Trade Services Limited had no standing under the Act to act as adjudicator in this case. The entry of judgment in the District court proceeded on the mistaken premise that the adjudicator had standing to make the award which led to the entry of judgment. Given the defect in the appointment of the adjudicator and the fact that there was no adjudicator appointed for the purposes of the Act there was no basis for the entry of judgment in the District Court.
- [17] It follows that the appeal must be allowed. I find Mr Bradshaw was not an adjudicator within the meaning of the Act. The arbitration process did not comply with the provisions of the Act. The purported award the adjudicator made on 20 September 2005 can therefore have no effect in law or in equity. The appeal must be allowed and the entry of judgment in the District Court set aside. Order accordingly.
- [18] That leaves the issue of costs. Mr Chamley seeks costs on behalf of the appellant. Mr Bates opposes costs. He does so on the basis that at an early stage the respondent indicated it would not oppose the appeal and acted in good faith in reliance on Mr Bradshaw and Mr Bradshaw's authority. In relation to those submissions I note two matters. First, when the appeal was called at a directions conference the Judge noted that the respondent had written to the Court advising that in his opinion the judgment of the District Court was correct. He asked the Court to dismiss the appeal. He did, however, at that time also indicate that he did not propose to brief counsel to oppose the appeal. The concession of the respondent does not perhaps go quite as far as Mr Bates submitted.
- [19] Next, whilst the respondent may have relied on Mr Bradshaw's authority it is apparent Mr Bradshaw must have been appointed by the respondent and even when this appeal was lodged the respondent took steps to seek to enforce the judgment of the District Court by the issue of a distress warrant. The appellant has been forced to pay the amount in issue into the District Court. The respondent took those steps at a time when it should have been aware the appeal had been brought.
- [20] However, I accept Mr Bates' submission that this Court can only deal with the costs in this Court. It cannot deal with the issue of costs in the District Court.

The appellant is entitled to its costs in this Court on a 2B basis. I allow a quarter day for this appeal and a quarter day for preparation. I also allow for the commencement of the appeal in accordance with the timeband in the schedule and the appearance at the earlier judicial conference. That comes to 1.2 days at \$1,450, in total an award of costs of \$1,640. The respondent is to pay the appellant costs of \$1,640 together with disbursements being the filing fee and all other associated disbursements related to this appeal.

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