

IN THE MATTER OF the Judicature Amendment Act 1972

JUDGMENT : RHYS HARRISON J : High Court. New Zealand. Auckland Registry. 1st March 2006.

- [1] The first and second plaintiffs, Willis Trust Company Ltd and Messrs Ian Laywood and Gary Rees, have applied for interim orders pursuant to s 8 Judicature Amendment Act 1972 in these circumstances.
- [2] On 26 March 2004 Willis and the second defendant, Holmes Construction Wellington Ltd, entered into a contract for construction work. Willis planned to develop apartments on its site at 266 Willis Street, Wellington. They are known as the Augusta Apartments. It contracted Holmes to construct the buildings for a price of \$8.066 million. The terms and conditions of the contract are complex.
- [3] On 9 September 2004 Messrs Laywood and Rees, who are directors of Willis, signed a contract of guarantee in Holmes' favour. Its terms are open to ambiguity. Arguably Messrs Laywood and Rees jointly guaranteed payment to Holmes of a discrete contract price of \$250,881 relating to rooftop apartments at the site.
- [4] Willis pleads that Holmes had commenced construction in or about November 2003 and that the contractual engineer, Mr Chris Hoskins, certified for practical completion in June 2005.
- [5] Two months earlier, on 6 April 2005, Willis and Holmes signed an agreement for resolution of certain disputes which had arisen under the principal contract. Materially this later agreement provided that any issues not resolved should be referred to arbitration by Mr Anthony Dean or some other person. It is sufficient to record for these purposes that Mr Dean was never called upon to issue an award.
- [6] On 20 September 2005 Mr Hoskins certified that no funds were owing by Willis to Holmes in terms of the principal contract. However, on 28 October 2005 Holmes gave Willis notice of adjudication under the Construction Contracts Act 2002. It referred to six claims in dispute and sought relief. The first defendant, Mr John Green, was appointed as adjudicator. Holmes particularised its claim on 9 November 2005. Willis responded on 23 November 2005.
- [7] On 10 February 2006 Mr Green issued his determination. In summary, he found Willis liable to pay Holmes \$1.16 million inclusive of GST and \$58,655 in interest as damages. He also held that Messrs Laywood and Rees were jointly and severally liable to pay Holmes \$282,241 inclusive of GST together with \$14,248 in interest as damages. He approved the issue of a charging order in Holmes' favour over the subject property. Also he made certain costs awards.
- [8] On 20 February 2006 Willis and Messrs Laywood and Rees filed this proceeding. They allege that the determination was wrong on two discrete grounds. First, Holmes claims that the adjudicator erred in law in exercise of a statutory power under the Construction Contracts Act or, alternatively, that the dispute resolution agreement estops Holmes from enforcing its rights under the determination. Second, Messrs Laywood and Rees allege that the adjudicator erred by imposing personal liability upon them for any amount; they say that the terms of their guarantee do not extend to Willis' adjudicated liability to Holmes.
- [9] Contemporaneously with filing their substantive claim, Willis and Messrs Laywood and Rees applied for interim orders (s 8 Judicature Amendment Act 1972) prohibiting Holmes from taking any steps to enforce any of the adjudicated determinations until their substantive claim is determined. Mr David Carden, who appears for the plaintiffs, submits essentially that both entities have good arguable cases in law and that if interim orders are not made then their substantive application will be imperilled. He submits that the consequence of success on the applications for judicial review will be to relieve Willis and Messrs Laywood and Rees from all liability under the determination. He submits that an interim order is necessary for the purpose of preserving the status quo.
- [10] Mr Sherwyn Williams for Holmes opposes the application. Among other things, he submits that the Court does not have jurisdiction to grant substantive relief under the Judicature Amendment Act in the sense that it cannot negate or derogate from the express terms of the Construction Contracts Act. Additionally his comprehensive and constructive notice of opposition disputes the strength of the plaintiffs' application for judicial review. He also submits that the overall justice of the case does not require an interim order. In that respect he refers to Holmes' deprivation of access to funds due and owing to it under the contract for a significant period and its entitlement to enforce the adjudicator's determination by entering judgment and obtaining charging orders. If interim relief is granted, Willis may dispose of the land and dissipate funds. Consequently Holmes would suffer substantial if not irreversible prejudice.
- [11] I heard oral argument from Mr Carden this morning. The legal issues appear complex. Some or all of them may be tenable. I have not, of course, heard Mr Williams orally in opposition. However, he confirms that the principal basis of Holmes' resistance to Willis' application is a concern that any delays in enforcement of the determination will have adverse financial consequences.
- [12] I am satisfied, on a preliminary basis at least, that some of the arguments raised by Mr Carden in support of the substantive applications by Willis and Messrs Laywood and Rees should proceed to a hearing. In the event that their challenge to the determination is successful, wholly or in part, then Willis and Messrs Laywood and Rees would also be prejudiced by payment of the sums owing if they were unable to recover them substantially or promptly from Holmes.

- [13] As is frequently the case, determination of this application involves a balancing of rights and interests. During argument I raised with counsel the prospect of making an interim order in the terms sought but subject to conditions requiring payment to a stakeholder of the disputed amounts. Counsel conferred and took instructions but were unable to agree.
- [14] I record Mr Carden's advice that 34 of the 37 Augusta Apartments have been sold but that neither Willis nor Messrs Laywood and Rees have sufficient funds to pay the determined amounts into Court or to a stakeholder. Apparently Willis has land available adjacent to the site. Its proposal is to develop a second stage of the apartment project there. It has offered Holmes a charging order over it to secure the adjudicated amounts wholly or in part. Mr Williams advises that the terms offered are unsatisfactory to Holmes but, with commendable realism, he does not oppose an interim order, providing that Holmes' existing rights are properly secured.
- [15] Accordingly, I make an order prohibiting Holmes from taking any steps to enforce any determinations or orders made by the adjudicator in his determination dated 10 February 2006 until further order of this Court, upon conditions that:
- (1) Willis is to pay to a stakeholder to be agreed between the parties the sums of \$1.16 million and \$58,655 (or to provide such other security for payment as is satisfactory to Holmes) together with costs as awarded, on or before midday on 9 March 2006;
 - (2) The nominated stakeholder is to hold the funds in an interest bearing account pending determination of this proceeding or further order of the Court;
 - (3) Willis and Messrs Laywood and Rees are to apply to this Court by midday on 9 March 2006 for a priority fixture for determination of their substantive application for judicial review. Once a date is fixed (presumably for a hearing of two days duration), counsel are to agree upon a timetable for exchanging written submissions in advance. The documents produced as exhibits in the comprehensive affidavit sworn by Mr Laywood on 20 February 2006 should constitute a core bundle together with any additional documents relied upon by the parties;
 - (4) Holmes is prohibited from taking any further steps to register and enforce its application to the District Court at North Shore for a charging order against Willis until midday on 9 March 2006;
- In the event that Willis fails to satisfy any of the preceding conditions, time being of the essence, the terms of the interim order relating to it shall be discharged, with the consequence that Holmes will be free to enforce the terms of the adjudication against Willis. In that event, however, Messrs Laywood and Rees will remain obliged to pursue their claims for a priority fixture. (In this respect I record that I am exempting them from obligations to provide security because of the prima facie strength of their case for challenging the adjudicator's determination against them).
- [16] Mr Green, who is sued as first defendant, advises that he will abide the decision of the Court.
- [17] I direct the registry to arrange a telephone conference between me and counsel at 8.45 a.m. on 15 March 2006.
- [18] Costs of today's hearing are reserved.

David Carden for Plaintiffs instructed by Alexander Dorrington (Auckland)
Sherwyn Williams for Second Defendant instructed by Kensington Swan (Wellington) for Second Defendant