Russell McVeagh

Breaking Ground

Russell McVeagh
Construction Quarterly

Issue 10 | Sept 2023 | russellmcveagh.com

Case Law Update - NZ

G K Shaw Ltd v Green [2023] NZHC 605

A recent decision of the High Court analysed the scope of money claim disputes which can be referred to adjudication under the Construction Contracts Act 2002.

Background

G K Shaw Limited is a civil contracting company. In April 2019, it entered into a construction contract with CentrePort for the replacement of wharf fenders at Seaview Wharf, Wellington. During construction works, an unsupervised trainee improperly operating a 20 tonne crane caused it to topple into the sea. Retrieving the crane involved a complex and costly salvage operation. The crane operator was lucky to escape without injury. CentrePort ultimately cancelled the contract over the incident.

First adjudication

G K Shaw considered CentrePort's purported cancellation an unlawful repudiation of the contract. It initiated an adjudication under s 48(1) of the Construction Contracts Act 2002 (CCA) claiming that, as a consequence of the repudiation, CentrePort was liable to pay G K Shaw damages of around $1 million.

The adjudicator made two determinations. First, he determined that he did not have jurisdiction under the CCA to grant the relief sought, on the basis that the common law damages G K Shaw was seeking was not money due to it "under the contract". The wording of section 48(1)(a) of the CCA confers jurisdiction to determine liability to make payment "under the contract" only, not liability to make any payment whatsoever. Second, the adjudicator determined that, in any event, G K Shaw's claim failed on its merits.

Second adjudication

G K Shaw commenced a second adjudication, this time seeking a determination of the parties' rights and obligations under the contract – in particular, its entitlement to recover losses.[1] While it used a different pathway under section 48 for its claim, the issues in dispute in the second adjudication were essentially identical to those in the first (as G K Shaw itself later acknowledged).

Footnotes

1. Seemingly via s 48(1)(b).

The second adjudicator determined that he did not have jurisdiction to grant the relief sought. This time it was on the basis of the principle of *res judicata*; that the merits of the claim had already been finally decided in the first adjudication, and that the second adjudicator was therefore prevented from determining them again.

G K Shaw applied to the High Court for a judicial review of the second adjudication determination. It claimed that, because the first adjudicator had concluded that he had no jurisdiction, any conclusions he had reached in relation to the claim's merits were "of no consequence" and not binding. This meant that the second adjudicator was incorrect to think he was prevented from determining the claim.

The law

The case largely turns upon exactly what section 48 requires an adjudicator to do. Section 48(1) provides that, if a claimant brings an adjudication seeking money under a construction contract, the adjudicator must determine whether or not any of the parties are liable, or will be liable, to make a payment under that contract (s 48(1)(a)), and any questions in dispute about the rights and obligations of the parties under the contract (s 48(1)(b)). Section 48(2) then separately provides for an adjudicator to make determinations about disputed rights and obligations under the contract even when no amount of money is claimed.

G K Shaw said that it had initiated its first adjudication under section 48(1)(a) only. It said it had expressly excluded reliance on section 48(1)(b). Therefore, because the first adjudicator had concluded he had no jurisdiction to determine the claim under section 48(1)(a), anything he had then gone on to say about the merits of the claim (seemingly under section 48(1)(b)) should be disregarded.

What the court decided

The High Court found that: (1) the first adjudicator had made a binding determination on the merits of the claim; (2) he was entitled to make that determination; and (3) the second adjudicator was therefore correct that he had no jurisdiction to determine it again. The judicial review application was dismissed.

The Court decided that section 48(1) provided that when an amount of money is claimed, the adjudicator must determine whether a party is liable to make payment (s 48(1)(a)), and any disputed questions about the parties' rights and obligations (s 48(1)(b)). This meant that, not only was the adjudicator entitled to consider the merits under section 48(1)(b), the Act itself required him to do so.

The judge did not agree with G K Shaw's contention that it was able to limit the scope of the adjudicator's jurisdiction to a determination of liability under section 48(1)(a) only. The judge said, "While it is true that an adjudicator may only determine matters within the bounds of the parties' case, equally an adjudicator must determine those matters that are properly put before them."[2]

Observations

Where a party is dissatisfied with an adjudication determination, the best approach (if the parties are unable to negotiate a different outcome between themselves) is usually to initiate an arbitration or court proceedings. The principle of *res judicata* does apply in adjudication, meaning it is not permissible to resubmit the same claim to a new adjudicator if the original determination does not go your way.

An adjudication claimant should also be careful to refer all relevant aspects of the particular dispute for determination at the same time, rather than attempting to adjudicate "by instalment". The judge in this case noted that the second adjudication had also involved a claim which "could and should" have been brought as part of the first adjudication. If a party fails to raise an argument in a proceeding when they could and should have done so, they will not usually be permitted to raise it later as a new claim.

CONTRIBUTORS: Joanna Trezise & Angela Yang

Footnotes

2. At [33].

Case Law Update – United Kingdom

Atalian Servest AMK Ltd v B W (Electrical Contractors) Ltd [2023] ScotCS CSIH 18

In rejecting a challenge to an adjudication award, the Scottish Court of Session has approved an adjudicator's robust approach to achieving the simple and rapid determination of a dispute.

Background

Atalian Servest AMK Ltd engaged B W (Electrical Contractors) Ltd to undertake electrical works at Lord's Cricket Ground in London. The works were subject to a fixed price lump sum contract. After numerous additional instructions from Atalian, BWE spent significantly more time and resource on the project than had been anticipated.

The parties' valuations for the final amount due to BWE were considerably different, particularly in relation to the value of the variations undertaken. When BWE disagreed with Atalian's final account statement, it referred the matter to adjudication.

Two weeks after referral to adjudication, the first adjudicator resigned. The parties had provided him with nine boxes of files requiring review, prompting him to conclude that the dispute was "absolutely incapable of proper resolution in the timescales set by the Construction Act"[3]. Three months later, following failed attempts at negotiations, BWE initiated another, substantially similar, adjudication claim.

The claim

This time, BWE provided over 26,000 pages of material with its claim. Atalian responded in detail, providing a 50-page response with 20 appendices. BWE then filed a 38-page reply, to be met with a rejoinder with 19 appendices.

Around two weeks before making his decision, the new adjudicator wrote to the parties. He noted his preliminary view that the scope of the original works had been superseded by what he called a "beck and call" contract, due to the additional instructions which had caused the work to substantially deviate from the parties' original agreement. The adjudicator invited the parties to comment, including on how the additional work undertaken should be valued in that context. BWE agreed with this characterisation and sent the adjudicator updated figures. Atalian complained that this was a breach of natural justice, on the basis that neither party had ever suggested that a new beck and call arrangement had been formed, and that it did not have time to respond to BWE's figures (though it later did respond in detail).

The adjudicator ultimately concluded there was no new beck and call contract, but determined the changes were so extensive they were not variations as defined under the contract (and therefore should not be valued at such), but that the events were best characterised as a varied contract. He emphasised the need for costs to be valued on a fair and reasonable basis, and noted that he aimed to do "broad justice at high speed". His determination awarded BWE £1.4m plus interest, fees and expenses.

Footnotes

3. The timeframes for adjudication are even shorter in the United Kingdom than those under the New Zealand regime: an adjudicator is required to determine a dispute within 28 days of receiving the referral, unless an extension is agreed.

Decision of the Court

BWE applied to court to have the adjudicator's award enforced. While Atalian opposed the application, it was granted. Following appeals from Atalian, the matter came before the Scottish Court of Session (Scotland's supreme civil court).

Atalian complained that the adjudicator "had gone off on a frolic of his own". Instead of answering the question posed by the parties, he had posed and then answered a number of other questions which they had not presented. This meant his award was unenforceable. Atalian also complained that the adjudicator had acted contrary to natural justice in raising new issues at a late stage, and had not taken sufficient account of Atalian's evidence.

Amongst other things, the court concluded:

- There was no natural justice issue. The adjudicator gave the parties due notice of his line of thinking and invited comment. The parties took full advantage of that opportunity.
- The volume of materials involved in the adjudication was enormous. It would have required a "super-human effort" to carry out a full and precise valuation exercise by the adjudication deadline. Having brought an adjudication claim, BWE was entitled to a decision within the short timescale the legislation provides. "The presentation of an excessive amount of material, as both parties did, and the tabling of a wide range of legal and factual issues, could not be allowed to derail the robust and summary adjudication process."[4]
- Given the background, the adjudicator's work was exemplary. "Having cut to the chase, the adjudicator used a broad axe with a blunt edge to reach a robust and summary conclusion."[5]

Atalian's challenge failed.

Observations

Parallels can be drawn between this case and a recent decision of the High Court of England and Wales, *Home Group Ltd v MPS Housing Ltd*.[6] In *Home Group*, the referral to adjudication was accompanied by an expert report of 155 pages with 76 appendices (amounting to 338 megabytes of data), a further 2,325 files, and five extensive witness statements, each with multiple additional accompanying documents. After a determination in its favour, Home Group sought court enforcement. MPS claimed that the volume of material provided by Home Group, given the strict time frame within which MPS had to reply, meant that a breach of natural justice had occurred. In court, the judge noted that challenges based upon the time constraints in adjudication have rarely succeeded. He quoted with approval the passage of an earlier decision, *The Dorchester Hotel Limited v Vivid Interiors Limited*:[7]

> The concepts of natural justice which are so familiar to lawyers are not always easy to reconcile with the swift and summary nature of the adjudication process; and in the event of a clash between the two, the starting point must be to give priority to the rough and ready adjudication process…

As stated by the Court of Session in *Atalian*, the purpose of adjudication is not to "resolve disputes by reference to innumerable rounds of pleadings and submissions," but to grant fast resolution of contractual disputes so as to prevent works from becoming unduly delayed.[8]

Amongst other things, this means that courts will be reluctant to interfere with an adjudicator's award, unless the adjudicator has acted beyond the scope of their power.[9] Where an adjudicator has considered both the complexity of the dispute in question, and the constraint of time, and has nonetheless concluded they will be able to make a determination that delivers "broad justice" between the parties, the court will be extremely slow to interfere with that conclusion.[10]

This case also demonstrates that an adjudicator can consider issues on which neither party has focussed evidence or submissions.[11] However, to comply with natural justice, the adjudicator must give the parties appropriate notice of those issues, and an opportunity to make submissions in response.[12]

CONTRIBUTORS: Joanna Trezise & Harry Fleming

Footnotes

4. At [38].
5. At [41].
6. *Home Group Ltd v MPS Housing Ltd* [2023] EWHC 1946 (TCC).
7. *The Dorchester Hotel Limited v Vivid Interiors Limited* [2009] EWHC 70 at [20].
8. At [38].
9. At [36].
10. *Home Group Limited v MPS Housing Limited* [2023] EWHC 1946 (TCC) at [38].
11. In New Zealand, see Construction Contracts Act 2002 at section 42(1)(a) & (b).
12. For a statement of this concept by New Zealand courts, see *Horizon Investments Limited v Parker Construction Management (NZ) Limited and Anor* HC WN CIV 2007-485-332 4 April 2007; *Spark It Up Ltd v Dimac Construction Ltd* (2009)] 19 PRNZ 631 (HC) at [42].

Case Law Update – Australia

Veesaunt Property Syndicate 1 Pty Ltd v Alliance Building and Construction Pty Ltd [2023] QSC 129

A recent decision of the Supreme Court of Queensland applies the well-established principle that contractual parties will not be permitted to take advantage of their own "default".

Background

Veesaunt and Alliance entered into a contract for the design and construction of residential townhouses on the Gold Coast. The contract was subject to a number of conditions precedent which needed to be satisfied by Alliance, or waived by Veesaunt, by a specified date. It provided that, unless each of those conditions were either satisfied or waived by that date, the contract:

"will be taken to have been terminated on that date … and the Contract will be of no further force or effect"[13].

Alliance satisfied some, but not all, of the conditions precedent. Two days prior to the nominated date, the superintendent to the contract sent a "proceed with works" notice to Alliance. The notice referred to the conditions that had been satisfied but made no mention of those that had not.

The Dispute

The relationship between Alliance and Veesaunt broke down. Veesaunt wanted the contract to continue, but Alliance asserted that its failure to satisfy all of the conditions precedent, and Veesaunt's failure to waive them, meant the contract had, according to its own terms, been terminated.

Veesaunt applied to the court for a number of declarations, including that the contract had not been terminated and remained on foot. It made two key arguments:

- That the "proceed with works" notice had constituted a waiver of the remaining conditions precedent, because it ordered that the works proceed, and had been issued by the superintendent in his capacity as Veesaunt's agent.
- Even if Veesaunt had not waived the conditions, the failure to satisfy or waive them by the nominated date did not result in termination, it simply made the contract voidable. This gave Veesaunt an election: it could either terminate or choose to continue with the contract. It chose to continue.

Footnotes

13. Clause 6.1(c)(ii).

The Decision

The Supreme Court of Queensland held that, under the contract, waiver could only occur by written notice from Veesaunt. The superintendent to the contract had expressly stated in the relevant notice that he was writing in his capacity as superintendent and was therefore not acting as Veesaunt's agent. As the notice was not from Veesaunt, it was not a valid waiver under the terms of the contract.[14]

However, the court nonetheless concluded that the contract had not terminated on the due date for satisfaction or waiver, but had merely become voidable. It did so by construing the contract in light of the principle that a defaulting party cannot rely on its own default to claim termination and thereby avoid its contractual obligations.[15]

As Veesaunt had repeatedly expressed a firm wish to continue with the contract, it was held to have elected to affirm it. The contract remained on foot and was binding on the parties.

Observations

Veesaunt turned on the construction of the contract. The court's approach was, however, influenced by the general maxim that parties will not be permitted to take advantage of their own wrongdoing. It gave effect to this maxim by reading the contract as allowing the innocent party the opportunity to affirm the contract, and thus denied the defaulting party any benefit from its default.

CONTRIBUTOR: Harry Fleming

Footnotes

14. At [41].
15. At [71].

Breaking Ground is produced quarterly by Russell McVeagh. It is intended to provide summaries of the subjects covered, and does not purport to contain legal advice. If you require advice or further information on any matter set out in this publication, please contact one of our experts.

Subscribe to Breaking Ground

Key contacts:

Michael Taylor
Partner
Litigation/Construction
+64 9 367 8819
michael.taylor@russellmcveagh.com

Polly Pope
Partner
Litigation
+64 9 367 8844
polly.pope@russellmcveagh.com

Editor:

Joanna Trezise
Senior Associate
Litigation
+64 9 367 8896
joanna.trezise@russellmcveagh.com

Construction law experts:

David Butler
Ed Crook
Anna Crosbie
Nick Saxton