IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2018-419-58
[2018] NZHC 1803

BETWEEN	CRAIG ANDERSON AND VICKI VOLKOVA Applicants
AND	EDWARD SWINDELLS First Respondent
AND	MCDOWALL RENOVATIONS LIMITED Second Respondent

Hearing: 30 May 2018

Appearances: M R Taylor for Applicants
A W Johnson & K R Narayanan for Second Respondent

Judgment: 19 July 2018

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 19 July 2018 at 4:30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
M Taylor, Auckland
Martelli McKegg, Auckland

Introduction

[1] In this proceeding Craig Anderson and Vicki Volkova (the applicants) seek judicial review of an adjudicator's determination (the determination) made by the first respondent, Mr Edward Swindells, pursuant to the Construction Contracts Act 2002 (the Act).[1] The second respondent, McDowall Renovations Limited (McDowall), is a building contractor and was the other party to the adjudication which related to a dispute with the applicants over a contract for building work at their property at 5 Logan Terrace, Parnell. The applicants seek an order quashing the determination.

[2] The applicants' principal ground for review is that the determination was made without jurisdiction. They say that the first respondent failed to address and determine the matters put in dispute and to be determined by the adjudication, and instead based the determination on an entirely different matter which was not the subject of the contract dispute: the first respondent found that the applicants were liable to pay the full amount claimed by McDowall by reason of having failed to comply with those provisions of the Act which stipulate that where a payment claim is served upon a party to a construction contract, that party is liable to pay the full amount claimed unless they provide a payment schedule within the time provided in the Act.

[3] The applicants also allege that the first respondent's determination was made on the basis of mistaken facts; errors of law; by failing to take into account relevant considerations; by taking into account irrelevant considerations; by failing to give coherent and adequate reasons in the determination; and by failing to reach conclusions on issues raised by the parties to the adjudication for his determination.

[4] The first respondent (the adjudicator) was served with the proceedings and in accordance with usual practice has taken no steps in the proceedings and is thereby taken to abide the decision of the Court.

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1 The adjudicator's determination is dated 31 January 2018.

Background

The dispute leading to the adjudication

[5] On or around 7 February 2016, the applicants entered into a written construction contract (the contract) with Epsom Renovations Limited (Epsom), trading under the name Smith & Sons, for work to be done at their Logan Terrace property.

[6] The building work is described in the contract as being:

> REAR SITE EXCAVATIONS AND LEVELLING WITH THE CONSTRUCTION OF RETAINING WALLS INTERNAL WORKS INCLUDING INSTALLING AN NEW STAIRWELL, CREATING A STORAGE AREA, REPLACEMENT WINDOWS AND DECK ETC AS PER PLANS ATTACHED.

[7] The estimated cost of the work was $453,200 (including GST), subject to adjustments as provided for in the contract.

[8] In accordance with the contract Epsom commenced the building work on 15 February 2016. On 31 May 2016, when only around 50 per cent of the building work had been completed, Epsom sold its business to McDowall. The sale was undertaken without prior notice to the applicants. On or about 10 August 2016, Epsom confirmed to the applicants that McDowall had purchased its Smith & Sons business and advised that the contract would need to be "re-assigned" to McDowall. However, no documents were executed recording a re-assignment. On 16 August 2016 McDowall advised the applicants that it had purchased the Smith & Sons construction business from Epsom, and thereafter it continued to carry out the building work under the direction of its principal Mr Steven McDowall.

[9] Thereafter, as building work progressed, McDowall issued invoices to the applicants which they paid. However, in May 2017 a dispute between the parties arose when the applicants disputed their liability to pay the then outstanding invoices, and McDowall suspended work at the site until its outstanding invoices were paid.

[10] The six invoices which were submitted by McDowall and not paid by the applicants were for a total sum of $56,930.32 (the invoices).

[11] The parties exchanged emails setting out their respective positions regarding the disputed matters. The applicants said that they were entitled to withhold payment of the invoiced amounts for a variety of reasons, including incorrect materials being used; unnecessary work being undertaken; being charged for remedial work; and being charged twice for some materials. The applicants further claimed that they were entitled to payment of $100,000 from McDowall for remedial work that they considered necessary, and that they were entitled to withhold a sum of $4,300 by reason of a dispute with a sub-contractor. They also claimed that the estimated cost that had been given at the commencement of the contract had been exceeded by around $240,000. They said that because completion of the work had been substantially delayed, they had suffered losses for which they were entitled to damages.

[12] McDowall disputed the various claims made by the applicants and maintained that they were liable to pay the outstanding balance of the invoices. The parties were unable to resolve their dispute and on 10 November 2017, McDowall issued a notice of its intention to refer the dispute with the applicants to adjudication in accordance with the provisions of the Act.

[13] On 16 November 2017, following application by McDowall to the Adjudicators Association of New Zealand, the first respondent was appointed as adjudicator. Also on 16 November 2017, the applicants issued a notice of adjudication in which they too referred the dispute which had arisen to adjudication. The parties then agreed that the jurisdiction of the adjudicator would be extended to encompass both the McDowall claim and the applicants' counterclaim together in a composite and single determination.

[14] Accordingly the parties submitted the following issues to the first respondent as adjudicator.

The McDowall issues for adjudication

[15] In its description of the dispute for adjudication, McDowall referred to its purchase of Epsom's business and the issue of whether the contract had been validly novated. McDowall claimed that it was currently owed the sum of $56,930.32, and noted that Mr Anderson and Ms Volkova had raised issues regarding delay,

overcharging and defective workmanship as justifications for withholding the payment to McDowall. By way of relief McDowall sought orders from the adjudicator that Mr Anderson and Ms Volkova pay the sum due under its invoices together with interest and legal fees.

The applicants' issues for adjudication

[16] In their notice of adjudication, the applicants questioned whether McDowall was entitled to the amounts it had claimed in the invoices. They alleged that the sum to which they were entitled exceeded the amount of the invoices which they disputed, because:

(a) McDowall had claimed around $246,000 in excess of the estimated contract price without justification for the increase;

(b) the claimed novation of McDowall was invalid, it having occurred without the express consent of the applicants;

(c) McDowall had claimed for items of work which were defective or which required remedial work;

(d) McDowall had claimed for works that were unnecessary;

(e) the applicants were entitled to contra-charges or deductions as damages for delays in the completion of work and for remedial work;

(f) McDowall had unlawfully terminated the contract; and

(g) the applicants were entitled to damages for the costs of their completion of the works.

[17] The applicants also raised as issues that McDowall had refused to provide them with the documentation necessary to obtain a Code of Compliance Certificate, and

McDowall had lodged a caveat on the title of their property notwithstanding that it had no caveatable interest.

[18] By way of relief, the applicants sought the following determinations by the adjudicator:

(a) that McDowall was liable to pay them $47,161.00 or such sum as the adjudicator thought fit;

(b) that McDowall was required to provide them with all documentation held relating to the work and as necessary to enable them to obtain a Code of Compliance Certificate; and

(c) that McDowall be directed to pay the adjudicator's costs and expenses in full.

[19] The applicants also filed an 'Adjudication Response' in which they responded to McDowall. In their response they submitted that McDowall had failed to discharge the onus of proof upon it to establish its entitlement to the sum claimed, as it had not provided any evidence as to the work undertaken and for which payment was claimed in the invoices. They further alleged that McDowall had failed to provide information regarding variations to the contract work, or why the variations were undertaken, and the cost of that work. The applicants also alleged that the contract price estimate had been negligently given, and said that they disputed liability to pay anything further. They alleged that they should not be required to pay for defective work carried out by McDowall or its subcontractors, or for products delivered to the site but damaged.

[20] The applicants further said that McDowall had ceased work, but had failed to provide them with written notice specifying a payment default or omission upon which the suspension of the work was based. The applicants disputed liability to pay McDowall interest. They also set out a claim for damages arising from the delay in completing the work, which they said had caused them lost rental income and additional storage charges. In their response notice the applicants sought relief by way of determinations as to whether McDowall had unlawfully suspended work on 12 May

2017; as to their entitlement to damages for the delays; and as regards a number of matters relating to allegedly defective work and products.

McDowall's reply

[21] McDowall filed with the adjudicator a reply to the applicants' adjudication response and counter-claim. In its reply McDowall addressed and responded to each of the issues raised by the applicants.

Evidence in the adjudication

[22] The parties both supported their respective claims and responses with witness statements. The applicants each submitted statements themselves, as well as a statement by an expert witness, Mr Alan Light (a building consultant). McDowall submitted two statements by Mr Steven McDowall, and the statement of an expert witness, Mr John Wotherspoon (a building contractor).

[23] The adjudication was done on the papers.

The adjudicator's determination

[24] The adjudicator issued his written determination on 31 January 2018. Regarding the McDowall claim, the adjudicator noted that both parties accepted that the contract had been novated. He then referred to s 21 of the Act regarding the provision of payment schedules by a payer under a construction contract. He said:[2]

> The Claimant [McDowall] made payment claims under the CCA and the Respondent [sic] failed to send the Claimant payment schedules within the allowed timeframes and thus became liable to pay the claims in full.
>
> The dollar amount of the claims cannot under the CCA be disputed by the Respondent [sic] failing to provide payment schedules within 5 working days as per clause 6.6 of the Cost and Margin Building Contract.
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> These omissions by the Respondents removed the requirement for the "Burdon [sic] of Proof" which the Claimant would have had to respond to if the Payment Schedules were issued.

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2 At [5]–[10].

> By reading, understanding and signing [the] contract the Respondents should have known their responsibilities to submit Payment Schedules under the contract.
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> Interest on the outstanding amount is payable under clause 19.1 of the contract.
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> Interest claimed under clause 23.10 of the contract is considered doubling up on the interest owed and not justifiable in law.

[25] Addressing the applicants' response and counter-claim regarding McDowall's suspension and abandonment of work around 12 May 2017, the adjudicator said that although McDowall had not followed the contract procedure correctly, nevertheless there were outstanding payments due and there had been regular demands for payment made. The adjudicator found that the applicants could not succeed in their claim for damages for lost rental income by reason of the delays as they had not raised the issue of delay until "late in the contract". He noted that at the time that McDowall purchased the Epsom business the work was under 50 per cent complete, and commented that this was at a time when the work was supposed to have been completed under the contract. The adjudicator said that the applicants had allowed the contract to be extended by having the interior work portion of the contract started at around that time, and so they should have known that the contract time period would have to be extended. He further noted that the contract makes no provision for liquidated damages, or damages for late completion.

[26] The adjudicator found in favour of the applicants in relation to their claim for a refund for the cost of a defective concrete path and for incorrectly installed Decortech panels, but rejected all their other claims. In relation to the applicants' claim for damages for lost rent and storage costs incurred due to delay, the adjudicator found those claims to be "outside" the adjudication.

[27] The adjudicator directed the applicants to pay McDowall the sum of $37,728.97 (less the deposit held by McDowall of $19,201.35), together with interest of $4,859.09 on the unpaid invoices and legal fees of $3,484.55. After deducting the sums relating to those items where he had found in favour of the applicants, the adjudicator found the net amount payable by the applicants to McDowall was $36,166.66. He said:

> The main part of this determination was the lack of Payment Schedules from the Respondents.

The applicants' submissions

[28] Mr Taylor for the applicants submits that the adjudicator:

(a) made a significant error of fact;

(b) made a mistake of law;

(c) acted outside the jurisdiction conferred on him;

(d) failed to take into account relevant considerations;

(e) took into account irrelevant considerations;

(f) failed to give coherent and adequate reasons; and

(g) failed to make conclusions on the important issues that were raised for determination.

[29] He acknowledges that the courts are generally unwilling to review the determinations of adjudicators under the Act, having regard to the legislative objective of providing a simple and speedy process for resolving disputes between parties to construction contracts so as to avoid delay in payments being made. However, he submits that the present case is an instance where the court should do so. He further says that the adjudicator was required by the terms of the adjudication notices and by the Act to determine the issues referred to him by the parties. Those issues related to the rights and obligations of the parties pursuant to the contract. But rather than deciding the matters referred to him, the adjudicator determined the matter on an entirely different basis, namely by reference to whether the applicants had provided a payment schedule in accordance with s 21 of the Act.

[30] Mr Taylor says that the issue of payment schedules pursuant to s 21 of the Act was not put in issue by either party before the adjudicator, and consequently no

evidence or submissions were presented to him on that subject. As a result, the adjudicator acted without jurisdiction in determining that the applicants were to pay McDowall the amount of its invoices by reason of their failure to provide a payment schedule, and by failing to determine the real question in dispute, which was whether McDowall was entitled to any payments under the contract. Furthermore, says Mr Taylor, contrary to the observations of the adjudicator, McDowall had not made payment claims in accordance with the requirements of the Act, and although a valid payment claim is a prerequisite before a payer is required to produce a payment schedule under the Act, the adjudicator failed to consider that issue.

[31] Mr Taylor further submits that the first respondent failed to discharge or comply with the obligations of an adjudicator under the Act. He submits that because the adjudicator made his determination by reference to s 22 of the Act, the applicants have had no opportunity to make submissions or present evidence on the issue of the validity of the payment claims and consequently there has been a breach of natural justice.

[32] In relation to the adjudicator's finding that there was no evidence to support the applicants' claim for damages for lost rental, Mr Taylor says that there was in fact a substantial amount of evidence presented by the applicants. He notes for example that despite the evidence in the applicants' statements regarding building delays and the extensive examination by Mr Light of the mis-management of the building work and the unnecessary delays, the adjudicator made no reference whatsoever to Mr Light's evidence. Mr Taylor submits that the adjudicator's decision was not only made without jurisdiction, but it also lacks evidential foundation and fundamental reasoning.

McDowall's submissions

[33] Mr Johnson for McDowall accepts the factual background as described by Mr Taylor. He says that adjudication under the Act is not intended to be as thorough a process for dispute resolution as arbitration or litigation, but rather is intended to be a speedy mechanism for obtaining a result to ensure that money is paid and remains flowing in the construction industry. He says that the decided cases make it clear that judicial review will only rarely be available, and that here the applicants fall well short

of establishing grounds that should lead the court to review and quash the adjudicator's determination.

[34] Mr Johnson says that the adjudicator was required to determine not only whether the applicants were liable to pay the amounts of the McDowall invoices, but also any questions in dispute between the parties under the contract. Mr Johnson notes that the McDowall notice of adjudication clearly set out McDowall's claim for relief for payment of the amounts due under the invoices. Accordingly the liability of the applicants to pay the invoices was clearly in issue. He therefore says that payment claims were a relevant consideration for the adjudicator, and he refers to that part of the McDowall adjudication notice which says that McDowall seeks:

> An order that Mr Anderson and Ms Volkova pay to McDowall Renovations Limited the sum of $37,728.97 being the sum due under the Invoices less the deposit of $19,201.35, which has been applied to the sum outstanding pursuant to clause 19.9 of the Contract.

[35] Mr Johnson further submits that the validity of the payment schedules or the lack of payment schedules was a highly relevant consideration in the adjudication in order to determine whether or not McDowall was entitled to payment of the amount claimed. Mr Johnson says that having examined the payment claims, and having determined that McDowall was entitled to payment of its invoices, the adjudicator then proceeded to consider the other issues raised by the applicants in the counter-claim section of their notice of adjudication. He says that the adjudicator considered and determined the issues raised by the applicants as to delay, overcharging, and defective workmanship, and made determinations in respect of each of them.

[36] Regarding the issue of damages for delay, Mr Johnson submits that the adjudicator determined the merits of that claim by reference to a provision of the contract which allowed for the completion date to be extended due to variations, failure of the owner to provide timely directions, the unavailability of materials, matters beyond the reasonable control of the builder, and the builder exercising its right to suspend the work under the contract. McDowall says that it was therefore open to the adjudicator to find that the contract provided for an extension of time and to determine that the applicants were not entitled to any damages for delay, and that the adjudicator did not err in doing so.

[37] Mr Johnson says that the adjudicator gave reasons as to why he rejected the applicants' claim for damages for delay, and when the adjudicator said that the issue of delay was outside the jurisdiction of the adjudication, he should be taken as meaning that the delay claim had not been made out by the applicants. Similarly, when the adjudicator said that there was no evidence to support the applicants' claim for lost rental, he should be taken to mean that having considered the evidence presented in support of the claim, he found it to have little weight and not to support the applicants' claim.

[38] Mr Johnson further says that the adjudicator was clearly aware and took account of Mr Light's statement, but due to his finding of fact that the delay was justified, the claim for damages for delay failed. He notes that Mr Light's statement did form the basis of the adjudicator's decision regarding the concrete path and Decortech sound panels, which shows that it was considered. The absence of any other reference to Mr Light in the determination simply reflects the fact that the claim for damages for delay was rejected.

[39] In response to the applicants' submission that the adjudicator's determination was inadequate as regards reasons and reasoning, Mr Johnson submits that the determination meets all the requirements in terms of form and substance prescribed by the Act, and that the reasons for the determinations were clear and intelligible. He says that the adjudicator also made determinations on each of the issues of law presented to him, including the applicants' claim of negligence relating to the estimated contract sum, in respect of which he found that the parties had not provided sufficient evidence to enable him to make a decision.

[40] In conclusion, Mr Johnson says that the applicants have inappropriately sought judicial review rather than having the issues they raise reviewed in the District Court or by submitting the dispute to arbitration or litigation.

Judicial review of an adjudicator's determination

[41] The appropriate approach to applications for judicial review of an adjudicator's determination was considered by the Court of Appeal in *Rees v Firth.*[3] The Court said:

> [22] … The key point, we think, is that the statutory context is such that a person who does not accept an adjudicator's determination should litigate, arbitrate or mediate the underlying dispute, rather than seeking relief by way of judicial review of the determination. Such relief will be available only rarely.
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> …
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> [26] Second, an adjudicator's determination of rights and obligations under a construction contract is not binding in any event. A party with the benefit of such a determination must issue proceedings in order to enforce its rights and the court will be free to reach a different view from that of the adjudicator. In this type of case, it is difficult to see what point there would be in any judicial review proceedings.
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> [27] The courts must be vigilant to ensure that judicial review of adjudicators' determinations does not cut across the scheme of the CCA and undermine its objectives. But this does not mean that judicial review should be limited to instances of "jurisdictional error". In principle, any ground of judicial review may be raised, but an applicant must demonstrate that the court should intervene in the particular circumstances, and that will not be easy given the purpose and scheme of the CCA. Indeed, we consider that it will be very difficult to satisfy a court that intervention is necessary. As an example, given that an important purpose of the CCA is to provide a mechanism to enable money flows to be maintained on the basis of preliminary and non-binding assessments of the merits, it is unlikely that errors of fact by adjudicators will give rise to successful applications for judicial review. In the great majority of cases where an adjudicator's determination is to be challenged, the appropriate course will be for the parties to submit the merits of the dispute to binding resolution through arbitration or litigation (or, of course, to go to mediation).

[42] In *Body Corporate 200012 v Keene QC*, Brewer J in dismissing an application for judicial review of an adjudication determination said:[4]

> In this case, [counsel] for [Body Corporate 12] makes it clear that [Body Corporate 12's] objective is to avoid the "pay now, argue later" policy of the CCA. It hopes to avoid payment until the arbitration is concluded, with the goal of succeeding at arbitration and thus eliminating or reducing the requirement to pay. This objective clearly cuts across the scheme of the CCA. It would require a genuine excess of jurisdiction by the adjudicator (which would mean [Body Corporate 12] should not be subject to the CCA scheme), a serious breach of natural justice, or some apparent and significant error of law to persuade me to intervene.

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3 *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408.

4 *Body Corporate 200012 v Keene QC* [2017] NZHC 2953, [2018] NZAR 120 at [17].

[43] Applying the approach described in *Rees v Firth*, it is clear that the applicants face a high legal hurdle and must demonstrate that the adjudicator has made a significant and substantial error of law or that there has been a fundamental and substantial breach of natural justice such as warrants the Court exercising its discretion to grant judicial review relief.

The relevant provisions of the Act and the contract

[44] Section 20 of the Act contains the provisions enabling a party claiming entitlement to a payment under a construction contract (the "payee") to serve a payment claim on the party liable to make the payment ("the payer"). Section 20(2) sets out the mandatory requirements of a payment claim, and ss 20(3) and (4) stipulate that it must be accompanied by a written outline of the process for responding to the claim and an explanation of the consequences of not responding and not paying the amount claimed.

[45] The information outlining the process for responding to a payment claim is required to be in Form 1, which is found in Schedule 1 to the Construction Contracts Regulations 2003.[5] The Form 1 notice is a detailed document headed "Important notice", and contains comprehensive information regarding the payment claim process, the steps the payer is required to take in providing a payment schedule, and the consequences of the payer doing nothing.

[46] Section 21 of the Act provides that the payer served with the payment claim may respond by providing a payment schedule setting out the amount proposed to be paid. Where the proposed payment is less than the amount claimed, the payment schedule is required to include the reasons for the difference and any reasons why payments are being withheld.

[47] Significantly in relation to the present case, s 22(b) provides that a payer who has not provided a payment schedule within the time required by the construction contract, or within 20 working days of service of the payment claim, becomes liable to pay the amount claimed in the payment claim on the due date. Section 23(2)(b)

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5 See Construction Contracts Regulations 2003, reg 4.

further provides that where the payer has failed to provide a payment schedule and is thereby liable to pay the amount claimed in the payment claim, the sum together with the actual and reasonable costs of recovery can be recovered as a debt due in any court, and the construction work may be suspended. Section 23(4) provides that in any proceedings for the recovery of a debt under that section, the court must not enter judgment in favour of the payee unless satisfied that the circumstances referred to in s 23(1) exist, which include the payee having served a payment claim on the payer and the payer not having paid the amount claimed.

[48] In the present case, cl 22.4 of the contract provided that where a dispute had not been resolved within 20 working days of the dispute arising and where no agreement to mediate was in place, either party was entitled to elect to have the dispute resolved by adjudication under the Act.

[49] Clause 22.5 of the contract provides:

> If a dispute is referred to adjudication under the [Construction Contracts Act], the adjudicator's ruling shall be final and binding between the parties and neither party shall attempt to resolve the dispute by any other method except for judicial review or enforcement of the adjudicator's ruling.

[50] Section 38(1) of the Act provides that the adjudicator's jurisdiction is limited to determining the matters referred to in ss 48, 49(1)(c) and 50(1)(c) of the Act, together with any other matters that are of a consequential or ancillary nature necessary to exercise the jurisdiction conferred by those sections of the Act.

[51] Section 48(1) concerns the substance of an adjudicator's determination:

> **48 Adjudicator's determination: substance**
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> (1) If an amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine —
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> (b) whether or not any of the parties to the adjudication are liable, or will be liable if certain conditions are met, to make a payment under that contract; and
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> (c) any questions in dispute about the rights and obligations of the parties under that contract.

[52] An adjudicator making a determination must only consider: the provisions of the Act; the provisions of the contract; the adjudication claim and any written reply by the claimant; the respondent's response and any rejoinder; all submissions and relevant documentation that have been made by the claimant and respondent; any report by experts appointed to advise on specific issues; the results of any inspection the adjudicator has carried out; and any other matter that the adjudicator considers to be relevant.[6]

[53] Section 41 of the Act requires the adjudicator to comply with the principles of natural justice and to act independently, impartially, and in a timely manner, among other things.

[54] Section 47 of the Act prescribes the form and contents of the adjudicator's determination. It must be in writing and dated, and must contain reasons for the determination, unless the parties have dispensed with that requirement in writing. The determination must also include a statement setting out the consequences if the defendant takes no steps in relation to an application to enforce the adjudicator's determination. Section 47(2) provides that a failure to comply with s 47(1) does not affect the validity of the adjudicator's determination.

What issues was the adjudicator asked to determine?

[55] The terms of the McDowall adjudication notice referred to McDowall's claim to payment of the amount outstanding pursuant to six unpaid invoices.[7] Mr Steven McDowall attached copies of the six invoices to his written statement presented to the adjudicator. I note that while some of the invoices were accompanied by notices as required by s 20 and reg 4, not all of them were. It appears that notices accompanied only three of the six invoices.[8]

[56] The McDowall adjudication notice set out the issues as being:

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6 Construction Contracts Act, s 45.
7 Invoices: 0341; 0343; 0345; 0348; 0350; 0351.
8 Invoices: 0341; 0343; 0345.

(a) Whether there was a valid novation of the contract such that McDowall assumed the rights and obligations under the contract.

(b) If there was no novation, whether McDowall had an implied contract with the applicants to undertake the building work.

(c) If there was neither a valid novation nor a valid implied contract, whether McDowall could recover reasonable payment for work done on a quantum meruit basis.

(d) Whether the applicants have a valid counter-claim against McDowall.

[57] In their response, the applicants took no issue with the alleged novation of the contract, and accepted for the purposes of the adjudication that the contract was assigned or novated during the course of the building project.

[58] The applicants' adjudication notice stated that they had withheld payment of the amounts sought in the six invoices and asserted that they did not owe McDowall any money, but rather were owed money by McDowall. They said that McDowall had failed to prove that it was entitled to recover the amounts sought in its six invoices, as it had presented no evidence relating to the work for which payment was claimed in the invoices; no breakdown of the work; and no explanation of what work was done and when. The applicants challenged McDowall's claim that contract variations were responsible for the delays, saying that no evidence had been produced as to what work was carried out pursuant to variations, why it was considered a variation, who had done the variation work, how long it had taken, or any information regarding the cost of the work. The applicants said that while the estimated contract price was said by McDowall to have been exceeded by reason of the variations, McDowall had failed to provide any evidence to support or justify the variations and consequently the amounts claimed in the six invoices.

[59] The applicants raised the issues of the contract price estimate which they alleged was negligently assessed; an unlawful suspension of work by McDowall; and

their opposition to the payment of the interest claimed on the invoice amounts. They set out their claim for damages for lost rental and storage costs due to the building completion delay, and sought determinations on a number of further building issues and specific refund claims.

[60] Nowhere in the notices of adjudication, submissions of the parties, evidence and documents presented to the adjudicator did either party address the issue of McDowall's compliance with the requirements of s 20 of the Act. Similarly, nowhere did either party refer to or identify the issue of whether the applicants had or were required to satisfy the requirements of s 21 of the Act, or the consequences of their failure to provide a payment schedule.

[61] According to the way in which the issues for determination by the adjudicator were framed by the parties' respective notices of adjudication, it was not simply the invoiced amounts that were in issue, but whether McDowall had undertaken the work for which payment was claimed and furthermore, irrespective of whether the work was undertaken, whether McDowall could charge for the work having regard to the delays and whether it was work that should be considered part of the building work covered by the contract, or valid variations of the contract work. Here the dispute between the parties had moved well beyond questions of whether the speedy process contained in ss 20 and 21 for recovering payments due under the contract should apply. Rather, the dispute related to whether or not McDowall was entitled to recover any more money at all under the contract following the delays that had occurred, and having regard to the various building defects and overcharging that was alleged to have occurred.

[62] By determining McDowall's entitlement to payment of the six invoices by reference to s 21 of the Act and the applicants' failure to provide payment schedules in relation to the payment claims comprised by the invoices, the adjudicator addressed and determined an issue that was not contained in either of the parties' adjudication claims. In doing so I consider that he acted without jurisdiction: the issue of the parties' compliance with ss 20 and 21 of the Act was not one of the questions in dispute about the rights and obligations of the parties under the contract.

[63] Furthermore, by adopting that approach, the adjudicator deprived both parties – but particularly the applicants – from addressing and making submissions on the issue of compliance or non-compliance with ss 20 and 21 of the Act, which I find to have been a breach of natural justice contrary to s 41(c) of the Act. It is a fundamental requirement of natural justice as it applies to an adjudication under the Act that the parties be given the opportunity to be heard in relation to the matter that the adjudicator is to decide.[9] Here, the adjudicator reached conclusions on the issue of the application of ss 20 and 21 of the Act without the parties having made submissions to him on the subject. That was a serious breach of natural justice. Had the opportunity been given, it can be reasonably expected that the applicants would have made submissions that ss 20 and 21 did not apply to the situation by reason of the nature of the dispute and the terms of the contract.

[64] Having determined McDowall's entitlement to payment of the six invoices on the basis that the applicants had not provided any repayment schedules, the adjudicator found it unnecessary to consider whether McDowall was entitled to payment for the work in respect of which the invoices were issued. He said:

> These omissions by the Respondents removed the requirement for the "Burdon [sic] of Proof" which the Claimant would have had to respond to if the Payment Schedules were issued.

[65] Consequently, the adjudicator's erroneous approach of determining the matter by reference to ss 20 and 21 of the Act had a compounding effect in that he then did not address the issues identified by the applicants and in respect of which his determination was sought by both parties.

The adjudicator's reasons

[66] As noted above, s 47(1)(b)(ii) of the Act states that an adjudicator's decision must contain the reasons for the determination. Here, the adjudicator's reasons for his determinations were expressed in brief terms. While reasons may be expressed briefly or in an abbreviated manner,[10] they must nevertheless be expressed in sufficient detail

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9 See *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC) at 723.

10 *Waikanae Christian Holiday Park Inc v New Zealand Historic Places Maori Heritage Council* [2015] NZCA 23, [2015] NZAR 302 at [72].

as to enable the parties affected by the determination to understand the basis for the decisions and determinations.[11]

[67] In the present case, in relation to each of the issues determined by the adjudicator the reasons are either so briefly or unclearly expressed as to fall well short of satisfying the requirement that they enable the parties to understand the basis for his determinations. For example, the following is the adjudicator's determination and reasons for rejecting the applicants' claim for damages for delay in McDowall's completion of the building work:

> 14. The Respondents did not raise the time delay issues until late in the contract.
>
> 15. It was reported that when the [sic] McDowell [sic] bought the business that the project was under 50% complete and this was around the time the contract was supposed to be completed.
>
> 16. The Respondents allowed this contract to be extended by having the interior work portion of the contract started around the same time so should have known that the contract time period would have to be extended.
>
> 17. The Contract has no liquidated damages or other clauses for claiming damages for late completion.

[68] The adjudicator went on to comment that "[for] this adjudication there is no evidence to support this claim".[12] It is not clear just what this comment is intended to refer to. If it is intended to refer to evidence relating to the claimed loss, the applicants had produced a document relating to the quantification of the loss. If it is intended to refer to the issue of delay, that issue had been comprehensively addressed.

Relevant and irrelevant considerations

Irrelevant considerations

[69] In my view the adjudicator also took irrelevant considerations into account.[13] In disallowing the applicants' claim for losses due to delay, the adjudicator noted that they should have known the contract time period would have to be extended when

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11 *Butler v Removal Review Authority* [1998] NZAR 409 (HC) at 420–421.

12 At [18].

13 See *Gibson v New Zealand Land Search and Rescue Dogs Inc* [2012] NZHC 1320, [2012] NZAR 699 at [45].

McDowall took over the work, and referred to the absence of provision in the contract for liquidated damages for late completion. Those were irrelevant considerations in this context. Whether or not the applicants knew that the work yet to be completed when McDowall took over would necessitate an extension to the contract period for completion of the building work is not relevant to the builder's obligation under the contract to have completed the work in accordance with the contract. There was no agreement or arrangement made between the applicants and McDowall to amend the contract to provide additional time for completion, and McDowall did not seek any extension of time. Similarly, the issue of whether the contract contained any provision for liquidated damages for late completion was also irrelevant.

Relevant considerations

[70] The applicants had presented independent expert evidence from a building consultant, Mr Alan Light, regarding what would be considered a reasonable period of time to undertake the building work required by the contract; whether the variations claimed by McDowall were in fact variations; and if so whether the contractor ought to be entitled to an extension of time to carry out the additional work.

[71] Mr Light's written statement contained a detailed examination of the work and the construction time taken. Mr Light said that in his opinion, the additional work required by justifiable variations to the contract would have required a time extension of eight weeks to the contract period, so that the revised completion date would become 19 August 2016. He said this extension of time ought to have been more than enough for completion of the project if the work had been managed efficiently and economically. Mr Light said that having been advised that McDowall vacated the site on 12 May 2017, some 38 weeks after the revised completion date, he considered there to have been no justification for the delay. He said from the invoices he had examined it appeared that labour had been expended on the site for little productivity. He expressed his opinion that the applicants should have been able to occupy the property from 19 August 2016. He said that based on the work still required to be done when McDowall vacated the site, a further period of two months would be required for completion.

[72] Mr Light also addressed the issue of the contract price of $453,200. Having examined all the available contract and building documents and all invoices, he noted that the applicants had paid $660,706.20. He said that he did not consider that the difference between the estimated cost of $453,200 and what was paid could be accounted for by the variations listed on the claim. He noted that in some instances, the scope of work had in fact been reduced. He said of the cost overruns:

> Only when McDowell [sic] renovations took over did things appear to go awry and progress stalled. This is when good management was needed to steer the project and control the budget but because the systems were not in place the owners were not informed and unaware of the cost blowout occurring.
>
> If the owners had been apprised of the situation then they could have stopped the work and avoided considerable cost which in the context of a 453k project [is] now going to cost 700k and still unfinished.

[73] The comprehensive evidence of Mr Light regarding the construction delays during the period of McDowall's management of the construction work, and his opinions as to the other specific building issues covered in his report, could not sensibly be ignored or discounted by the adjudicator when addressing those issues, including that of delay.

[74] The adjudicator's failure to address the matters covered in Mr Light's report is an example of the adjudicator's failure to take relevant considerations into account.[14] As I have said, Mr Light's report was detailed and extensive. He set out the reasons why the delays that had occurred were well in excess of what he considered would be reasonable. By failing to address the whole of Mr Light's report, and particularly the parts relating to delay of the building work, the adjudicator made a significant error of law.

Conclusion

[75] I find that the adjudicator's determination was made by deciding an issue that the adjudicator was not asked or required to determine, and in doing so caused a serious breach of natural justice.

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[14] See *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

[76] Moreover, the reasons given by the adjudicator in his determination decision were inadequate and in some instances cryptic. They fall well short of the standard required to enable the parties to understand the reasons for and the basis of the determinations.

[77] Finally, it is also clear that the adjudicator took irrelevant considerations into account in his determination, and failed to take relevant considerations into account.

[78] While the courts will not generally interfere with adjudication determinations, given that the objective of the Act is to provide a fast-track means of enabling contractors to secure payments due under construction contracts, nevertheless judicial review remains available for those cases where an adjudication has been undertaken in a manner where there has been a significant breach of natural justice or significant error of law. Here the determination was made outside the jurisdiction conferred on the adjudicator which is itself a significant error of law. That error is compounded in this case by the serious breach of natural justice which deprived the applicants the opportunity of being heard on a central issue for determination by the adjudicator. There is also the failure of the adjudicator to give adequate reasons for his determination, and the taking into account of irrelevant considerations.

[79] The grounds of judicial review that I have found established are so significant in terms of their combined effect on the integrity of the process and their improper influence on the outcome that this a clear instance where it is appropriate for the Court to exercise its discretion to grant relief to the applicants and quash the adjudication determination.

Result

[80] I make an order quashing the adjudicator's determination dated 31 January 2018.

[81] The applicants have succeeded and are entitled to an award of costs. I direct that the applicants are to file and serve a memorandum as to costs within 10 working days following the delivery of this judgment. The second respondent is to file and serve its memorandum as to costs within five working days following receipt of the

applicant's costs memorandum. Neither party's memorandum is to exceed three pages in length, excluding schedules and annexures.

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Paul Davison J