

[1] On 22 December 2008 Christopher LaHatte, a construction adjudicator, issued a determination under the Construction Contracts Act 2002 to resolve a dispute between Canam Construction and Yun Corporation as to the amount, if any, to which Yun remained entitled under a painting subcontract at the University of Auckland between March – September 2007.

[2] On 3 April 2008 Yun submitted a final account, \$1,223,597.76, later amended to \$1,183,941.89. Canam had by then paid \$543,973.25. Yun sought the balance, \$639,968.64. The Adjudicator awarded Yun, as variations to the contract, extras and remedial work \$291,017.79, and \$36,377.22 GST. He also awarded Yun \$18,000, including GST, for costs incurred in preparing its claim. His total award was \$345,395.01.

[3] Even though the Adjudicator ruled against Yun as to two aspects of its claim, on this application for review Canam seeks to have the determination wholly set aside. In that aspect of his decision in which the Adjudicator did make an award in favour of Yun, Canam contends, he exceeded his jurisdiction under the 2002 Act and made errors of law that render his decision wholly invalid.

[4] Canam's second major point, which I take first because it goes to jurisdiction most directly and generally, is that the determination is wholly invalid because the Adjudicator was only entitled to resolve a dispute arising under a construction contract. He was faced also with a claim in quantum meruit as to which he had no jurisdiction. In making the contested aspect of his award he did not identify on what basis in law he made it. That failure can only mean that he failed to decide what was within his jurisdiction, what sum if any was due under the contract.

[5] The Adjudicator's other primary error, Canam contends, lay in this. In contrast to that aspect of his decision in which he ruled against Yun, the Arbitrator did not in his award in favour of Yun give reasons for his decision. That was an error of law, Canam contends, inherent in which there was a breach of natural justice, the result of which was to render his decision unintelligible and unreasonable.

[6] This raises immediately, as Yun points out, an issue of interpretation. The 2002 Act does impose a duty to give reasons. But it says also that a want of reasons does not make a determination invalid. Is the effect of that privative? Does it preclude this Court from visiting on review the validity of a decision in which there is a want of reasons and, therefore, the other forms of invalidity to which that can give rise?

[7] Canam also contends that the Adjudicator's decision in favour of Yun is wholly or partly invalid on five other bases, which I set out in what I understand to be their order of significance:

- (i) When the Adjudicator made allowances beyond the schedule of quantities, he departed from the position agreed; that the contract was for a fixed price based on the schedule.
- (ii) The Adjudicator did not resolve, as he was required to do, whether any remedial works had been capped at \$35,000.
- (iii) The sum the Adjudicator awarded was not the total of the individual awards that he made for variations and extra work. They came to \$238,083.95. He awarded \$291,017.79.
- (iv) The Adjudicator exceeded his jurisdiction in awarding Yun costs. Canam, as the Adjudicator accepted, neither acted in bad faith nor took any stance devoid of substantial merit.
- (v) The Adjudicator attempted to impose interest after he had made his determination and had ceased to have jurisdiction. (This aspect has been conceded and is severable.)

[8] In seeking to have the decision quashed Canam seeks consistent declarations and restraining orders and an order directing that the contested issues be reconsidered in a fresh adjudication, preferably before a different adjudicator.

[9] Yun contends that, under the guise of invalidity, Canam seeks to appeal the Adjudicator's decisions of fact, a right not conferred by the 2002 Act, and contests Canam's argument at every other point except as to the interest award. Yun has issued to Canam a statutory demand for the sum awarded. Canam has sought to have the demand set aside. That question is now resolved. The fate of the demand will depend on the fate of this application.

Context

[10] In 2006 Canam entered into a contract with Fletcher Construction Limited, the principal contractor, under which it was to fit out the interior of the new University of Auckland Business School. On 28 June 2006 Canam invited Yun, a subcontractor it had engaged some 90 times before, to tender with others for the paint work. Yun's tender, dated 25 September 2006, \$376,073 plus GST, was the lowest made and Canam accepted it. A formal contract was, however, never entered into.

[11] The contract entered into, it appears to have been common ground at the adjudication, had to be based in part, if not completely, on Canam's letter to Yun dated 21 December 2006 following a meeting that day, in which Canam accepted Yun's tender. Amongst the documents Canam then relied on was its invitation to tender letter dated 28 June 2006 and the documents referred to in that letter; the schedule of quantities dated 25 September 2006 and the notes of the 21 December 2006 meeting. Yun appears not to have disputed these. It did dispute Canam's claim in the 21 December 2006 letter that its standard sub-contract and its contract with Fletcher Construction were also governing.

[12] When Canam invited tenders, it contends, it anticipated that paint work would begin in early February 2007 and finish in late June. In its draft program, dated 21 November 2006, it anticipated that the first half of the work would begin on 14 February 2007 and be completed by May, and the remainder completed within the next three months. That is not what happened. Yun commenced in March 2007. The ostensible practical completion date was 28 September 2007. However, as the

Adjudicator found, remedial work and related claims and responses continued until February 2008.

[13] Canam deemed Yun's account following the ostensible date for practical completion, dated 5 October 2007, to be its final account and, it says, resolved what was then due to it from Fletcher Construction on that footing. Yun, however, contending that Canam had maladministered the project and added very significantly to the cost, and that the schedule of quantities grossly understated the paint work called for, an error revealed on a re-measurement by Fletcher Construction, furnished its final account on 3 April 2008 for \$1,223,597.76. In June 2008 it varied that to \$1,183,941.89. Canam rejected both these accounts.

[14] On 15 October 2008 Yun made its claim for \$639,968.64 under the 2002 Act and Canam, on 18 November 2008, denied the claim on three bases: the final account, so called, it contended, was out of time; the sum claimed lay beyond the value of the contract work expressly agreed; and the sum claimed was not owing.

[15] In his determination, dated 22 December 2008, the Adjudicator, recorded that Yun's claim was not confined to variations. Yun claimed also that Canam had disrupted the contract and accelerated its pace, causing Yun additional expenses. He referred also to the re-measurement. He denied, however, Yun's claims for delay and disruption, treating them as claims in contract, and that for overtime and meal allowances, whether in contract or quantum meruit, finding that none of these claims met the civil standard.

[16] The Adjudicator awarded Yun \$291,017 and \$36,377.22 GST; the sum set out in the table of variations attached to his decision. There he identified Yun's claims by subject matter and source and allowed them as remeasurements or repairs or extra work, or rejected them as lying within the schedule of quantities, but without there giving any more specific reason why.

[17] Yun has accepted the two adverse findings. Canam does not accept the award as to the remainder. Canam contends that the table of variations cannot be a functional element of the Adjudicator's decision. The absence of reasons is fatal. In

its challenge to the validity of the decision, Canam also raises the other lesser concerns to which I have referred. Canam challenges the award of costs on a quite distinct basis, and the interest award is to be set aside by consent.

Judicial review

[18] There is not, and cannot be, any issue on this application that an adjudicator's determination is an exercise of a statutory power of decision susceptible of review under s 4 of the Judicature Amendment Act 1972. If that needs any underlining it is to be found in s 27(2) of the New Zealand Bill of Rights Act 1990. That accords, moreover, with ordinary principle.

[19] In *O'Regan v Lousich* [1995] 2 NZLR 620 at 626 – 627, Tipping J said:

Parliament grants the decision maker the power to decide on the footing that the power is to be exercised lawfully (i.e. correctly in law), fairly (i.e. according to the rules of natural justice, if applicable) and reasonably (i.e. within the bounds of reason – the *Wednesbury* principle). If the decision maker goes wrong in law, acts unfairly or makes an unreasonable decision, the decision is regarded as having been made ultra vires and thereby the decision maker exceeds his or her jurisdiction.

Tipping J went on to say that Parliament, by a privative provision, can exclude one or more of these sources of invalidity, but must say so clearly and when it does so any such statement will be narrowly construed. Parliament is not to be assumed to intend a decision to be conclusive in spite of any apparent invalidity.

[20] Canam's argument that the decision is invalid because the Adjudicator either founded the contested aspect of his decision in part at least on quantum meruit, or failed to be clear that he decided it as a dispute arising under the contract, is plainly open. That is an issue going to jurisdiction in the strict sense: *Willis Trust Company Ltd v Laywood* (HC AK CIV 2006-404-809, 25 May 2006), Harrison J.

[21] Whether any failure by the Adjudicator to give reasons for his decision, insofar as it is in favour of Yun, lies within the scope of review entails two questions of law, the first of which is as to the scope of s 47. It prescribes what form a determination must take but at the same time says that a failure to comply does not

render the determination invalid. Is s 47(2) privative and, if it is, how widely is that so?

[22] The other is as to how s 47 is to be reconciled with the Court's capacity to review for excess of jurisdiction or, for that matter, for breach of natural justice. In at least two instances breaches of natural justice have founded a right of review: *Horizon Investments Ltd v Parker Construction Management (NZ) Ltd* (HC WN CIV 2007-485-332, 4 April 2007), Simon France J; *Taylor v Lahatte* (HC AK CIV 2007-404-6843, 24 June 2008), Stevens J.

[23] I should also add this. Though, in contrast it appears to Australia and the United Kingdom, an adjudicator's determination is susceptible of review in New Zealand, the remedy the Act itself envisages is ordinary civil proceedings. Nor is review a remedy that ought to be invoked except in the clearest of cases. The purpose of the Act is definitive. In *George Developments Ltd v Canam Construction Ltd* (CA 244/04, 12 April 2005), at [52], the Court of Appeal deprecated any interpretation that could frustrate the Act's purpose; any that is 'technocratic' or 'formalistic'.

Construction Contracts Act 2002

[24] The purpose of the Construction Contracts Act 2002, as set out in s 3, is to ensure that payments under such contracts are both regular and timely, that any disputes are speedily resolved and that when payments are in arrears there is a prompt remedy. As the Court of Appeal said in *Laywood v Holmes Construction Wellington Ltd* [2009] 2 NZLR 243 at [46]:

It attempts to provide a speedy mechanism by which a person providing construction services can obtain payment and ensure some cash flow before final resolution of all issues between the parties.

[25] In its earlier decision, the *George Developments* case, at [52], the Court of Appeal stressed how definitive these purposes are. They inform every aspect of the Act. The Act is not to be read narrowly. That would 'undercut Parliament's intent that cashflow be maintained'. The priority the Act gives to prompt payment and

secure cashflow, the Court said in *Salem Limited v Top End Homes Limited* (CA 169/05, 12 December 2005) at [22], obliges one disputing liability to ‘pay first and argue later’.

[26] This philosophy is reflected, first, in the prescriptive payment regime the Act imposes. Claims for progress payments must identify the work they relate to, the amount and how it is calculated, and the date on which payment is due: s 20. The one claimed on must respond by payment schedule, mirroring the claim, and where not willing to meet the claim in any part set out the extent to which that is so and the reason why: s 21. A failure to respond by schedule, or to pay according to any schedule furnished, gives the claimant an immediate but not absolute right to judgment: s 23, 24.

[27] This philosophy is reflected, secondly, in the immediate recourse the Act gives where there is a qualifying dispute, ‘a dispute or difference that arises under a construction contract’: s 5. Any party to a construction contract may refer such a dispute to an adjudicator: 25(1); a dispute, as s 25(2) says, if only illustratively, primarily if not exclusively as to the right to any amount claimed to be payable:

... a disagreement between the parties to a construction contract about whether or not an amount is payable under the contract (for example, a progress payment) or the reasons given for non-payment of that amount.

[28] This right of referral is inherent in every construction contract; the 2002 Act may not be contracted out of: s 12. It may be exercised even if there are civil proceedings already in train: s 25(1)(b). The only exception is where a contract provides for an arbitration international in character: s 25(3), (4). This immediate recourse does not however bring any civil proceedings then extant to an end, or preclude any being brought. Nor, as I shall say shortly, does an adjudication constitute a definitive remedy.

[29] Thirdly, and consistently, on a referral under the Act an adjudicator is clothed by s 38(1)(a) with jurisdiction to decide under s 48(1) a money claim under a construction contract: whether the respondent is liable immediately or conditionally to pay any amount claimed. Also the ability to resolve any questions entailed about any ‘rights and obligations ... under that contract’. Where money is not claimed, the

adjudicator may nevertheless determine under s 48(2) ‘any questions’ concerning ‘rights and obligations’.

[30] This primary jurisdiction in its two aspects extends under s 38(1)(b) to consequential or ancillary matters, but otherwise may only be extended under s 38(2) by agreement. It also encompasses the issue of charging orders and the liability of owners not parties to the contract in issue, neither of which materially extends its scope.

[31] Fourthly, in determining a claim an adjudicator must, and may only, consider the matters s 45 prescribes: the Act and the contract under which the dispute arises, the claim and the response giving rise to the dispute, the reports of experts and the results of any inspection. That ability extends to matters that the adjudicator ‘reasonably considers to be relevant’, but clearly that is no licence.

[32] The adjudicator must also, under s 46, give his or her decision within a confined time: 20 working days from the notice of response, or 30 days at the adjudicator’s discretion or more if the parties agree. Unless the parties allow greater time a rapid decision is therefore mandatory.

[33] The adjudicator’s decision must also comply in form with s 47. It must be in the form prescribed if there is one, and there is. It is prescribed by the Construction Contracts Regulations 2003. Where no form is prescribed a determination must, s 47(1)(b) says, be in writing, ‘contain the reasons for the determination’ unless they are dispensed with and set out the consequences if any payment ordered is not made. A failure to comply with s 47(1), however, does not result in the decision becoming invalid: s 47(2).

[34] Fifthly, the final defining feature of the Act is, as I mentioned earlier, that a determination has immediate but not final effect. It has immediate effect in that it is not subject to any right of appeal. The owner of a property against whom a charging order has been issued may apply for review to the District Court but that is all. It does not have final effect because determinations can only be enforced, and may be

rendered nugatory, by civil proceedings commenced before, during or after adjudication.

[35] The right s 25 gives to seek an adjudication even where proceedings are in train has its immediate counterpart. A referral to adjudication does not preclude any party to a construction contract turning to a court or tribunal or seeking mediation: s 26(1). The adjudication and any new proceeding then run in parallel: s 26(2). An adjudication must cease if the parallel proceeding is resolved first: s 26(3).

[36] Where civil proceedings are not in train at the date when a determination is given it may be enforced directly insofar as it requires a payment: 58(1). Section 59(2)(a) enables the one entitled to claim the sum payable as a debt due in any Court. Or it can be enforced as a judgment in the District Court. The Court can only withhold judgment if liability is not imposed under a construction contract or a payment has already been made: ss 73, 74.

[37] A determination as to the rights and obligations under a construction contract, insofar as it undergirds or denies a right to payment, or is merely declaratory, is not directly enforceable: s 58(2), (3). A failure to comply, or comply fully, with a determination gives rise to a right to bring proceedings in a Court to enforce the obligations imposed: s 58(3), s 61(1).

[38] Where civil proceedings are resolved after adjudication, whether brought before or after, and whether to affirm or enforce the adjudication, or to challenge it, the adjudication itself becomes subsumed. It does not 'affect' the civil proceedings, except in one sense: s 27(1). The Court must have regard to but is not bound by the adjudicator's determination: s 61(2). The Court must allow for any amount paid over as a result of the adjudication process, and may take into account any step taken in good faith as a result of a determination: s 27(2). That is all.

[39] The result is that an adjudication can amount to a 'final judgment' for the purpose of s 19(1)(d) of the Insolvency Act 1967, for instance, even though, as the Court of Appeal said in *Laywood* at [52], it may be 'temporary and incomplete'. As

the Finance and Expenditure Committee said when reporting on the Bill ‘the adjudicator’s decision is binding but not final’: [46].

[40] In *Concrete Structures (NZ) Ltd v Palmer* [2006] NZAR 513 Courtney J held that s 60 does not preclude interim relief denying the one who has the benefit of a determination the ability to obtain payment, if there is the prospect that he or she may be able to unable to repay the sum awarded should the tables turn later. It is the counterpoise to *Laywood*.

Contract or quantum meruit

[41] In his determination the Adjudicator described Yun’s claim as advanced on two bases – in contract and in quantum meruit. The claims made, he said, were to be resolved contractually and that required him to decide what the contract was and how under the contract variations were to be, and had been, agreed. He then added this:

I do not overlook the fact that there is a claim in the alternative for quantum meruit, but based on a claim that a substantial amount of work has been done either in or out of the contract but for which NZCPM is entitled to be paid in any event.

[42] In this the Adjudicator understood that quantum meruit arises independently of contract. A quantum meruit will lie, he said, where services are given because they are invited or accepted, or because the giver of the services ‘expects to be reimbursed’ regardless of benefit to the receiver: *Morning Star v Canan Construction Ltd* (CA 90/05, 13 June 2006). That did not inhibit him. He saw his order of inquiry as this:

Obviously if the variations can be determined pursuant to contractual terms, then this is a contractual claim for which the burden of proof is on NZCPM. If the variations claimed cannot be derived from the contractual framework, then it is necessary to determine whether it is a valid claim based on the enrichment principle.

[43] To this extent, to the extent that is to say that the Adjudicator held himself entitled to make an award in favour of Yun, if not under the contract then on a quantum meruit independent of it, I agree with Canam that he misconstrued his

jurisdiction. As is patent in the title to the Act and its purposes, it concerns only rights and liabilities arising under construction contracts. The jurisdiction expressly conferred extends no more widely. The matters the adjudicator is obliged to take into account are correspondingly confined. That an adjudicator's determination is as confined in scope as it is also explains why it can only ever have provisional status.

[44] The Adjudicator did not, however, make any error that I can see in the first two heads of his decision in each of which he found that Yun had not made out its claim. He resolved the first contractually. He resolved the second, advertent to the possibility of a quantum meruit, only to reject that as well. The issue is whether he made any such error in the award he sets out in the table of variations that forms part of his decision. Here too it is not evident to me that he did.

[45] Even though the Adjudicator spoke of a quantum meruit arising independently of contract, Canam in its 21 December 2006 letter, accepting Yun's tender, itself envisaged that Yun's entitlement might in two circumstances be assessed on a quantum meruit. Having contended that the contract was constituted by its usual subcontract and the head contract, Canam said this:

In the event that Canam Interior Limited and the Sub-Contractor are unable to agree the terms of the Sub-Contract, or this letter of intent is rescinded, the works are to be measured and valued in accordance with the mechanisms stipulated in the Sub-Contract agreement, and a fair and reasonable amount is to be paid to the Sub-Contractor.

If valuation by means of measurement of the works is not practicable, a fair and reasonable valuation utilising 'open-book' policy is to be carried out, and payment on a quantum meruit basis is to be made to the Sub-Contractor.

[46] In the absence of a contract in writing, in the state of debate that there was as to the boundaries of the contract entered into, the Adjudicator would have been entitled, I consider, to make an award in the nature of quantum meruit within the bounds of the contract that was agreed. If then he made any error as to the extent of his jurisdiction that made no material difference.

Failure to give reasons

[47] Canam, principally attacking the determination adverse to it for want of

reasons supporting the cumulative awards made in the table of variations, contends that it does not comply with s 47(1). That subsection requires that any decision be in the form prescribed and, if none is prescribed, that it be in writing and contain reasons. Section 47(2), which excuses any invalidity resulting from any failure to comply with s 47(1), Canam contends, does not and cannot dispense with that basic necessity.

[48] Reasons are intrinsic to a decision, Canam contends secondly, and are indispensable to it unless dispensed with, relying on *Thermal Energy Construction Ltd v A E & E Lentjes UK Ltd* [2009] EWHC 408, where an adjudicator's failure to refer to a counterclaim or set-off was held to render his decision unintelligible and to have caused substantial prejudice:

An adjudicator is obliged to give reasons so as to make it clear that he has decided all of the essential issues which he must decide as being issues properly put before him by the parties, and so that the parties can understand, in the context of the adjudication procedure, what it is that the adjudicator has decided and why.

[49] On this basis, Canam contends that any failure on the Adjudicator's part to give reasons was no mere matter of form. Inherent in that was a breach of natural justice. Also the seeds of unreasonableness. Yun contends by contrast that the Adjudicator did comply with s 47. He did give reasons for his decision as s 47(1) requires; and to the extent that he did not s 47(2) provides a complete answer.

Section 47

[50] In question, therefore, is the effect, individually and together, of subss (1) and (2) of s 47, which is entitled 'Adjudicator's determination: form'; and they say this:

- (1) An adjudicator's determination—
 - (a) must be in the prescribed form (if any); or
 - (b) if there is no prescribed form,—
 - (i) must be in writing; and
 - (ii) must contain the reasons for the determination (unless the parties to the adjudication, by written

agreement, indicate that the requirement for the adjudicator to give reasons may be dispensed with); and

- (iii) in a case where the adjudicator determines that a party to the adjudication is liable to make a payment, must include a statement setting out the consequences for the defendant if the defendant takes no steps in relation to an application from the plaintiff to enforce the adjudicator's determination by entry as a judgment.

- (2) A failure to comply with subsection (1) does not affect the validity of an adjudicator's determination.

[51] Section 47(2) has no precedent in any statute, in any other jurisdiction, analogous to the 2002 Act; and the extent to which it qualifies the duty imposed by s 47(1), and excuses any resulting invalidity, is not to be assessed in isolation. Section 47 as a whole, and the purpose it serves, must be assessed against the statute as a whole and its purpose: *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767.

[52] The purpose of the 2002 Act, as Yun says, is to aid cashflow, in part by providing a rapid form of adjudication. That, as Yun says, will be subverted if a determination can be too readily attacked as to form and s 47(2) supplies a shield. That still begs the question, however, as to the scope of s 47(2). Section 47(1), as Canam says, requires an adjudicator to give a decision in writing with reasons unless the parties dispense with that basic need; basic because reasons in writing provide certainty, clarity and allow the parties to evaluate the determination made. It is for that reason, Canam says, that s 47(2) can only excuse from invalidity merely formal departures from what s 47(1) requires.

[53] In effect, Yun says, Canam contends that s 47 partly goes to substance and partly to form and that this cannot be. But there is a sense in which s 47 can be understood, potentially anyway, in these two ways. Section 47(2) applies most intelligibly to any failure to comply with s 47(1)(a); any departure from the form of decision prescribed by the Construction Contracts Regulations 2003, to which in this case the Adjudicator did not adhere literally. The scope of s 47(2) becomes less easy to measure when it excuses from invalidity any failure to comply with s 47(1)(b),

which sets out the attributes ordinarily essential to a decision; that it be in writing and contain reasons, as well as a statement of consequences. Then it might seem to excuse what could well be failures of substance.

[54] Precisely what scope s 47(2) has, as it relates to s 47(1)(b), I cannot say. I am clear that it cannot excuse any invalidity that is more than merely formal; any resulting as to jurisdiction under s 48, for instance, for such an error in contrast to any error under s 47 has to go to the root of an adjudicator's decision. Nor could it excuse any failure to comply with the duty to adhere to the rules of natural justice imposed by s 41(c).

[55] If s 47(2) were intended to have that much more wide ranging privative effect, extending beyond the requirements made by s 47(1) as to form, that would have to have been stated very plainly. The contrary is the case. Section 47(2) is pointedly concerned only with any invalidity arising under s 47(1). That has to be fatal to Yun's argument. The issue is rather, it seems to me, what the extent of the adjudicator's duty to give reasons is.

Scope of duty

[56] There is in New Zealand no general duty to give reasons for a decision. In *R v Awatere* [1982] 1 NZLR 644 the Court of Appeal, there considering an exercise of summary criminal jurisdiction, preferred to say, at 649, that judges 'should always do their conscientious best to provide with their decisions reasons which can sensibly be regarded as adequate to the occasion'. A failure to do that, the Court held, might render the decision vulnerable on appeal. A want of reasons might suggest that there were no reasons.

[57] Since then the Court of Appeal, though still stopping short of imposing a general duty, has identified three purposes which reasons indispensably serve; the first two underpinned by the New Zealand Bill of Rights 1990. Reasons promote open justice, they enable any Court exercising supervisory jurisdiction to assess the lawfulness of the decision, and they provide a discipline for the Judge: *Singh v*

Department of Labour [1999] NZAR 258, *Lewis v Wilson & Horton Ltd* (CA 131/00, 29 August 2000).

[58] Canam also calls in aid the duty on an arbitrator under the Arbitration Act 1996, article 31(2) of which is analogous to s 47(1). In *Imperial Leatherwear Co Pty Ltd v Macri & Marcellino Pty Ltd*, Smart J said of an arbitrator's duty to give reasons, 'the reasons must not be so economical that a party is deprived of having an issue dealt with by the Court'. Canam relies also on *Brodyn Pty Ltd t/as Time Cost & Quality v Davenport & Anor* [2004] 61 NSWLR 421, where an adjudicator was held as a matter of natural justice obliged to give reasons. There the Court held that a decision would be void if it did not exhibit:

... a bona fide attempt by the Adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power ... and no substantial denial of the measure of natural justice that the Act requires to be given.

[59] In a general sense, I agree that an adjudicator must give sufficient reasons to answer in fairness the arguments for and against a claim and render his or her decision intelligible and free from unreasonableness. I am not convinced that this duty is to be equated with that imposed on an arbitrator under the Arbitration Act 1996.

[60] Article 31.2 of the First Schedule to the 1996 Act may, like s 47(1), require that reasons be given for an award unless they are dispensed with. However, an arbitrator's award is, in contrast to an adjudicator's determination, intended to be final unless marred by error of law. There is then also a corresponding right of appeal on a point of law with leave. An arbitrator's award must have sufficient reasons, therefore, to stand scrutiny against the first two of the three purposes reasons indispensably serve. Neither of those purposes can apply so literally to an adjudicator's determination.

[61] There are three features of the adjudication process the 2008 Act prescribes, which have to be relevant to what form an adjudicator's decision is to take and how elaborate his or her reasons need to be. The first is structural. Disputes arise most typically, I understand, when a progress claim is made in the form prescribed and is

rejected in the schedule of payments issued in response. That can involve related rights and liabilities, of course, and submissions, but the claim and response frame the dispute. Secondly, there is no hearing and no evidence taken. Issues of credibility cannot be resolved. The adjudicator must weigh the material as best he or she can. Thirdly, and depending on the scale of the dispute, the adjudicator may need to weigh many such claims and do so, unless the parties agree otherwise, within the confined time the statute allows.

[62] These three features, and s 47(2) itself, suggest to me that an adjudicator ought to be allowed a level of latitude. Ideally, I agree, an adjudicator ought to decide each claim as envisaged in the form prescribed under s 47(1)(a), first stating what is in dispute and what relief is sought and then determining the dispute with reasons. But I do not see it as essential that he or she do so completely within the confines of a conventional decision. I cannot see that s 47(1), or s 48 or s 41(c) for that matter, preclude use of a table. What is essential finally is that the determination be intelligible.

Intelligibility

[63] The Adjudicator's determination, Canam contends, is unintelligible. He did not determine what the contract was, or the scope of works, or what works constituted variations. Nor did he explain how he allowed some claims and disallowed others. There is nothing to show that he took into account Canam's position. The table of variations provides no answer. It is mute.

[64] The Adjudicator's determination, Yun says, could have been more explicit. It does suffice. The Adjudicator did identify the core of the contract, and the scope of works, when resolving Yun's claims against what it was entitled to. He identified the three areas of claim in question: re-measurement of the schedule of quantities, rework up to and including 28 September 2007 and, finally, contractual claims. How he resolved Yun's claims appears from the body of his decision as well as the table of variations. The table itself is easily intelligible when set against, as it is designed to be, Yun's claims and Canam's responses.

[65] The Adjudicator, Yun accepts, may not say why in the table of variations he allowed or disallowed Yun's claims. But that is entirely understandable. He had 20 working days within which to review in excess of 6,000 documents.

Adjudicator's decision

[66] In the body of his decision the Adjudicator set the context for the award he made in the attached table of variations, beginning with an attempt to identify the scope of the contract and the method by which any variation was to be resolved. He found both to be elusive:

The informality of the contract process between the parties means that there is something of a fog of contractual documents through which I must grasp the relevant provisions to identify the correct way to approach the claim made by NZCPM.

I sought further assistance in the way the parties treated variation claims. I had hoped to find a clear process by which variations were either originated from either party and (sic) then valued, accepted or rejected. Regrettably there is not such a clear path although some variations have clearly been made and determined.

[67] The Adjudicator next said, as I have mentioned already, that aspects of the claim were not strictly for variation and he dealt with them independently. He identified the variations that he did accept as 'variations caused by a subsequent re-measure' and also 'reworking claims'.

[68] The Adjudicator next remarked that a feature of the history of claims and responses was that Canam, having previously certified claims as proper for payment, changed its mind as to a number. He then said this:

To make a decision on the variations, it is necessary to refer to documents such as 5201 – 5203 which set out the responses to the individual variation claims. From there some items can be resolved by reference to the contract and schedule of quantities.

I have prepared a table which describes the claims, the response and my decision on each of them. In assessing these items I have read the claims and responses and the evidence provided. This table is at the foot of this document but is part of the reasons and incorporated in this determination.

[69] The Adjudicator next said that the disputed claims ‘as to the correct schedule of quantities rates’ were complicated by confusion; ‘the parties themselves appear to have been unsure as to which schedule applied’. By this I understand him to refer to the fact that the original schedule of quantities had been overtaken by a remeasurement made by Fletcher Construction.

[70] The Arbitrator then found as a matter of fact that the parties had agreed that the rate applying should be \$55, not \$35, and, having done that, said that the progress claims made and the payment schedules in response set the parameters of the claim, supplemented by spreadsheets supplied by each side supported by reasons, all of which he had considered.

[71] The Adjudicator again remarked on Canam’s hardening attitude at the time of practical completion. Negotiations, claims and responses, continued until early 2008, he said, in an atmosphere of developing mistrust. Then he said this:

Although there is a schedule of quantities which is relevant to interpretation of this contract, it was in fact a fixed price contract. This schedule of quantities becomes relevant only when the issue of calculation of variations is considered. For any variation to succeed, it must be shown that there was the usual process of a request for a variation followed by an acceptance. The principals (sic) of formation of contract apply equally to variations as do the main contract, and the basis for value is the schedule of quantities.

[72] Finally, the Adjudicator accepted that figures set out in the claims and responses in dispute were open to adjustment at the point of adjudication and ended by saying this:

I have set all this out in some detail because it is important to identify the way in which these claims have evolved, and the methodology for ascertaining whether they are correct. The answers to the claims must be determined in terms of the contract and the schedule of rates.

[73] What the Adjudicator does not do, and Canam contends this is fatal, is to include in his table of variations any reasons why, to the extent that he allowed Yun’s claims, he was unpersuaded by Canam’s responses. Indeed, as I have said, Canam contends that the table itself is impossible to decipher.

Conclusions

[74] The Adjudicator's table of variations, set against the remarks that he made in the body of his decision to which I have just referred, is, I consider, intelligible enough. It is a schedule of Yun's claims for further payment, 45 in total, in the sequence in which they are set out in the affidavit filed on the adjudication by Yun's quantity surveyor. The Adjudicator relied on the quantity surveyor's symbols or acronyms, all of which are explicit. He set out the schedule in such a way as to express the essential elements of his decision, except his express reasons.

[75] As to each claim, the Adjudicator identified the item to which it related, categorised the item and stated whether he rejected or accepted the claim. Claim two, for instance, concerned 'sample rooms'. He categorised this claim as a 're-measurement', and he allowed it. Claim three concerned the 'high level atrium ceiling'. He rejected this claim, categorising it as lying within the schedule of quantities. Other claims he allowed as 'extra work' or 'repairs' or 'extras' but on the same principle. Wherever he rejected a claim he did so because considered it fell within the schedule of quantities.

[76] Also notable is that when the Adjudicator allowed Yun's claims he allowed them entirely, and when he rejected them he rejected them entirely. In the former case he must have accepted Yun's reasons. In the latter he must have referred to Canam's response. Ideally, no doubt, he should have said why. But at most, I would have thought, he need only have said so generally in the body of his decision, setting out the broad premises on which he decided claims in one way or the other. Had he treated each claim in turn, that would have added greatly to the length of his decision and the time it would have taken to deliver.

[77] I agree with Canam that the decision is not explicit enough. If this were an appeal by way of rehearing I might well, in part at least, find it less than cogent. But this is not a review of that kind. This is an inquiry into validity. The Adjudicator did, as he was obliged to do, review each of Yun's claims and did so by a process, consistent with natural justice, which was broadly intelligible. His is not a decision

so unintelligible or devoid of reasons as to amount to no decision at all. It is not a decision that deserves to be set aside as a nullity.

Departure from position agreed

[78] Canam next contends that it was common ground before the Adjudicator that the schedule of quantities constituted a definitive overarching contract document. The extra amounts Yun claimed, Canam contends, could only ever have been allowed as variations and Canam never accepted them in that way. But the Adjudicator departed from this agreed position, Canam contends, when he held the schedule not to be definitive, stating this:

Although there is a schedule of quantities which is relevant to the interpretation of the contract, it was in fact a fixed price contract. This schedule of quantities becomes relevant only when the issue of calculation of variation is considered. For any variation to succeed, it must be shown that there was the usual process of a request for a variation followed by an acceptance. The principles of formation of contract apply equally to variations as do the main contract, and the basis for value is the schedule of quantity.

[79] In awarding Yun amounts beyond the schedule of quantities, moreover, and placing them in an extra category, Canam contends, the Adjudicator so far departed from what was agreed that he acted in breach of natural justice. He was not entitled to take that further step without first giving Canam an opportunity to be heard: *Horizon Investments Ltd v Parker Construction Management (NZ) Ltd* (HC WN CIV 2007-485-323 4 April 2007), Simon France J.

[80] If the schedule of quantities had enjoyed by agreement before the Adjudicator that overarching definitive effect contractually, I accept, Canam might well have a point. But Yun says in response that there was never any such agreement as to the scope of the contract. The contract was partly written and partly oral. The schedule of quantities did form part of the contract, but as the Adjudicator recorded, 'it was agreed that NZCPM's price would vary if there were variations in the specification beyond that set out in the schedule of quantities'.

[81] Yun's position then and now is that the contract contemplated a variation of the specification itself rather than a variation of quantities and that was the explicit basis on which it mounted its claim. Its claim rested on the proposition that the schedule of quantities was grossly understated. To the extent that the Adjudicator made an award in Yun's favour, it says, he simply accepted that to be so.

[82] I prefer Yun's interpretation of the record. I do not see any evidence to suggest that the schedule of quantities was as overarching and definitive as Canam states. Or any to suggest that the nature of the award made in favour of Yun could have caught Canam by surprise. I see no breach of natural justice from this perspective in the Adjudicator's decision.

Settlement agreement

[83] Then, by contrast, Canam contends next, there was an issue squarely before the Adjudicator that he failed to resolve. It was as to whether any extra payment to which Yun was entitled, resulting from work to which it was put to remedy the acts or omissions of other subcontractors, was capped on 18 January 2008 at \$35,000. In failing to resolve this, Canam contends, the Adjudicator was in breach of s 48(1) and that renders his decision void.

[84] Yun contends in response that the agreement spoken of has to be set against the extent to which the Adjudicator allowed claims for rework. He allowed the claims for August – September 2007. He rejected those between October 2007 – February 2008. Moreover, Canam having made the extra payment, deducted it later.

[85] Yun's response seems to me conclusive. Though the Adjudicator may not have referred expressly to the \$35,000 cap issue, any breach of s 48(1) has to be notional. It certainly cannot be inferred that the omission Canam complains of, when set against the Adjudicator's decision as a whole, meant that he failed to resolve the issue referred to him. And, to the extent there was any omission, Canam is unprejudiced.

Sum awarded incorrect

[86] Canam contends next that the sum awarded for variations in extra works, \$291,017.79, deriving from the table of variations is incorrect. Those allowed total \$238,083.95.

[87] Three items included in the total, Canam contends, are neither accepted nor rejected in the table: a re-measurement of sample rooms for which Yun claimed \$1,880.37, and two negative details, involving extra work, for which Yun claimed \$390, and \$50,633.77. The Adjudicator appears to have failed to determine these three claims. That was potentially at least a significant error going to jurisdiction, Canam contends, not a mere arithmetical or clerical error.

[88] I do not agree. It is clear that the Adjudicator did award these three amounts. They correspond exactly with what Yun claimed and, \$29.70 apart, they are essential to the amount he awarded Yun. He made minor arithmetical and clerical errors well able to be cured under s 47(3). None touched the validity of his decision.

Costs award

[89] The award of costs the Adjudicator made for Yun's 'claim preparation costs', incurred in respect of the quantity surveyor, who framed Yun's claim, Canam contends, was in excess of the Adjudicator's power. In this instance I agree with Canam.

[90] This was not an award of the kind envisaged in the *George Developments* case for expenses necessarily incurred in the completion of work during the course of the contract and before the adjudication process began. It was a claim for costs incurred for the purposes of the adjudication. The award made could only have been under s 56. There was no basis for s 56 to be invoked, nor did the Adjudicator invoke it.

[91] To have invoked s 56 the Adjudicator would have had to find either that Canam put Yun to unnecessary cost by acting in bad faith, or by adopting a stance

without substantial merit. The Adjudicator made no such finding. Nor on the record could he have. Instead the Adjudicator made an award in the nature of damages. That was beyond his jurisdiction.

Result

[92] There is no basis for the declaration Canam seeks. The Adjudicator did not err in law, act unreasonably, or in breach of natural justice, or make any reviewable error of fact, in any of the ways advanced, except as to the award of costs and that of interest after the event, which Yun concedes was in excess of his jurisdiction. Only those two aspects of his decision will be quashed. Otherwise his decision must stand. There will be a declaration and consequent orders accordingly.

[93] The agreed consequence is, as to Yun's statutory demand, that Canam must now withdraw its application to set the demand aside and will have 14 working days from the date of the issue of this decision within which to comply. The further consequence is that Yun is entitled to costs and, if these cannot be agreed, Yun is to file within ten working days, and Canam within the succeeding ten working days, submissions no greater than four pages in length as to what costs are proper.

P.J. Keane J