IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1665
[2017] NZHC 2953

UNDER	the Judicial Review Procedure Act 2016 and the Declaratory Judgments Act 1908
IN THE MATTER	of an application for review of a decision made pursuant to the Construction Contracts Act 2002
BETWEEN	BODY CORPORATE 200012 Applicant
AND	BRIAN PAUL KEENE QC First Respondent
	DAVID MARTIN CARDEN Second Respondent
	NAYLOR LOVE CONSTRUCTION LTD Third Respondent

(continued over)

Hearing:	14 November 2017
Counsel:	T J Rainey and U B Keller for Body Corporate 200012 C J Booth and D J Halliwell for Naylor Love Construction Ltd (First and Second Respondents abide decision of the Court)
Judgment:	30 November 2017

JUDGMENT OF BREWER J

This judgment was delivered by me on 30 November 2017 at 12 noon pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

CIV-2017-404-1695

UNDER	the District Court Act 2016
BETWEEN	BODY CORPORATE 200012 Applicant
A N D	NAYLOR LOVE CONSTRUCTION LTD Respondent

Introduction

[1] The Construction Contracts Act 2002 ("the CCA") has a procedure by which parties to a construction contract can refer a dispute to an adjudicator for determination.[1] The determination is binding on the parties, however they can repeat their arguments in another forum if they wish.[2] If the adjudicator holds that money is payable by one party to another, then the money must be paid even if the dispute is to be determined finally in another forum.[3] The money can be refunded, to the extent necessary, if the paying party has success in the other forum.

[2] If the party found liable to pay money by the adjudicator does not pay the money as required, then the adjudicator's determination can be entered as a judgment of the District Court or High Court and enforced as such.[4]

[3] In this case, the plaintiff ("BC12") and the third defendant ("Naylor Love") have disputes in relation to their construction contract entered into in 2013. Mr Keene QC adjudicated one tranche of disputes ("the first adjudication"). He upheld various claims by Naylor Love totalling $3,246,215.46.[5] BC12 continues to dispute that it is liable to pay the bulk of this sum.

[4] Another adjudicator, Mr Carden, subsequently determined another tranche of disputes ("the second adjudication"). He upheld claims by Naylor Love of which two are still disputed by BC12. The total of these claims is $588,775.99 (plus GST).[6]

[5] The disputes still current following the adjudications have been referred to arbitration. The arbitrator has been appointed, the process is engaged, and the parties anticipate the arbitrator hearing the disputes in mid-2018.

[6] BC12 has not paid Naylor Love the disputed money. Naylor Love applied to enter Mr Keene's determination as a judgment of the District Court. Judge GM

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1 Section 25(1).
2 Section 26(1).
3 Section 59(2)(a).
4 Section 73(2).
5 This includes an interest component.
6 This includes an interest and a costs component.

Harrison granted the application[7] in the sum of $2,840,189.94.[8] Naylor Love is taking steps to enforce payment.

[7] Naylor Love intends also to enter Mr Carden's determination as a judgment of the District Court and to enforce payment.

[8] BC12 does not want to pay the disputed sums, even though it can claim refunds to the extent it is successful in the arbitration. BC12 is the Body Corporate for an 83-unit residential townhouse development in Mount Eden. The construction contract was for remediation of leaky building defects. I infer that paying the disputed sums, even (possibly) pro tem, would be onerous for the owners of the 83 units.

[9] To avoid paying, BC12 applies for judicial review of the two adjudications. It also appeals Judge Harrison's decision. The outcome of the judicial review will determine the outcome of the appeal.

Approach to judicial review

[10] Judicial review is concerned with the control of public power. It involves the courts exercising their jurisdiction over a government body or some other administrative agency to ensure that the entity acts within the confines of the law. In other words, it is a remedy "invented by judges to restrain the excess or abuse of power".[9]

[11] The right to apply for judicial review is affirmed in s 27(2) of the New Zealand Bill of Rights Act 1990. It is primarily concerned with examining the decision-making process, not the substance of the decision.[10] In that regard, an

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7 *Naylor Love Construction Ltd v Body Corporate 200012* [2017] NZDC 14435.

8 I am puzzled as to how this figure was calculated since the sum sought to be entered was said by Judge Harrison to be $2,633,323.10 (at [3]), but the possible discrepancy is irrelevant to my task.

9 *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL) at 715.

10 *Mitchell v Privacy Commissioner* [2017] NZHC 569 at [20]; *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 127.

application for judicial review is not an appeal against the challenged decision.[11] As Joseph has explained:[12]

> The courts proclaim an essential difference between appeal and review. Review is concerned with the legality of the decision, whether it was reached "in accordance with law, fairly and reasonably". A reviewing court must address the process and procedures of decision-making and ask whether the decision should be allowed to stand. Appeal, in contrast, entails adjudication on the merits and may involve the court substituting its own decision for that of the decision-maker.
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> (Citations omitted)

[12] The courts, therefore, retain the broad discretion to intervene where decision-makers misconstrue their statutory powers,[13] commit procedural errors,[14] act unreasonably[15] or contravene fundamental rights and values that underpin the rule of law.[16]

[13] A Judge may judicially review the determination of an adjudicator.[17] But, because, as in this case, the matters in dispute can be resolved in another forum, the Court will be sparing in the exercise of its discretion to judicially review a determination. The leading case is the Court of Appeal's decision in *Rees v Firth*.[18]

[14] In *Rees v Firth*, the Court of Appeal had to decide what approach should be taken to judicial review of an adjudicator's determination under the CCA. It held:

> [22] We are satisfied that the CCA as a whole does not require that judicial review be limited to instances of what might be classified as jurisdictional error. In our view, to hold that the availability of judicial review is limited in that way invites unproductive and diversionary debate about whether a particular error is or is not "jurisdictional". 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. We now explain our reasons for this view.

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11 *X v Bovey* [2014] NZHC 1103 at [4].

12 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 863.

13 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [51].

14 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

15 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) at 230.

16 See, for example, *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [47]-[48].

17 The adjudicator is making a 'statutory power of decision': defined in s 4 of the Judicial Review Procedure Act 2016.

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

[15] The Court of Appeal went on to give its reasons for its view. They are, in summary:[19]

(a) A determination that money is to be paid can be enforced but that does not stop contemporaneous or subsequent argument on the points in dispute by way of litigation, arbitration or mediation.

(b) The policy of the CCA is to solve cashflow problems in the construction industry by facilitating the quick payment of disputed amounts (the "pay now, argue later" policy).

(c) A judicial review proceeding does not stop a party enforcing a determination and it is unlikely a Court would grant interim relief to prevent the party from doing so.

[16] The Court of Appeal went on to say:

> [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).

[17] In this case, Mr Rainey for BC12 makes it clear that BC12'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 BC12 should not be subject to the CCA scheme), a

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19 At [23]-[26].

serious breach of natural justice, or some apparent and significant error of law to persuade me to intervene.

BC12's grounds for review

[18] The disputes between BC12 and Naylor Love stem from variations to their contract. As I have said, the contract was for the remediation of a leaky complex of 83 residential units. The scope of the contract included the work that was anticipated as being necessary, but it was understood that variations to the scope would inevitably arise from what was uncovered when the work began.

[19] BC12 submits generally that several of the claims referred to the first adjudication by Naylor Love were not matters that Mr Keene had jurisdiction to determine.[20] He simply addressed each of the claims without considering whether he had jurisdiction to do so. He also determined matters which were not referred to adjudication, as well as breaching principles of natural justice.

[20] In terms of the second adjudication, it submits that Mr Carden made a fundamental error of law in concluding that he was bound by Mr Keene's findings.

The first adjudication

[21] There are four claims in the first adjudication which I will examine. I will refer to them as EOT 3, P&G thickening, rate escalation, and Hope Construction.

EOT 3

[22] Naylor Love initially argued that it was entitled to an extension of time and prolongation costs for completion of stage two of the contract due to delay caused by the net effect of variations associated with additional timber replacement, as well as the supply and installation of defective Nu Wall cladding by one of its subcontractors.

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[20] I note that there was no agreement pursuant to s 38(2) extending Mr Keene's jurisdiction.

[23] Pursuant to cl 13.2.1 of the contract, the dispute was referred to an engineer. On 10 September 2015, the engineer issued his decision under cl 13.2.4 and awarded an extension of time, as well as a sum of prolongation costs. But, on 9 August 2016, Naylor Love served its adjudication notice seeking a further extension of time and further prolongation costs.

[24] Mr Keene awarded Naylor Love a sum of $87,400 for redesign work affecting stages two to four of the contract.

[25] BC12 submits this is contrary to cl 13.1.1 of the contract:

> No decision, valuation, or certificate of the Engineer shall be questioned or challenged more than three Months after it has been given or more than one Month after the date on which any relevant Adjudicator's Determination is given to the parties, whichever is the later, unless notice has been given to the Engineer within that time. This subclause 13.1.1 shall not apply to a Progress Payment Schedule.

[26] BC12 contends, therefore, that there was no dispute or difference capable of being referred to adjudication under the CCA. As per cl 13.2.4, "[t]he Engineer's formal decision shall, subject to 13.3 and 13.4 or any Adjudication proceedings, be final and binding". Because Naylor Love did not refer the matter to mediation, arbitration or adjudication within the specified contractual timeframe, Mr Keene had no jurisdiction to consider claims in relation to EOT 3.

[27] In response, Naylor Love submits that the alleged effect of cl 13.1.1, namely deeming a dispute not to exist if the engineer's decision was not challenged in the requisite timeframe, is contrary to s 12 of the CCA:

> This Act has effect despite any provision to the contrary in any agreement or contract.

[28] Naylor Love claims there is no contractual ability to 'deem' a dispute not to exist. Section 12 was designed to prevent situations like this. But BC12 submits this is not contracting out of the provisions of the CCA. A party in Naylor Love's position has no right to challenge the engineer's decision if it failed to give the requisite contractual notice.

[29] The key issue is whether Mr Keene has acted outside his jurisdiction. He will have done so if he acted beyond the authority granted in the CCA.

[30] The Supreme Court in *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* quoted Diplock LJ's classic expression of the meaning of jurisdiction:[21]

> In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors.

[31] It also quoted Lord Scott in *Tehrani v Secretary of State for the Home Department*:[22]

> When issues are raised as to whether or not a court of law has jurisdiction to deal with a particular matter brought before it, it is necessary to be clear about what is meant by 'jurisdiction'. In its strict sense the 'jurisdiction' of a court refers to the matters that the court is competent to deal with. Courts created by statute are competent to deal with matters that the statute creating them empowered them to deal with. The jurisdiction of these courts may be expressly or impliedly limited by the statute creating them or by rules of court made under statutory authority. Courts whose jurisdiction is not statutory but inherent, too, may have jurisdictional limits imposed on them by rules of court. But whether or not a court has jurisdictional limits (in the strict sense) there are often rules of practice, some produced by long-standing judicial authority, which place limits on the sort of cases that it would be proper for the court to deal with or on the relief that it would be proper for the court to grant.

[32] Mr Keene had the statutory jurisdiction to determine a dispute under the CCA. Section 5 of the CCA defines a dispute as meaning "a dispute or difference that arises under a construction contract". Here, there was a dispute. The engineer's decision does not change that fact.

[33] The issue was instead whether, in light of cl 13.1.1 of the contract, Mr Keene should exercise his statutory jurisdiction. In other words, Mr Keene had to decide whether the clause barred Naylor Love's claim. This is a matter of contractual

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21 *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [25]; quoting *Garthwaite v Garthwaite* [1964] P 356 (CA) at 387.

22 At [26]; quoting *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47, [2007] 1 AC 521 at [66].

interpretation.[23] The interpretation of a contract and where it fits within the statutory framework of the CCA is within the jurisdiction of an adjudicator.[24] Challenging the correctness of an adjudicator's decision is a matter for appeal. It is not part of the process and procedure of the adjudicator's decision-making.

[34] Nevertheless, a decision will be reviewable if it is based on a material or significant error of law.[25] But even if I were to review Mr Keene's determination and find an error of law, I would not regard it as material or significant in the context of the CCA.

[35] First, s 12 is unambiguous. It was open to Mr Keene to conclude that he could consider the dispute.

[36] Second, the Court of Appeal in *Rees v Firth* explicitly stated that relief in these cases will be rare.[26] The Court commented separately on the purpose of adjudicator's awards:[27]

> [46] … An adjudicator's award is not intended to be a final determination of all issues between the disputing parties. Rather, 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 …

[37] BC12's attempt to prevent payment for work performed is contrary to the purpose of the CCA. As I have said, I infer that raising this large sum of money will be onerous for the owners of the 83 units. But I have not seen any affidavit evidence to that effect or as to how onerous the burden might be. Regardless, I do not consider there to be a material or significant error of law. This is not one of those rare situations where I should intervene notwithstanding the purpose and scheme of the CCA.

[38] The appropriate course of action for BC12 is to utilise the other methods of dispute resolution contemplated in the CCA.

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23 *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226 at [31].
24 Construction Contracts Act, ss 38, 45, 48.
25 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [30]; *Peters v Davison* [1999] 2 NZLR 164 (CA) at 181.
26 At [22].
27 *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243.

P&G thickening

[39] Naylor Love referred to adjudication the matter of whether it was entitled to additional disruption, preliminary and general expenses, and supervisory costs.

[40] It based its claim primarily on cl 9.1.1(a) of the contract, which allows the engineer to order any variations to the contract which increase or decrease the quantity of any work. Alternatively, it relied on cls 2.85 and 2.8.7:

> The Engineer may clarify or further define the Contract Works by issuing to the Contractor instructions, documents and Drawings in addition to those included in the Contract Documents. The Contractor shall be bound by such additional instructions, documents and Drawings.
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> …
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> If the Contractor suffers delay in completion of the Contract Works or incurs additional Cost by reason of the late issue by the Engineer or Principal of any instructions, documents or Drawings, that late issue shall be treated as if it was a Variation. If the Contractor suffers delay in completion of the Contract Works or incurs additional Cost by reason of the issuing to the Contractor of instructions, documents, Drawings, or Specifications under 2.8.5, which results in delay or additional Cost the Contractor could not reasonably have foreseen when tendering, such issuing shall be treated as if it was a Variation.

[41] Mr Keene agreed with Naylor Love. The sheer scale of additional variations allowed Naylor Love to claim over and above the contractual rates. Using the methodology in cl 9.3.5, he awarded a sum of $385,782.50.

[42] BC12 first claims that although Mr Keene used the term P&G thickening in his determination, he decided a different claim that was not referred to him. Naylor Love was claiming an entitlement to be paid preliminary and general expenses as a separate stand-alone variation under cl 9.1.1(a). But BC12 submits that Mr Keene held that Naylor Love was entitled to the additional amount claimed as a part of the valuation of the variations ordered by the engineer, valued by the engineer pursuant to the contract, paid to Naylor Love and which Naylor Love expressly said in its adjudication notice was not in dispute. Mr Keene then exceeded his jurisdiction in respect of quantifying the amount of the award too.

[43] Naylor Love submits, in contrast, that Mr Keene decided precisely the claim in its adjudication notice in accordance with the contract.

[44] As with the EOT 3 claim, this matter does not go to jurisdiction. The adjudicator made a determination on the substance of the dispute referred to him. To challenge his decision is to appeal it. In the context of this case, the arbitration will give BC12 the opportunity to argue the matter afresh. BC12 has attempted to frame its argument in terms of jurisdiction to bring it within the scope of judicial review. But it just does not fit.

[45] BC12 also submits that Mr Keene failed to apply the principles of natural justice in two ways. First, although Mr Keene used the term P&G thickening in his determination, he decided a different claim and awarded Naylor Love an additional amount. He had no jurisdiction to do so. Second, he did not give BC12 prior notice it was facing such a claim and did not give it an opportunity to be heard.

[46] Naylor Love, on the other hand, claims that the P&G thickening claim was included in the notice of adjudication and that BC12 responded to it in its adjudication response filed 19 September 2016. Mr Keene expressly referred to the response.

[47] Section 41(c) of the CCA provides that "[a]n adjudicator must comply with the principles of natural justice". The specific requirements of natural justice are context-dependent. As Cooke P put it: "[t]he requirements of natural justice vary with the power which is exercised and the circumstances".[28]

[48] I see no evidence in the context of this adjudication to establish a breach of natural justice. An adjudication is, to an extent, a rough and ready means of getting an interim determination of contractual disputes in a construction contract setting. That is what the adjudicator did. Whether he was right will be determined at arbitration.

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[28] *Daganayasi v Minister of Immigration*, above n 14, at 141; cited with approval in *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120].

[49] Lastly, BC12 submits that this claim was not a claim under the contract. The contract provides for its own mechanism of compensating Naylor Love for additional on-site overheads, off-site overheads and profit associated with additional work carried out under the contract as a variation.

[50] In reply, Naylor Love submits that it claimed P&G thickening on the basis that it represented an express or implied variation under cl 9.1.1 of the contract. Accordingly, the claim arose under the contract and was determined under the contract.

[51] For the reasons given above, I do not find that this argument goes to jurisdiction. It is a matter of contractual interpretation, not process. It is not amenable to judicial review in this context.

[52] I also dismiss BC12's submission that Mr Keene made an error of law in excluding from his consideration relevant documents which were included in BC12's response to the adjudication notice, but were not specifically referred to by any of the witnesses who provided witness statements in support of that response.

[53] As noted by Naylor Love, Mr Keene was provided with a substantial number of documents. There was no explanation as to the relevance of these particular documents. BC12 failed also to explain how it was prejudiced by Mr Keene's refusal to take them into account. Even if I were to find that Mr Keene made an error of law as BC12 contends, I would not, in this context, intervene. The error would not be of sufficient significance.

Rate escalation

[54] In its adjudication notice, Naylor Love submitted in reliance on cl 9.3.6 that it was entitled to new rates applying to every variation to the contract performed after 10 December 2015.[29]

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[29] The original contract period envisaged completion by 10 December 2015.

[55] Mr Keene agreed. He stated that the contract did not pass the risk of cost fluctuations arising out of a variation onto Naylor Love and awarded Naylor Love a sum of $835,551.05.

[56] BC12 submits that cl 12.8.2 of the special conditions of the contract precludes any claim for rate escalation: "[c]ost fluctuation adjustments shall not be paid". Accordingly, Mr Keene did not have jurisdiction to make his award.

[57] Again, this is not a point for judicial review in this context. It does not go to jurisdiction. It goes to contractual interpretation. I note Mr Keene's comments:

> 12.6 For Naylor Love, how would they have reasonably responded at the time of signing the Contract if they were told that the cost fluctuation provisions meant that post the projected Contract Completion Date delayed solely by the Body Corporate, they must bear all the cost rises even though all of these arose from changes made and work ordered by the Body Corporate? That after all, is the effect of the Engineer's ruling. It is vaguely absurd to suggest they would agree.
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> 12.14 In a contract for remediation where:
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> (a) Time extensions have added broadly a year to a contract projected to last 2.5 years
>
> (b) The value of the contract pricing (ignoring present claims) has risen by $9,925,510 (71%)
>
> (c) The increased Scope of the Work is visually demonstrated by Appendix 1 of this Determination
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> for the Body Corporate to reject the substantial nature of the increases and their contribution to a complex work flow is quite simply untenable.

Hope Construction

[58] Naylor Love also referred to adjudication whether claims brought by its subcontractors for disruption and associated costs could be passed on to BC12. It claimed it was entitled to have those variations valued on the basis of net cost pursuant to cl 9.3.6.

[59] It, again, based its claim primarily on cl 9.1.1(a) of the contract. Mr Keene agreed that new rates should be applied to the Hope Construction work after 10 December 2015. He awarded Naylor Love a sum of $813,804.00.

[60] This is essentially the same point raised in the P&G thickening claim. BC12 makes the same submissions. I give the same answer. This is not a matter for judicial review in the context of the CCA.

[61] Additionally, BC12 claims Mr Keene decided a different claim than that referred to him. Naylor Love submits, in response, that Mr Keene had already decided that Naylor Love could recover for costs arising after 10 December 2015. Therefore, he calculated the portion of Hope Construction's costs after that date and awarded Naylor Love an appropriate sum.

[62] This is not a matter for judicial review in the context of the CCA. It is contractual interpretation and a finding of error of law would not cause me to intervene.

[63] BC12 next submits that Mr Keene failed to observe the principles of natural justice. First, Mr Keene did not determine the dispute referred to him. Second, he did not give BC12 prior notice it was facing such a claim and did not give it an opportunity to be heard.

[64] Naylor Love, on the other hand, says that Mr Keene was directly referred to the issue of the subcontractors' additional costs in the notice of adjudication. BC12 responded to it in its adjudication response filed 19 September 2016.

[65] As with the P&G thickening claim, I do not see, in this context, evidence of a breach of natural justice that would cause me to intervene.

[66] Lastly, BC12 submits that there was no basis for this claim under the contract. BC12 contracted with Naylor Love. Naylor Love subcontracted some of that work to Hope Construction. Naylor Love then submitted payment claims for its performance of the contract with BC12. Mr Keene held that Naylor Love was entitled to increase its rates. Whether Hope Construction was also entitled to rate escalation in the performance of its subcontract is a matter which only concerns Naylor Love and Hope Construction.

[67] Naylor Love, in reply, submits that it claimed these costs on the basis that it represented an express or implied variation under cl 9.1.1 of the contract. Accordingly, the claim arose under the contract and was determined under the contract.

[68] This is an appeal point. It is not for judicial review in this context.

The second adjudication

[69] On 29 March 2017, Naylor Love issued a second notice of adjudication containing five claims.

[70] In relation to two of those claims, Naylor Love's position was that the principle of res judicata meant that the first adjudication should be applied to determine those claims.

[71] Mr Carden released his determination on 28 June 2017. He found that the first adjudication was binding on him:

> I have concluded that in the particular circumstances of this current adjudication, the issues raised by the first adjudication are identical with respect to the issue in this adjudication. The question for the first adjudicator was whether there should be extensions of time in respect of EOT claims Nos #7 and #8. The first adjudicator determined the questions raised before him in the context of the disputes that he was dealing with and made his determinations accordingly. The end result of that determination on those issues was to extend the time for practical completion to a date beyond which such practical completion was eventually certified.

[72] The first claim involved Mr Carden relying on Mr Keene's finding that Naylor Love was entitled to compensation and an extension of time for completion of stage four of the contract works. The 35 working days for which BC12 had imposed liquidated damages were absorbed. Naylor Love was, therefore, entitled to the refund of liquidated damages of $310,620.

[73] The second claim was for cumulative variations arising after 30 June 2016[30] amounting to $237,899.97. Mr Carden applied Mr Keene's findings on the P&G

[30] This was for after the period of time covered by the first adjudication.

thickening claim relating to additional costs for cumulative variations arising before 30 June 2016 to the work carried out by Naylor Love after 30 June 2016.

[74] BC12 takes issue with Mr Carden's finding. It submits Mr Carden made a fundamental error of law in finding that he was bound by the first adjudication.

[75] It submits that, in reliance on the Court of Appeal's decision in *Shiels v Blakeley*, the principle of res judicata does not apply to a determination under the CCA:[31]

> … The rule is, so far as material to the present case, that where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits …

[76] BC12's position can be summarised as follows. The first adjudication is not a judicial decision. It does not finally determine any question of fact or law between the parties to the adjudication proceedings.[32] It is also not final as the parties are free to litigate through court proceedings or arbitration. Further, Mr Keene was not acting as a judicial tribunal because the matter can be relitigated and can only be enforced to the extent provided in the CCA.

[77] Naylor Love's position is that the first adjudication was determinative in respect of those two claims. An express purpose of the CCA is the speedy resolution of disputes.[33] This purpose would clearly be thwarted if either party to an adjudication determination could simply commence another adjudication as many times as it liked in the hope of obtaining a preferred decision.

[78] It acknowledges that this issue has not been directly addressed in the New Zealand courts. But it submits that an estoppel res judicatum was established

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31 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266.

32 See s 27(1): "Except as provided in this section, nothing done under, or for the purposes of, this Part affects any civil proceedings arising under a construction contract."

33 Section 3(b).

by the first adjudication as the determination complied with the principles set out in *Shiels v Blakely*. It relies on a separate passage from the High Court:[34]

> … once a judgment is obtained, the principle of estoppel per rem judicatum applies. The judgment is a final decision. It has been pronounced by a New Zealand Judicial Tribunal of competent jurisdiction. It is pronounced over the parties to the subject-matter of the litigation. Those parties are therefore estopped from disputing or questioning that decision on the merits in any subsequent litigation …

[79] Although the discussion concerned decisions from courts, Naylor Love submits that an adjudication registered as a judgment in the District Court is the same as an adjudication which is not registered. If one were to adopt BC12's view, then if a party paid an adjudicator's award before it was enforced, it would be able to re-adjudicate the facts in the hope of getting a different result. If it did not, and the award was subsequently enforced, it would not.

[80] Naylor Love also referred me to five decisions from the United Kingdom under their equivalent legislation[35] where their courts have rejected BC12's argument.[36] Relying on these decisions, it submits that the clear intent of the CCA is to ensure that a matter, once adjudicated, cannot be re-adjudicated.

Analysis

[81] I do not find there to be an error of law, let alone a material or significant one. A determination is a judicial decision. It is binding pro tem and can be enforced. It would be contrary to the purpose of the CCA to suggest that a matter can be re-adjudicated.

[82] The decisions from the United Kingdom helpfully illustrate that point in the context of the Housing Grants, Construction and Regeneration Act 1996 (UK), which has similar purposes behind it. Section 108(3) of that Act also provides that

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34 *Freemont Design and Construction Ltd v Natures View Joinery Ltd t/a Nebulite Waikato* HC Hamilton CIV-2006-419-269, 26 July 2006.

35 Housing Grants, Construction and Regeneration Act 1996 (UK).

36 *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC); *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC); *Ballast PLC v The Burrell Co (Construction Management) Ltd* [2002] ScotCS 324 (IH (E Div)); *Birmingham City Council v Paddison Construction Ltd* [2008] EWHC 2254 (TCC); *Quietfield Ltd v Vascroft Contractors Ltd* [2006] EWCA Civ 1737.

the decision of the adjudicator is binding pro tem. I, therefore, endorse the remarks of Justice Coulson in *Benfield Construction Ltd v Trudson (Hatton) Ltd*:[37]

> (a) The parties are bound by the decision of an adjudicator on a dispute or difference until it is finally determined by court or arbitration proceedings or by an agreement made subsequently by the parties.
>
> (b) The parties cannot seek a further decision by an adjudicator on a dispute or difference if that dispute or difference has already been the subject of a decision by an adjudicator.
>
> (c) The extent to which a decision or a dispute is binding will depend on the analysis of the terms, scope and extent of the dispute or difference referred to adjudication and the terms, scope and extent of the decision made by the adjudicator. In order to do this the approach has to be to ask whether the dispute or difference is the same or substantially the same as the relevant dispute or difference and whether the adjudicator has decided a dispute or difference which is the same or fundamentally the same as the relevant dispute or difference.
>
> (d) The approach must involve not only the same but also substantially the same dispute or difference. This is because disputes or differences encompass a wide range of factual and legal issues. If there had to be complete identity of factual and legal issues then the ability to readjudicate what was in substance the same dispute or difference would deprive clause 39A.7.1 of its intended purpose.
>
> (e) Whether one dispute is substantially the same as another dispute is a question of fact and degree.

[83] I also note May LJ's observations in the *Quietfield Ltd v Vascroft Contractors Ltd* case:[38]

> [20] The judge said, again uncontroversially, in paragraph 34 of his judgment that the effect of these provisions is that, once a dispute has been determined by adjudication, there cannot be another adjudication about that same dispute. The adjudicator's decision remains binding on the parties unless and until it is overtaken by a judgment of the court, an arbitration award or a settlement agreement …
>
> …
>
> [31] Section 108(3) of the 1996 Act and paragraph 23 of the Scheme provide for the temporary binding finality of an adjudicator's *decision*. More than one adjudication is permissible, provided a second adjudicator is not asked to decide again that which the first adjudicator has already decided. Indeed paragraph 9(2) of the Scheme obliges an adjudicator to resign where the dispute is the same or substantially the same as one which has previously

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37 *Benfield Construction Ltd v Trudson (Hatton) Ltd*, above n 36, at [34].

38 *Quietfield Ltd v Vascroft Contractors Ltd*, above n 36.

> been referred to adjudication and a *decision* has been taken in that adjudication.
>
> [32] So the question in each case is, what did the first adjudicator decide? The first source of the answer to that question will be the actual decision of the first adjudicator …

Amendments to the CCA

[84] BC12 also submits that as Nayor Love sought a determination in the first adjudication that it was entitled to an extension of time for completion of stage four of the contract works pursuant to s 48(1)(b), it cannot be enforced because, under ss 58(3) and 61(2), a court before whom it has been brought must have regard to any such declaration, but is not bound by it.[39]

[85] Naylor Love submits, in brief, that these sections have no relevance to a second adjudication between the same parties.

[86] I concur with Naylor Love. These sections concern the effect of determinations about the rights and obligations of parties on subsequent court proceedings. The CCA contemplates that parties may wish to litigate after an adjudicator's determination. These sections have the effect of stating that the determination will not bind the court or arbitrator. They have no relevance to a subsequent adjudication on the same issues.

Confidentiality

[87] Section 68 of the CCA provides:

> (1) This section applies to the following information:
>
> (a) any statement, admission, or document created or made for the purposes of an adjudication; and
>
> (b) any information (whether written or oral) that, for the purposes of the adjudication, is disclosed in the course of the adjudication.

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[39] Sections 41(2) and 44 of the Construction Contracts Amendment Act 2015 repealed ss 58(3) and 61 respectively. But these amendments do not apply as this construction contract was entered into before 1 December 2015: s 11A(1).

> (2) The adjudicator and any party to a dispute must not disclose to another person any of the information to which this section applies except—
>
> (a) with the consent of the relevant party; or
>
> (b) to the extent that the information is already in the public domain; or
>
> (c) to the extent that disclosure is necessary for the purposes of, or in connection with, the adjudication or the enforcement of the adjudicator's determination; or
>
> (d) in statistical or summary form arranged in a manner that prevents any information disclosed from being identified by any person as relating to any particular person; or
>
> (e) if the information is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify any particular person.

[88] BC12 submits that s 68 precludes any argument that the first determination could simply be relied on as "evidence" in the second determination.

[89] Naylor Love, in contrast, relies on s 68(2)(c). There is clearly a connection between the first adjudication and the second adjudication given the overlap of claims.

[90] Justice Lang has previously accepted:[40]

> [22] The wording used in s 68 suggests that it is designed to apply primarily to the material that the parties place before an adjudicator and not to the adjudicator's determination. The words "any document created or made for the purposes of an adjudication" are, however, sufficiently wide to capture within their scope the determination itself. For that reason I accept that an issue may arise as to whether a determination is caught by the section.

[91] His Honour found that s 68 could not be viewed as absolutely prohibiting any party from placing an adjudicator's determination before the court.[41]

[92] Section 68 is concerned with keeping information confidential to the parties. Its purpose is to prevent third parties from having access to the information. It also

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[40] *Concrete Structures (NZ) Ltd v Inframax Construction Ltd* HC Hamilton CIV-2010-419-909, 9 November 2010.

[41] At [25].

means that in any dispute resolution process following an adjudication the parties are not bound by the way they presented their case at the adjudication. But, I agree with Lang J that s 68 does not necessarily apply to the adjudicator's determination. It does not prohibit a party putting before an adjudicator a determination by another adjudicator involving the same parties and related issues. Indeed, given that res judicata applies, it is necessary that it be done.

Conclusion

[93] The application for judicial review is dismissed.

[94] The appeal from the decision of the District Court (which I do not need to discuss) must necessarily also be dismissed. It could succeed only if I had found for BC12.

[95] Naylor Love is entitled to costs. If the parties cannot agree costs, Naylor Love must file its memorandum by 19 December 2017 and BC12 its reply by 26 January 2018.

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Brewer J

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