IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2017-404-000241
[2017] NZHC 480

UNDER	The Judicature Amendment Act 1972 and Part 30 of the High Court Rules 2009
IN THE MATTER OF	A decision made under the Construction Contracts Act 2002
BETWEEN	ELTEK AUSTRALIA PTY LTD Applicant
AND	DEREK FIRTH First Respondent
	HAWKINS CONSTRUCTION NI LIMITED Second Respondent

Hearing: 15 March 2017

Appearances: B D Gray QC and K Harkess for Applicant
First Respondent abiding the decision of the Court
G J Christie and D A Rowe for Second Respondent

Judgment: 16 March 2017

RESERVED JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 16 March 2017 at 4.30pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
B Gray QC/McElroys, Auckland
Simpson Grierson, Auckland

Introduction

[1] The applicant, Eltek Australia Pty Ltd ("Eltek"), seeks judicial review of a decision made by the first respondent, Mr Derek Firth, on 14 February 2017. Mr Firth gave his decision as an adjudicator pursuant to the Construction Contracts Act 2002 ("the Act"). He is abiding the decision of the Court.

[2] Eltek is an Australian company. In September 2013, it entered into a subcontract with the second respondent – Hawkins Construction NI Limited ("Hawkins"). There is a dispute between the parties arising out of the subcontract. It contained an arbitration clause and it is common ground that any arbitration between the parties would be an international arbitration as defined in art 1(3) of the First Schedule to the Arbitration Act 1996. Accordingly, the dispute between the parties could only be referred to adjudication under the Act if both parties consented.[1] Clause 13.2.1 of the subcontract between the parties provided as follows:

> Disputes may be dealt with by adjudication as provided for in the Constructions Contract Act 2002.

Mr Firth held that this clause permitted either Eltek or Hawkins to invoke the adjudication procedure set out in the Act, and that both parties had consented to adjudication when they entered into the subcontract.

Background

[3] Eltek manufactures and supplies an electrical system known as the Eltek Power Train. The Eltek Power Train provides emergency power when normal input power sources fail. It is typically used to protect hardware such as computers, data centre equipment, telecommunications equipment and other electrical components from unexpected power disruption.

[4] In 2013, Hawkins and its electrical engineers approached Eltek. They enquired about using the Eltek Power Train in a proposed data centre in Takanini that Hawkins had contracted to deliver to a third party under a design and build contract.

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1 Construction Contracts Act 2002, s 25(3).

[5] Following a tender process, on 6 September 2013, Eltek entered into the subcontract with Hawkins. Eltek agreed to design, manufacture, factory test, supply and install the Eltek Power Train system into the data centre.

[6] The data centre was completed and the Eltek Power Train system was installed. However, in late 2014, part of the system failed. Eltek was required to investigate the cause of the failure, and ultimately to replace damaged parts. In July 2015, it notified Hawkins that it was claiming additional costs and expenses in the sum of approximately $1.3 million (NZD).

[7] In October 2015, Hawkins notified Eltek that it considered that there was a dispute under the subcontract. It alleged that Eltek had breached the subcontract, asserting that Eltek had failed to manufacture, factory test, supply and install the Eltek Power Train as required. It claimed that Eltek was liable for the cost of the replacement parts, as well as building modifications which were required and associated costs. Hawkins' claim against Eltek was initially for $5.8 million (NZD), but Hawkins ultimately reduced its claim because it received partial payment under a contracts works policy which it and Eltek jointly held. Hawkins is now seeking $2.56 million (NZD) together with GST and other additional, but as yet unquantified, losses.

[8] Eltek's position is that it met its obligations under the subcontract to provide the Eltek Power Train system. It denies any liability to Hawkins. It says that the difficulties arose because Hawkins did not provide filtered air to the Power Train system. It says that as a result, the component parts of the Eltek Power Train system failed when dust, moisture and salt got into the equipment.

[9] Between February and November 2016, the parties endeavoured to resolve their dispute in good faith, pursuant to clause 13.1.1 of the subcontract. However, they were unable to settle matters.

[10] A mediation was initially scheduled for October 2016, but Eltek ultimately advised that it was not prepared to proceed with mediation. Hawkins had advised by letter, dated 30 November 2015, that if the good faith negotiations were

unsuccessful, it would have no choice but to move to arbitration. However, in the event it did not do so. Rather it referred the dispute to adjudication, pursuant to clause 13.2.1 in the subcontract, by giving notice of its intention to do so as required by s 28 of the Act.

[11] Mr Firth was nominated as the adjudicator.

[12] Eltek gave notice that it disputed Mr Firth's jurisdiction to deal with the matter. Both parties filed submissions on that issue in accordance with an agreed timetable. No conference was held before Mr Firth, and neither side pressed for one. Mr Firth's decision on the submissions filed was released on 14 February 2017. As I have noted, he decided that he had jurisdiction, and he directed Eltek to file a response to Hawkins' adjudication claim.

[13] On 21 February 2017, Eltek filed its application for review. It alleged that Mr Firth erred in law when he determined he had jurisdiction to determine the dispute between the parties. It asserted that Mr Firth misconstrued the subcontract, that he failed to take into account various relevant matters, that he took into account various irrelevant matters, and that the decision that he released did not contain adequate reasons and/or did not determine all of the essential issues put to him in its submissions. It sought:

(a) a declaration that Mr Firth does not have jurisdiction under the Act;

(b) a declaration that Mr Firth's decision of 14 February 2017 is invalid; and

(c) an order quashing or setting aside Mr Firth's decision

[14] Hawkins denies that there was any error by Mr Firth, and says that he exercised his powers in accordance with the relevant provisions in the Act.

[15] Neither party has yet sought to invoke clause 13.3.1 of the subcontract by referring their dispute to arbitration.

The Adjudicator's decision

[16] Mr Firth succinctly summarised the issue before him – was Eltek's consent required for the adjudication in view of the fact that any arbitration under the subcontract would be an international arbitration? He set out the relevant contractual and statutory provisions, and then, in some detail, the primary submissions advanced by Eltek, by Hawkins, and then by Eltek in reply.

[17] Mr Firth proceeded to discuss the submissions. He noted that for him, the starting point was the judgment of Blanchard J in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[2] He briefly referred to the Act, noting that it can provide a fast track for the resolution of claims under construction contracts, and then to the disputes provision contained in the subcontract – clause 13 – as a whole. He considered that the clause provided a dispute resolution framework comprising negotiation (and possibly mediation), adjudication if desired, and then arbitration. He commented that adjudication and arbitration are not mutually exclusive.

[18] Mr Firth then:

(a) expressed the view that it made no commercial sense for there to be a provision about adjudication, if all it did was to state an option which was available to the parties. He considered that, if that was all it achieved, the provision would be otiose;

(b) expressed the view that if Eltek was making a claim against Hawkins for monies outstanding under the subcontract, it would be hard to imagine that Eltek would construe the clause as providing, in favour of Hawkins, an absolute right of veto in respect of any attempt to use the adjudication procedure provided by the Act. He considered that any argument by Hawkins similar to those advanced by Eltek would be unconvincing and a "less probable" interpretation; and

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2 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

(c) considered various arbitration authorities relied on by Hawkins, noting that there was some analogy between them and clause 13.2.1.

[19] Mr Firth held that clause 13.2.1 meant that disputes might, at the instigation of either party, be dealt with by adjudication as provided for in the Act. He considered that any other interpretation was not commercially sensible or realistic. He also expressed the view that this interpretation reflected the commercial intent of the parties. He found support for his conclusion in an English decision – *Julius v Lord Bishop of Oxford.*[3] He concluded that clause 13.2.1 meant, in context, that if either party wished to invoke the procedure in the Act, it could do so, and that both parties were intending, by the clause, to consent as required by s 25(3) of the Act. He held that the challenge to jurisdiction failed and he made procedural directions requiring an adjudication response from Eltek within six weeks of the date of his ruling.

Submissions

Eltek's submissions

[20] Mr Gray QC, for Eltek, submitted that Mr Firth erred in law because he did not consider the plain and ordinary meaning of clause 13.2.1. He argued that clause 13.2.1 means what it says – namely that disputes may be dealt with by adjudication as provided for in the Act. He put it to me that the clause is permissive. He said that Mr Firth should have started his analysis by considering the plain and ordinary meaning of the words, and then considered the commercial context as a cross-check, and/or for clarity, to determine the parties' objective mutual intention.

[21] Mr Gray further argued that clause 13.2.1 does not expressly or impliedly confer consent under s 25(3) of the Act, and that construing the clause in this way brings in words that are not used and which cannot properly be implied from the clause as a whole. He argued that a contractual term excluding a legal or statutory right must be expressed in sufficiently clear wording, evincing a clear intention. He went on to consider the subcontract as a whole, and in particular clauses 13.1, 13.3 and 13.4. He argued that, in each clause other than clause 13.2.1, the words used by

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[3] *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 (HL).

the parties expressly state their mutual intention to be bound by an agreed consequence if a precondition is met. He submitted that clause 13.2.1 does not use mandatory language and that it has no precondition or consequence. He argued that Mr Firth's interpretation strains the plain and ordinary meaning of the words used.

[22] Eltek's submissions then moved to the commercial context. Mr Gray argued that Mr Firth erred when he held that it would make no commercial sense for there to be a provision about adjudication if all it did was state an option available to the parties. He submitted that Mr Firth failed to take into account, as part of the commercial context, that the subcontract was a standard form contract commonly used in this country by head contractors and subcontractors. He noted that the majority of subcontracts will be in the domestic context, and the consent under s 25(3) will therefore not be in issue. He put it to me that in the majority of cases, the parties would not intend clause 13.2.1 to mean that they were consenting as required by s 25(3). He argued that clause 13.2.1 cannot mean something different based on one of the parties' place of business.

[23] Mr Gray took me carefully through a number of the authorities cited by Mr Firth, and argued that they do not support the conclusion that Mr Firth drew from them. He argued that the authorities illustrate that it is the text, objectively construed and in context, which the Courts should use to ascertain meaning. Finally, Mr Gray argued that Mr Firth failed to consider what is required by s 25(3), and failed to take into account that something affirmative is required if there is to be consent under that section.

Hawkins' submissions

[24] Mr Christie, on behalf of Hawkins, submitted that the sole issue for determination by Mr Firth was whether clause 13.2.1 of the subcontract was sufficient consent under s 25(3) of the Act. He argued the answer to that question was, and is, clear on an objective plain and ordinary meaning of clause 13.2.1, taking into account the context in which the clause appears. He discussed the statutory framework for adjudication proceedings, and noted that the adjudication process is not final. He noted that a party dissatisfied with an adjudicator's decision may take

the merits of the matter further, either before the Courts or in an arbitration, depending on the terms of the contract.

[25] Mr Christie's submissions then turned to the approach which should be taken to the judicial review of decisions given by adjudicators under the Act. He argued that the threshold for success in such proceedings is high, relying on the decision of the Court of Appeal in *Rees v Firth*.[4] He then turned to the grounds of review raised by Eltek. He argued that Mr Firth did not err in his determination, and that Eltek cannot show that Mr Firth misstated or misapplied the relevant principles of interpretation. He accepted that Mr Firth did not use the words "plain and ordinary meaning" in the discussion section of his decision, but noted that this was a key point made in submissions to Mr Firth, and that he faithfully recorded the submissions made to him in this regard. He argued that Mr Firth's findings were based primarily on how he considered clause 13.2.1 should be construed objectively and that he was entitled, and indeed required on the *Vector Gas* approach, to ascertain the meaning of clause 13.2.1 in context. He submitted that Mr Firth was entitled to test the commercial reality of Eltek's interpretation by reference to how such an interpretation would be viewed in reverse circumstances.

[26] Mr Christie further argued that Mr Firth did consider clause 13.2.1 in context, and that the adjudication process, in terms of clause 13, is a separate process that can run before or concurrently with any arbitration. He argued that Mr Firth's finding was consistent with the correct interpretation of the disputes resolution clause as a whole.

[27] Mr Christie also referred to the commercial context, and submitted that Mr Firth was correct to find that it made no commercial sense for there to be a provision about adjudication if all it did was to state an option available to the parties. He argued that it was open to the parties to contractually provide their consent to adjudication, as required by s 25(3) of the Act, in advance, and that the wording in clause 13.2.1 was sufficient for that purpose. He argued that Mr Firth did not err in his interpretation of s 25(3), and that the section simply requires consent. He submitted that s 25(3) of the Act permits contractual consent being given in advance

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

of a dispute arising, and that Eltek's agreement to the contractual term was of itself a positive and affirmative act of acceptance. He argued that whether the clause is a "standard" clause is irrelevant, and that what is relevant is what the parties agreed to in this particular case.

[28] Mr Christie then referred to the various authorities cited by Mr Firth in his decision, and submitted that they were authority for the proposition, in the arbitration context, that a submission to arbitration which uses the word "may" is nevertheless a binding arbitration clause. He pointed out that there are no cases directly on point, and that Mr Firth was entitled to apply the reasoning from the arbitration cases in support of his finding that clause 13.2.1 provided sufficient consent.

Analysis

[29] It was common ground between the parties that Mr Firth, acting as an adjudicator, was making a determination under the Act, and that he was exercising a statutory power of decision susceptible to judicial review under the Judicature Amendment Act 1972.

[30] It is appropriate to start by referring to the decision of the Court of Appeal in *Rees v Firth*.[5] In that case, the adjudicator nominated under the Act had held that the party which had served a notice of adjudication did not have standing to bring the dispute to adjudication. The adjudicator went on to find that the contractor had received all it was entitled to under the contract with the principal, and that it was not entitled to a top-up payment. On judicial review, the High Court set aside the adjudicator's determination, and the party who served the original notice of adjudication appealed to the Court of Appeal, arguing that on judicial review the High Court was limited to reviewing jurisdictional errors of an adjudicator sitting under the Act. The Court of Appeal held that there is nothing in the Act which specifically limits judicial review to errors going to jurisdiction, and that the Act did not require that judicial review be limited to what might be classified as jurisdictional errors. It held as follows:[6]

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5 *Rees v Firth*, above n 4.

6 At [22]-[24], [26]-[27] and [48].

[22] … The key point, we think, is that the statutory context is such that a person who does not accept an adjudicator's determination should litigate, arbitrate or mediate the underlying dispute, rather than seeking relief by way of judicial review of the determination. Such relief will be available only rarely. We now explain our reasons for this view.

[23] The [Act] contemplates that adjudication and other dispute resolution techniques such as litigation may take place at the same time in relation to a dispute under a construction contract. So:

(a) Section 25(1) confers a right on a party to a construction contract to refer a dispute to adjudication even though the dispute is the subject of court proceedings between the same parties.

(b) Section 26(1) provides that nothing in Part 3 (which deals with adjudication of disputes) prevents the parties to a construction contract from litigating a dispute which is before an adjudicator.

(c) Section 26(2) provides that submitting a dispute which is undergoing an adjudication to litigation or some other dispute resolution technique does not bring the adjudication to an end.

[24] Further, an adjudicator's determination as to the payment of money remains in effect despite the issue of judicial review proceedings. … This is to be contrasted with the position in relation to an adjudicator's determination of questions or disputes about the rights or obligations of the parties under a construction contract. Such determinations are not enforceable, even if they are addressed in a determination dealing with a monetary claim. Rather, the party in whose favour the determination has been made may bring court proceedings to enforce its rights under the contract. In such proceedings, the court must have regard to, but is not bound by, the adjudicator's determination.

…

[26] … an adjudicator's determination of rights and obligations under a construction contract is not binding in any event. A party with the benefit of such a determination must issue proceedings in order to enforce its rights and the court will be free to reach a different view from that of the adjudicator. In this type of case, it is difficult to see what point there would be in any judicial review proceedings.

[27] The courts must be vigilant to ensure that judicial review of adjudicators' determinations does not cut across the scheme of the [Act] 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 [Act]. 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 [Act] 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).
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> …
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> [48] [The adjudicator] made an error of law in the interpretation of contract two. This Court has said that, although public law remedies are discretionary, there must be 'extremely strong reasons' to decline to grant relief where a public decision-maker is shown to have erred in the exercise of his or her powers. That approach has been criticised as being insufficiently nuanced, although the Court seems to have had in mind situations where it could be shown that there was substantial prejudice to the claimant. In any event, given the discretionary nature of public law remedies, it may be that a more nuanced approach is necessary in the generality of cases. But in the present context, a requirement to show 'extremely strong reasons' to deny relief would substantially undermine the [Act's]'s purpose and scheme. In most – indeed, almost all – cases involving construction contracts it will be preferable for parties to resolve disputes over contractual rights and liabilities by mediation, arbitration or litigation, given the non-binding nature of an adjudicator's determination on such matters, rather than by resorting to judicial review. The courts should be careful not to act so as to encourage parties to construction contracts to take judicial review proceedings rather than utilising other more appropriate alternatives. …
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> (citations omitted)

[31] In the present case, Eltek is challenging a preliminary decision as to jurisdiction made by the adjudicator. It has followed the procedure which this Court has suggested is appropriate in such cases.[7] The Court of Appeal's observations in *Rees v Firth* were not made in the context of a challenge to a jurisdictional decision, but I see no reason to read them down. The Court was clearly signalling that there are limits to the remedy of judicial review in the context of adjudicators' determinations made under the Act.

[32] Against this background, I turn to consider Eltek's review proceedings. As I have noted, Eltek has challenged Mr Firth's decision as to the meaning of clause 13.2.1 in the subcontract.

[33] Relevantly, s 25 in the Act provides as follows:

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[7] *Origin Energy Resources (Kupe) Ltd v Tenix Alliance New Zealand Ltd* HC Auckland, CIV-2010-404-106, 19 January 2010 at [27].

25 Right to refer disputes to adjudication

(1) Any party to a construction contract—

(a) has the right to refer a dispute to adjudication; and

(b) may exercise that right even though the dispute is the subject of proceedings between the same parties in a court or tribunal.

…

(3) A dispute may not be referred to adjudication without the consent of the parties to the dispute if—

(a) the parties to the relevant construction contract have agreed to refer disputes between them to arbitration; and

(b) the arbitration is—

(i) an international arbitration as defined in article 1(3) of Schedule 1 of the Arbitration Act 1996; or

…

(4) Subsection (3) prevails over subsection (1).

[34] Clause 13 in the subcontract provides as follows:

13.1 Negotiate in Good Faith

13.1.1 If either party notifies the other in writing of any dispute relating to the Subcontract, the parties must endeavour to resolve the dispute in good faith. The parties may agree to use a mediator.

13.2 Adjudication

13.2.1 Disputes may be dealt with by adjudication as provided for in the Construction Contracts Act 2002.

13.3 Arbitration

13.3.1 If any dispute cannot be resolved in accordance with 13.1 above, it must be referred to arbitration in accordance with the provisions of the Arbitration Act 1996.

13.3.2 The dispute must be referred to a sole arbitrator agreed to by the Contractor and the Subcontractor. If the Contractor and Subcontractor cannot agree on the sole arbitrator, then either party may request the appointment of a sole arbitrator nominated by the Registrar of the Building Disputes Tribunal (NZ) Limited.

…

[35] As can be seen, the parties have agreed to refer disputes between them to arbitration – see clause 13.3.1. It is common ground that any arbitration would be an international arbitration as defined in art 1(3) of schedule 1 of the Arbitration Act 1996. There was also no dispute between the parties that clause 13.2.1 is permissive – it allows disputes between the parties to be dealt with by adjudication under the Act. What was in dispute was the extent of the agreement between the parties contained in clause 13.2.1 – in particular was the use of the word "may" in clause 13.2.1 intended to confer, in advance, consent under s 25(3) of the Act?

[36] Clause 13.2.1 appears in a standard form subcontract agreement, which, it seems, is in common usage in the construction industry in this country. It was developed by a working group of representatives from the Registered Master Builders Federation and the New Zealand Specialist Trade Contractors Federation Incorporated with the benefit of legal advice. Notwithstanding that it is apparently in common usage, counsel were not able to refer me to any case where the meaning of clause 13 has been considered by the Courts.

[37] Clause 13 has to be interpreted. The modern approach to the interpretation of contracts generally has been set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Brunswick Building Society*.[8] His Lordship said as follows:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this

[8] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at [912]-[913].

respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945).

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Navieera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

> … if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

[38] This statement of the law has been adopted in New Zealand, e.g. by the Court of Appeal in *Boat Park Ltd v Hutchinson.*[9] It has been quoted in numerous cases since, including in *Vector Gas*, in the Supreme Court.[10] This case was referred to by Mr Firth in his decision. As Tipping J noted in that case:[11]

> The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. … The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all

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9 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 at 81-82.

10 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 2.

11 At [19].

> the facts and circumstances known to and likely to be operating on the parties minds. …

[39] It follows that in interpreting clause 13, it is necessary to look, on an objective basis, at the language used by Eltek and Hawkins in their subcontract. The Court, as the embodiment of a reasonable and properly informed objective third party, can consider the commercial and other contexts in which the subcontract was made, and all facts and circumstances known to, and likely to be operating on, Eltek's and Hawkins' minds when the subcontract was signed.

[40] Eltek argues that Mr Firth did not start his enquiry by looking at the plain and ordinary meaning of clause 13.2.1.

[41] I do not accept this criticism. Mr Firth set out clause 13. He was aware of the words used by the parties and of the issue he was called on to decide. While he did not use the words "plain and ordinary meaning" in the discussion section of his decision, he was clearly aware of the parties' competing submissions as to what was the plain and ordinary meaning of the clause. By way of example, he noted a submission by Eltek that the wording in the clause is permissive and not general, and that the clause does not say that the parties consent to refer any dispute between them to adjudication under s 25 of that Act. He expressly recorded that Eltek submitted that the word "may" evinces permissiveness, and that the words in the clause should be given their plain and ordinary meaning. He noted that Eltek also argued that construing clause 13.2.1 as consent to adjudication elevated the clause to a mandatory dispute resolution clause, and that that meaning was inconsistent with the plain and ordinary meaning of the word "may". Similarly, Mr Firth noted submissions by Hawkins that the plain and ordinary meaning of clause 13.2.1 is that the parties had agreed that disputes between them could be dealt with by adjudication.

[42] I do not consider that it was necessary for Mr Firth to expressly deal with this issue in the discussion section of his decision.

(a) First, while an adjudicator's determination must contain reasons for the determination, a failure to comply does not affect the validity of

the determination.[12] While this does not excuse any invalidity that is more than merely formal, it does suffice if an adjudicator gives sufficient reasons to answer in fairness the arguments for and against a claim and to render his or her decision intelligible and free from unreasonableness.[13] In my judgment, Mr Firth's decision readily surmounts this hurdle.

(b) Secondly, and more importantly, the plain and ordinary meaning of the words in clause 13.2.1 does not advance matters in the present case. Both the parties accept that the use of the word "may" in clause 13.2.1 is permissive – disputes between them may be dealt with by adjudication. Mr Gray acknowledged that this does not preclude the word "may" also being construed as conferring consent under s 25(3). This concession was properly made. Had the Chief Executive of Hawkins asked his equivalent at Eltek – "can we seek adjudication under s 25", and the Chief Executive of Eltek had said – "you may" – Eltek would have been giving its consent under s 25(3). Looking at the plain and ordinary meaning of clause 13.2.1 does not, of itself, answer the question raised by this case. I do not consider that Mr Firth erred in the discussion section of his decision by focussing on what is a commercially sensible interpretation which fulfils the objective commercial purpose, rather than on the plain and ordinary meaning of the word "may".

[43] In the present case, the commercial context for the subcontract at the relevant time was as follows:

(a) the subcontract was a construction contract pursuant to the provisions of the Act;

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12 Construction Contracts Act 2002, s 47(1) and (2).

13 *Canam Construction (1955) Ltd v LaHatte* [2010] 1 NZLR 848 (HC) at [54] and [59].

(b) the Act is legislation to which all significant construction contracting parties must, and do, turn their minds;[14]

(c) the Act provides a fast track process for the resolution of claims – often, but not exclusively, resulting in a monetary payment. It provides a truncated adjudication process, usually without an oral hearing, and generally conducted within very short timeframes;

(d) the right to refer a dispute to adjudication exists even though the dispute is the subject of proceedings between the same parties in a Court or tribunal,[15] or through some other dispute resolution procedure;[16]

(e) where money is sought in any adjudication, the adjudicator is required to determine not only whether or not either of the parties was liable to make a payment under the contract, but also any questions in dispute about the rights and obligations of the parties under that contract;[17]

(f) while any determination relating to liability to make a payment is enforceable, any determination about the parties' rights and obligations under the subcontract is not enforceable;[18]

(g) the adjudication process is quick and relatively cheap. It can be useful to unlock good faith negotiations where both parties have become entrenched in their respective positions. A determination by an independent adjudicator may lead one or other party to a change of position. It can be used to avoid expensive and protracted proceedings before an arbitrator(s) and/or the Courts. Adjudication can be used as a "dummy run" and to "test the water" before embarking on such proceedings.

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14 Mr Firth recorded this in his decision – para [71].
15 Construction Contracts Act 2002, s 25(1).
16 Section 26(1).
17 Section 48(1)(a) and (b).
18 Section 58(1) and (2). Section 58(2) was amended on 1 December 2015 by s 41(1) of the Construction Contracts Amendment Act 2015. As from that date, determinations about the parties' rights and obligations are enforceable in accordance with s 59A.

[44] All of these matters were, or should have been, known to the parties and they should have been operating on their respective minds when they entered into the subcontract. In addition, the parties would have known that clause 13.3.1 required that any dispute between them be referred to arbitration if it could be resolved in accordance with clause 13.1.1. They would have known that any arbitration between them would be an international arbitration, because Eltek is an Australian entity. They would have known that the dispute could not be referred to adjudication without the consent of both of them.

[45] With the knowledge of all these various matters, it seems to me unlikely that the parties, by clause 13.2.1, were simply recording that the option of adjudication was open to them. Adjudication can offer significant advantages to disputing parties and it is unlikely that they would have agreed that either of them could deny those advantages by refusing consent, thereby vetoing the process. Looked at in isolation, I agree with Mr Firth that, in context, a narrow interpretation, ignoring the issue of consent, makes little commercial sense.

[46] Mr Firth observed that it would not make commercial sense for there to be a provision about adjudication if all it did (as contended for by Eltek) was to state an option available to the parties collectively. He considered that the provision would be otiose.

[47] If the focus is only on the subcontract between Eltek and Hawkins, I agree with this observation. However this is a standard form subcontract. Mr Gray submitted that it will most commonly be used in the domestic context, where there is no prospect of an international arbitration and no requirement for consent. There is force in his argument that clause 13.2.1 should be interpreted in the same way, whether or not there is a submission to an international arbitration.

[48] In the domestic context, clause 13.2.1 recognises contractually the statutory option afforded by s 25 – the right to refer a dispute to adjudication. That right cannot be excluded by contract.[19] The clause arguably extends a little further. It sets out for the parties a tiered sequence of the steps they can take in the event that a

[19] Construction Contracts Act 2002, s 12.

dispute arises between them. Some of those steps – those in clauses 13.1.1 and 13.3.1 – are mandatory. The step in clause 13.2.1 is optional. As I have noted, it can be an adjunct to good faith negotiations under clause 13.1.1, or a prelude to more contentious proceedings under clause 13.3.1.

[49] Given that this is a standard form subcontract, on balance, I am not convinced by Mr Firth's observation that it would not make commercial sense for there to be a provision about adjudication if all it did was to state an option available to the parties. It seems to me that is what the clause will do in the most common situations in which it will fall to be applied.

[50] I do however agree with Mr Firth that:

(a) whatever interpretation is adopted in the present case, it must be one which would equally follow if Eltek were the claimant;[20]

(b) if Eltek was making a claim against Hawkins, it is hard to imagine that Eltek would accept clause 13.2.1 as providing, in favour of Hawkins, an absolute right of veto;

(c) any attempt by Hawkins to rely on the same arguments as were relied upon by Eltek would, in that counterfactual situation, be unconvincing.[21]

This favours the interpretation which Mr Firth gave to clause 13.2.1 – namely that the use of the word "may" in the clause does confer the consent required under s 25(3).

[51] Mr Gray criticised Mr Firth for not expressly referring to the differences in language between the various sub-clauses contained in clause 13. He noted that clause 13.1.1 requires, in mandatory terms, that the parties endeavour to resolve their dispute in good faith, and that they "may" agree to use a mediator. He noted that

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[20] Mr Firth's decision, para [71].
[21] Mr Firth's decision, para [74]-[75].

clause 13.3.1 is also in mandatory terms. He argued that there is a careful use of mandatory and permissive language between the various sub-clauses.

[52] Again, I do not accept this criticism. Mr Firth set out clause 13 in its totality. He noted Eltek's submission that the parties' objective intention in clause 13.2.1 was that they could, not would, use adjudication to deal with disputes. As I have already noted, he recorded Eltek's submission that the word "may" evinces permissiveness. He noted that the submission construing clause 13.2.1 as consent to adjudication elevates the clause to a mandatory dispute resolution clause, and that that is inconsistent with the natural and ordinary meaning of "may" which is not the same as "shall" or "must". He noted submissions that Eltek made about the construction of the subcontract as a whole, and their argument that clause 13.1.1 requires the parties endeavour to resolve disputes in good faith. He noted the submission that the parties' choice of words reflects their intention that the dispute resolution clauses operate differently, that negotiation and arbitration are mandatory, but that mediation and adjudication are not. He noted submissions made by Hawkins that clause 13 is a tiered dispute resolution clause, and the analogy which Hawkins drew between the use of the word "may" in clause 13.2.1 and the use of the same word in various submissions to arbitration which have been before the Courts. He noted that Hawkins argued that if one party wished to pursue a dispute, it must follow the processes in clauses 13.1.1 and 13.3.1, but that the right to adjudication stands outside this mandatory dispute resolution process. He noted the submission that the adjudication process is separate and can run before or even concurrently with arbitration, and that there is no choosing adjudication over arbitration; nor is there mandatory adjudication. He recorded Hawkins' submission that having both adjudication and arbitration available to the parties was exactly what the Act contemplates.

[53] It cannot be argued that Mr Firth was unaware of clause 13 as a whole, or of the contrasting use of language between clauses 13.1.1, 13.2.1 and 13.3.1. In the discussion section of his decision, Mr Firth expressly referred to the clause as a whole. He took the view that it provides a dispute resolution framework comprising negotiation and possibly mediation, adjudication if desired, and then arbitration.

This analysis was clearly correct, and it can only have followed from a careful reading of the relevant sub-clauses in clause 13.

[54] In my judgment, Mr Firth did consider clause 13.2.1 in the context of the subcontract as a whole, and he did not misdirect himself in this regard.

[55] Mr Gray argued that Mr Firth did not turn his mind to what is required for there to be consent under s 25(3).

[56] Again, I do not accept this submission. Mr Firth expressly recorded Eltek's submission that a clear intention must be shown if legal/statutory rights are to be excluded. It was, in effect, Mr Firth's view that that clear intention was shown. Mr Gray acknowledged that s 25(3) of the Act does not preclude contractual consent, in advance of a dispute arising, to the use of adjudication. Mr Firth clearly took the view that Eltek, by agreeing to clause 13.2 in the subcontract, had evinced a clear intention, and that its act in signing the subcontract was a positive and affirmative act of acceptance.

[57] Finally, Mr Gray challenged the various authorities which were relied on by Mr Firth in support of his view as to the meaning of clause 13.[22] Mr Gray took me through some, but not all of the cases, and argued that each turned on the terms of the submission to arbitration which was before the Court, and that, in the cases he analysed, all bar one provided that either party to the contract might refer the issue to arbitration.

[58] I agree with Mr Gray that the cases have to be seen in light of the particular submission to arbitration provision with which each was concerned. However, I do not think that anything turns on his argument that many of the cases concerned submissions to arbitration which conferred the ability to submit to arbitration on either party. While clause 13.2.1 does not use the words "either party", that is the effect of the clause when it is read in conjunction with s 25 of the Act. Clause 13.2.1

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[22] *On Line International Ltd v On Line Ltd* [2000] BCL 442 (HC); *Aitken v Ishimaru Ltd* HC Auckland CIV 2006-404-7953, 25 October 2007; *Shore Care Services Ltd v At Your Request Franchise Group Ltd* [2010] 3 NZLR 102 (HC); *Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA; The Messinaiaki Bergen* [1983] 1 All ER 382 (Q.B.); *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] SGHC 104, [2002] 1 SLR(R) 1088.

provides that disputes may be dealt with by adjudication. Section 25(1) of the Act provides any party to a construction contract has the right to refer a dispute to adjudication.

[59] The arbitration cases relied on, by way of analogy, by Mr Firth are clearly authority for the proposition that a permissive clause – using the word "may" – can create a binding obligation to arbitrate. That is all that Mr Firth took out of them and in my judgment he did not err in doing so.

[60] Mr Firth also referred to an additional authority which had not been referred to him by the parties. This was the decision of the House of Lords in *Julius v Lord Bishop of Oxford*.[23] Counsel advised that Mr Firth found this authority as a result of his own research, and that he referred it to the parties, and sought their submissions on it. Mr Firth cited passages from three of the judgments in that case – namely the judgments of Lord Cairns, Lord Penzance and Lord Blackburn. I do not consider that the passages cited from the judgments of Lord Cairns and Lord Penzance assist. Both were simply recording the question they were called upon to answer, which both in the event answered in the negative. The passage which Mr Firth cited from Lord Blackburn is closer to being in point. I doubt however that it is a particularly persuasive authority as to the meaning of the word "may" in clause 13.2.1 of the subcontract. It is a case of considerable antiquity, only marginally on point. I do not however consider that Mr Firth's reference to the *Julius* decision is fatal to his decision. It is clear that it was very much an add-on, to support the other reasons which Mr Firth had given for his ruling.

[61] In summary, I am not persuaded that Mr Firth erred in his decision. In my judgment, the plain and ordinary meaning or the language used in clause 13, and in particular in clause 13.2.1, and the commercial and statutory context, leads to the conclusion that the word "may" in clause 13.2 is both permissive, in the sense of allowing either party to invoke the adjudication process provided for by the Act, and consensual, in that it records in advance the parties consent to the use of that process, as required by s 25(3) of the Act.

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[23] *Julius v Lord Bishop of Oxford* , above n 3.

[62] The application for review is declined.

Addendum

[63] As a consequence of this decision, Eltek must now file a response to the notice of adjudication given by Hawkins. Mr Firth directed that the response had to be filed within six weeks of the date of his ruling. Some of that time has already run. Counsel were agreed that, in the event that Mr Firth's decision was upheld, I should direct that Eltek's response to the notice of adjudication is to be filed with Mr Firth, and served on Hawkins, within five weeks from the date of release of this judgment. I so order.

Costs

[64] Hawkins is entitled to its reasonable costs and disbursements. It may well be that the parties can agree in that regard. If not, I direct that Hawkins is to file a memorandum in support of any application it wishes to make for costs within 10 working days of the date of this judgment. Any memorandum in reply from Eltek is to be filed within a further 10 working days. Memoranda are not to exceed five pages. I will then deal with the issue of costs on the papers, unless I require the assistance of counsel.

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Wylie J