IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-000869
[2021] NZHC 554

BETWEEN	HELLABY RESOURCE SERVICES LIMITED First Plaintiff / Fourth Counterclaim Defendant
	TBS REMCON LIMITED Second Plaintiff / First Counterclaim Defendant
AND	BODY CORPORATE 197281 Defendant / Counterclaim Defendant
	MAYNARD MARKS LIMITED Second Counterclaim Defendant
	HOBANZ PROJECT ASSIST LIMITED Third Counterclaim Defendant

Hearing: 16 November 2020

Appearances: J Q Wilson and R D H Massey for the Second Plaintiff
R J Hollyman QC, N G Lawrence and W J Revell for the Defendant

Judgment: 14 April 2021

JUDGMENT OF ASSOCIATE JUDGE GARDINER

This judgment was delivered by me on 14 April 2021 at 3.30 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date.....

Introduction

[1] TBS Remcon Ltd (**TBS**) applies for summary judgment against Body Corporate 197281 (the **Body Corporate**) for payment of a debt under a construction contract. Hellaby Resources Services Limited (**Hellaby**) formerly owned TBS. TBS maintains that that amount plus the costs of enforcement are recoverable as a statutory debt, against which no counterclaim can be raised under the Construction Contracts Act 2002 (the **CCA**). It also applies for a stay of the counterclaim the Body Corporate has raised, saying that it needs to be pursued separately, through arbitration.

[2] The Body Corporate opposes summary judgment as it says it has an arguable defence. It also contends that this is a case where the Court should exercise its residual discretion to decline summary judgment to avoid oppression or injustice to the Body Corporate. If the Court decides to order summary judgment, the Body Corporate seeks a stay of enforcement pending resolution of the Body Corporate's counterclaim, as enforcement would result in a substantial miscarriage of justice.

Issues

TBS's application for summary judgment

[3] The issues in relation to this application are:

(a) Has TBS satisfied the Court that the Body Corporate has no arguable defence to TBS's claim?

(b) Even so, should the Court exercise its residual discretion not to order summary judgment?

The Body Corporate's application for a stay of enforcement

[4] In relation to the Body Corporate's application for a stay of enforcement of the summary judgment, if ordered, the issue is:

(a) Would a substantial miscarriage of justice result if the judgment is enforced against the Body Corporate?

TBS's application for stay of the Body Corporate's counterclaim

[5] Here, the issue is:

(a) Is the Body Corporate bound by the arbitration agreement in the construction contract? This turns on:

(i) Is the agreement inoperative or incapable of being performed?

(ii) Is the Body Corporate a "consumer", so the arbitration agreement is only enforceable if it is agreed after the dispute arose?

Factual background

[6] The Body Corporate is the body corporate for a 99-unit building apartment complex located at 68 Mountain Road, Panmure, Auckland (the **Complex**). The Complex was built in the early 2000s and received a code completion certificate in August 2003.

[7] Sometime prior to late 2008, weather damage issues were discovered at the Complex. An investigation by building consultants Cove Kinloch estimated that the required repair work would cost $1,346,100 and recommended further invasive testing.

[8] The Body Corporate made a claim through the Weathertight Homes Resolution Service (**WHRS**) under the Weathertight Homes Resolution Services Act 2006 (**WHA**). A WHRS assessor carried out a more detailed investigation, and in a report in March 2010 estimated the repair cost to the Complex to be approximately $5 million.

[9] The Body Corporate engaged Maynard Marks, building and construction consultants and engineers, to review the WHRS report and investigate further. In a report to the Body Corporate in August 2010, Maynard Marks estimated the overall project cost of repairing the weather-tightness defects to be $8,377,322.

[10] In 2009 the Body Corporate engaged Lighthouse NZ Ltd to provide guidance and advice on governance, the remediation process, contractual arrangements, and the claims procedure. From 1 September 2013 the services provided by Lighthouse NZ Ltd were provided by HOBANZ Consulting Ltd. On 1 September 2019, the name of HOBANZ Consulting Ltd changed to HOBANZ Project Assist Ltd. In this judgment, these entities are referred to as **HOBANZ**.

[11] In January 2012 the Body Corporate contracted Maynard Marks to provide design, procurement and implementation services. Between 2012 and 2014 Maynard Marks designed and planned the remediation works. The Body Corporate, with Maynard Marks and HOBANZ's assistance, obtained the required building consents and ran a tender process for the contract to complete the works.

[12] On around 4 November 2014 the Body Corporate entered into a construction contract with TBS to carry out the remediation works (the **Construction Contract**). The Construction Contract named Maynard Marks as the Project Engineers.

[13] The Construction Contract included a detailed schedule of works summarised on page one as "Removal of the defective cladding aluminium joinery and decks, and renewal as per the attached drawings and specifications". The Construction Contract said that the repair work would cost "$7,590,272.58 or such greater or lesser sum as shall become payable under the Contract". The Contract was described as a "lump sum with a portion of cost reimbursement items".[1]

[14] The Construction Contract incorporated the General Conditions of Contract NZS3910:2013 (**NZS3910**), which was a standard form of general conditions for incorporation into construction contracts. NZS3910 allowed for the agreement of variations to the project in consultation with the Project Engineers.

[15] The remediation work was to be carried on in five stages (one for each block) to allow some buildings to remain occupied during the works.

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1 Schedule 2, cl 2.1.1.

[16] The remediation work began in around November 2014. As remediation work progressed, TBS discovered that the damage to the Complex was worse than previously identified. In particular:

(a) there were significant defects to the passive fire protection system;

(b) there were structural and bracing issues which affected the performance of the buildings;

(c) there was timber damage inside the buildings as a result of faulty plumbing; and

(d) there were defects with the roofing.

(together, the **Further Defects**).

[17] TBS issued variations to the Construction Contract, largely due to the Further Defects. At one point, TBS had over 1,000 outstanding variations. Maynard Marks approved these variations. The Body Corporate paid for the work undertaken by TBS to remedy the Further Defects on a "cost plus agreed margin" basis, consistent with the terms of the Construction Contract. Maynard Marks was also required to undertake further design and planning work because of the Further Defects. The cost of the remediation works escalated.

[18] By 2017, the remediation works had significantly exceeded the time and cost provision in the Construction Contract and Maynard Marks' estimate in August 2010. In March 2018 TBS and the Body Corporate entered into a credit term extension (the **Credit Term Extension**), which entitled the Body Corporate to defer payments under the Construction Contract beyond the due date.[2] The Credit Term Extension provided that interest would accrue on deferred payments at the rate of 9.75 per cent per annum compounding monthly from the due date until the date the sum was paid in full.

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2 Affidavit of Michael Shane Flood-Smith sworn 6 May 2019 at [19]–[21].

[19] The Body Corporate and TBS discussed the Body Corporate's desire to obtain a guaranteed maximum price for the repair works. The Body Corporate and TBS eventually agreed on a fixed price to complete the remediation works of $35 million excluding GST. That agreement was documented in a Deed of Variation dated 22 June 2018 (the **Variation Agreement**).

[20] The first block of the Complex was completed in December 2016; the final block on 22 June 2018. Maynard Marks issued practical completion certificates and end of defects liability certificates as each phase of the works was finished. Auckland Council issued code compliance certificates (**CCCs**) for each phase, between August 2017 and July 2018.[3]

[21] The Body Corporate paid TBS a total of $32,188,700.35 of the agreed contract price of $35,000,000. It has refused to pay the balance of $2,826,299.65 (the **Unpaid Balance**), claiming that despite the CCCs, certain areas of work remain incomplete, defective, and/or non-compliant with the Building Code and building consents. The claimed defects are:

(a) incomplete and/or defective passive fire protection measures;

(b) remedial work to inter-tenancy walls;

(c) removal and re-fixing of floor sheeting;

(d) incorrect installation and repair of the roofing membranes;

(e) defective roof flashings;

(f) defective installation of deck balustrades / handrails;

(g) defective installation of guttering;

(h) defective installation of rainwater heads in Blocks 2 and 3;

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3 Affidavit of Antony Clune sworn 7 August 2019 at AC-124 to AC-138.

(i) incorrect installation and failure to install proper storm mouldings;

(j) installation of incorrectly treated timber in the substructure of decks.

(together, **the Remaining Defects**).

[22] The cost of fixing the Remaining Defects is currently unknown without further invasive testing, but it is presently estimated to be $5,235,910 plus GST.[4]

Procedural background

TBS's claim for the Unpaid Balance

[23] TBS was sold by Hellaby to SRG Contractors NZ Ltd in around December 2018. TBS, Hellaby and SRG entered into a Deed of Assignment dated 12 December 2018, under which TBS purported to assign to Hellaby all contractual rights and recourses against the Body Corporate under the Construction Contract, including the right to sue for the Unpaid Balance. Hellaby paid the full face-value of the Unpaid Balance as consideration for the assignment.

[24] Hellaby demanded that the Body Corporate pay the Unpaid Balance of $2,826,299.65 plus contractual interest (the **Claimed Debt**) on 19 December 2018, 22 February 2019 and 7 March 2019. The Body Corporate did not pay. Hellaby issued proceedings against the Body Corporate to recover the Claimed Debt on 8 May 2019 and sought summary judgment. In a judgment dated 16 October 2019, Associate Judge Lester found that the assignment was not effective because the Body Corporate had not consented to the assignment as required under the Construction Contract.[5] The application for summary judgment was accordingly dismissed.

[25] By consent orders dated 9 July 2020, Hellaby joined TBS as second plaintiff. In an amended statement of claim dated 3 August 2020, Hellaby or in the alternative TBS, seeks payment of the Claimed Debt. In an interlocutory application of the same date, TBS applies for summary judgment. TBS says that payment schedules numbered

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4 Affidavit of Melanie Jayne Norris sworn 11 September 2020 at [8].

5 *Hellaby Resource Services Ltd v Body Corporate 197281* [2019] NZHC 2641 at [31].

36 to 44, issued between November 2017 and July 2019, give rise to the Claimed Debt.[6]

[26] In its statement of defence and counterclaim dated 1 September 2020, the Body Corporate admits that TBS issued payment claims for the Unpaid Balance above, admits that Maynard Marks as Project Engineers issued provisional payment schedules in respect of those payment claims, and admits that the Body Corporate did not amend the provisional payment schedules (it says it was advised not to do so by Maynard Marks and HOBANZ).

[27] The Body Corporate denies that the issuing of payment schedules in respect of the payment claims gives rise to a statutory debt under the Construction Contract and s 24 of the Construction Contracts Act 2002 and says further that "the amount owing to TBS is uncertain given the BC's counterclaims".

The Body Corporate's counterclaim against TBS

[28] The Body Corporate's first cause of action against TBS is for breach of contract. The Body Corporate claims that TBS breached the Construction Contract by completing the remediation work with the Remaining Defects; failing to remedy the Remaining Defects; and failing to provide necessary information to justify variations to the Construction Contract.

[29] Its second cause of action against TBS is in negligence. The Body Corporate claims that TBS breached its duty of care by undertaking/supervising the remediation work in such a way that it resulted in the Remaining Defects and failed to comply with the Building Code; issued producer statements and certificates advising that the building work was completed in accordance with building consents and the Building Code when, by virtue of the Remaining Defects, the work did not; and failed to give the Body Corporate reliable information about the costs of the remediation works when it should have.

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6 Affidavit of Michael Shane Flood-Smith sworn 4 August 2020 at [7].

[30] Its third cause of action is for money had and received. The Body Corporate claims that had it been aware of the Remaining Defects, it would not have accepted the payment claims issued by TBS and paid the amounts in the payment claims related to the Remaining Defects.

[31] Its fourth cause of action is for misleading and/or deceptive conduct in breach of s 9 of the Fair Trading Act 1986 and involves similar allegations.

[32] Its fifth cause of action is for breach of s 35 of the Contract and Commercial Law Act 2017. The Body Corporate claims that it was induced to enter into the Construction Contract and the Variation Agreement by TBS's representations that it would complete the repair works with the necessary quality, care and skill required under the Construction Contract, the Building Code and building consents, and that it would be able to complete the repair works for the prices stated in the Construction Contract and the Variation Agreement.

[33] The Body Corporate claims the costs of remedying the Remaining Defects, or orders for specific performance requiring TBS to do everything and meet all costs necessary to repair the Remaining Defects to the required standards. The Body Corporate also claims consequential losses its members are said to have suffered/will suffer, such as lost rent, alternative accommodation costs, and relocation and storage costs (to be particularised before trial).

[34] TBS and Hellaby have filed an appearance and protest to jurisdiction in respect of the counterclaims against them. The grounds of objection are the arbitration agreement and s 79 of the CCA.

The Body Corporate's counterclaim against Maynard Marks

[35] The Body Corporate also counterclaims against Maynard Marks and HOBANZ. It pleads three causes of action against Maynard Marks. The first is for breach of their agreement for Maynard Marks to provide design, procurement and implementation services to the Body Corporate. The Body Corporate claims that Maynard Marks breached the obligations in that agreement by failing to identify the Further Defects; failing to properly advise the Body Corporate about the most

economical option of demolishing and rebuilding the Complex; failing to advise the Body Corporate that it was not in its best interests to agree to a costs-plus-agreed-margin approach to variations in the Construction Contract; continually approving variation orders and requests by TBS when it knew (or should have known) that the information to justify the request was insufficient and the variations would lead to an escalation in the cost of the repair works; failing to properly supervise the repair works; and certifying the Remaining Defects as complete in accordance with the building consents and plans when it issued practical completion certificates and final completion certificates.

[36] The second cause of action against Maynard Marks in negligence involves similar claims, with the addition of allegations concerning failures by Maynard Marks in relation to its 2010 investigation and report to the Body Corporate. Its third cause of action is for breach of s 9 of the Fair Trading Act 1986.

[37] The Body Corporate claims the costs of remedying the Remaining Defects, or orders for specific performance requiring Maynard Marks to do everything and meet all costs necessary to repair the Remaining Defects to the required standards.

[38] In relation to the second and third causes of action, it claims in the alternative an inquiry into its losses because of the lost opportunity to demolish and replace the Complex, and damages accordingly.

The Body Corporate's counterclaim against HOBANZ

[39] The Body Corporate pleads three causes of action by way of counterclaim against HOBANZ: breach of contract, negligent misstatement and breach of s 9 of the Fair Trading Act 1986. These causes of action focus on alleged failures of HOBANZ when advising the Body Corporate to proceed with the repair works; enter into the Construction Contract and the Variation Agreement; pay for variations to the Construction Contract and/or to follow Maynard Marks' advice to accept variations; and pay the full amount of the Variation Agreement considering the Remaining Defects.

[40] The Body Corporate seeks an inquiry into the losses because of these alleged breaches in terms of the lost opportunity to demolish and replace the Complex, or, in the alternative, the costs of remedying the Remaining Defects.

TBS's application for summary judgment

Legal principles

[41] Rule 12.2(1) of the High Court Rules 2016 provides:

> The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[42] The relevant principles governing a summary judgment application are well established:[7]

> The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[43] The wording of r 12.2 ("*may* give judgment") indicates a residual discretion. Having regard to the various authorities, the position appears to be as follows:[8]

> (a) The discretion implied by the use of the word "may" is to be restrictively applied. In a great majority of cases, once the court is satisfied the defendant has no defence, there is no room for the exercise of discretion.
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> (b) The residual discretion may be invoked to avoid oppression or injustice to the defendant where:

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7 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

8 *McGechan on Procedure* (online ed, Thomson Reuters) at [HR12.2.11].

(i) The proceeding involves the actions or possible liability of a third party which is not before the court;

(ii) The proceedings are such that the opportunity should be given to allow discovery or other interlocutory applications to be concluded;

(iii) The circumstances of the case disclose very unusual features, the presence of which leads the court to conclude that the entry of summary judgment would be oppressive or unjust; or

(iv) The combination of complex issues of fact and law justify the dismissal of the application for summary judgment, either as a matter of discretion or because the court cannot be satisfied that the defendant has no defence.

(c) Even where the court is not satisfied that a defence has been made out, in exceptional circumstances the application may be adjourned to allow for other processes to be followed.

[44] Summary judgment is available for payment claims under the CCA.[9]

Submissions

[45] TBS submits that the Body Corporate has no arguable defence to its application for summary judgment because the amount claimed is a debt due and payable according to s 24 of the CCA. Section 79 of the CCA prevents the Court from giving effect to the Body Corporate's counterclaim (which it says is without merit in any event).

[46] The Body Corporate opposes summary judgment on the basis that:

(a) it has an arguable defence on the merits;

(b) there are serious policy and natural justice reasons weighing against summary judgment;

(c) summary judgment will not finally determine the substantive dispute between the parties and so does not promote the just, speedy and inexpensive resolution of the dispute;

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9 *George Developments Ltd v Canam Construction* Ltd [2006] 1 NZLR 177 (CA) at [41]; *West City Construction Ltd v Edney* (2005) 17 PRNZ 947 (HC) at [12]; *NZI Bank Ltd v Philpott* (1988) 1 PRNZ 560 (HC) at 565.

(d) ordering summary judgment would be oppressive, unjust and prejudicial so the Court should exercise its residual discretion not to enter summary judgment.

Does the Body Corporate have an arguable defence?

[47] The "arguable defence" advanced by Mr Hollyman QC, for the Body Corporate, has two limbs to it. First, that the works are incomplete and/or defective. The Body Corporate relies on expert evidence of Mr Antony Clune, Mr Ronald Green and Mr Geoff Bayley on the nature and extent of the Remaining Defects.

[48] Second, the Body Corporate says that TBS's entitlement to be paid depends on the success of the Body Corporate's counterclaim against Maynard Marks. It says that if the Body Corporate is successful against Maynard Marks, it would seriously impact TBS's entitlement to payment.

[49] In my view neither of these arguments establish an arguable defence when considered in the context of the CCA. The payment scheme established by that legislation provides that a payee serves a payment claim on the payer for payment. A payer may respond to a payment claim by providing a payment schedule to the payee, stating the amount the payer intends to pay ("the scheduled amount"). If a payer does not provide a payment schedule within the time required by the relevant construction contract (or 20 working days if the contract does not provide for the matter), the payer becomes liable to pay the claimed amount.[10]

[50] The NZS3910, incorporated into the Construction Contract, modifies this process by providing for provisional progress payment schedules.[11] The Project Engineer assesses the Contractor's payment claims and issues a Provisional Progress Payment Schedule in response to each payment claim. The Principal can then notify the Project Engineer and Contractor of any amendments or deductions that the Principal intends to make from the sum certified by the Engineer. The Engineer issues a replacement Progress Payment Schedule with a revised scheduled amount. If the

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10 Section 22.
11 Section 12.2.

Principal does not notify any amendments or reductions within the specified time, the Provisional Progress Payment Schedule becomes the final Progress Payment Schedule. The scheduled amount is payable by the Principal within 17 working days of service of the Contractor's payment claim.

[51] Section 24 of the CCA provides that if a payment schedule indicates the scheduled amount the payer proposes to pay to the payee and the payer fails to pay by the due date, the payee may recover from the payer as a debt due to the payee, in any court, the unpaid portion of the scheduled amount and the actual and reasonable costs of recovery awarded against the payer by that Court.

[52] The Body Corporate does not deny in its statement of defence and counterclaim that the payment claims underpinning TBS's Claimed Debt were made, provisional Progress Payment Schedules were issued by Maynard Marks as Project Engineer, and that no deductions or amendments were notified by the Body Corporate to the provisional Progress Payment Schedules. Nor did Mr Hollyman QC argue that before me. It follows, as a function of the provisions of the Construction Contract and the CCA, that the Provisional Progress Payment Schedules became final Progress Payment Schedules, and the amounts contained in those schedules are payable by the Body Corporate to TBS as a debt, which TBS can recover in any court.

[53] I do not accept that the Body Corporate's allegations about the Remaining Defects provide an arguable defence to TBS's claim to the Claimed Debt. These allegations are pleaded as a *counterclaim* against TBS, not a defence or abatement.[12] As a general proposition, the existence of a counterclaim alone does not foreclose summary judgment.[13] Further, the Body Corporate is prevented from raising this counterclaim in TBS's proceeding to recover the Claimed Debt, by s 79 of the CCA. That section provides that in any proceedings for the recovery of a debt under s 24 (as here):

> **79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**

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12 Statement of Defence and Counterclaim, dated 1 September 2020, from [22].

13 *Roberts Family Investments Ltd v Total Fitness Centre (Wellington) Ltd* [1989] 1 NZLR 15 (HC).

> … the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if —
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> (a) judgment has been entered for that amount; or
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> (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[54] The exceptions at s 79(a) and (b) do not apply. The Court must not give effect to the Body Corporate's counterclaim in this proceeding which TBS brings to recover the Claimed Debt.

[55] As to the conduct of Maynard Marks, I can see no reason why issues between the Body Corporate as Principal and Maynard Marks as Project Engineer might invalidate the payment scheme that arises through the Construction Contract and the CCA, on which TBS relies. Mr Hollyman QC did not explain how this might follow. The extent of the submission on this point is that TBS's entitlement to be paid depends on the success of the Body Corporate's counterclaim against Maynard Marks that it did not carry out its role as Project Engineer properly, particularly in relation to the approval of variations. There is a suggestion that the completion certificates should be set aside as invalid, but this proposition was not developed any further at the hearing. My view is that any failures of the Project Engineer as agent for the Body Corporate when administering the Contract, or otherwise, are matters to be resolved between the Body Corporate and Maynard Marks through the Body Corporate's counterclaim. I can see no basis for invalidating Progress Payment Schedules that have resulted from the process prescribed by the Construction Contract because the Project Engineer has allegedly not fulfilled their role.

[56] I conclude that the Body Corporate does not have an arguable defence to TBS's claim to the Claimed Debt.

[57] The Body Corporate submits that it is doubtful whether the purpose of TBS's application for summary judgment adheres to the purpose of the statutory payment scheme in the CCA on which TBS relies. That purpose is "to facilitate regular and timely payments between the parties to a construction contract".[14] The Body

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[14] Construction Contracts Act 2002, s 3(a).

Corporate submits that this is not a case where the work is ongoing and cashflow the 'lifeblood' of TBS, which needs regular and timely payments to keep construction works continuing and to meet its own obligations.

[58] The Body Corporate emphasises that TBS has already been paid $32.5 million out of a $35 million contract. TBS is now attempting to enforce the Claimed Debt for Hellaby. The Body Corporate submits that these circumstances are far from a simple attempt by TBS to avail itself of the CCA for cashflow during construction works.

[59] I accept that the circumstances of this case are perhaps not what the statutory scheme was designed to address (where cashflow between the Principal, Contractor and sub-contractors is critical to keep construction progressing). But that does not permit a departure from the terms of the Construction Contract, to which the Body Corporate agreed; or the CCA. I will respond to this submission more fully, and that concerning the objective of the High Court Rules 2016, in the context of the Court's residual discretion.

Residual discretion

[60] The Body Corporate contends that whether intentional or not, TBS's application for summary judgment is an oppressive use of the Court procedure because it applies financial and emotional pressure on the Body Corporate and its members and avoids addressing the substantive issue (the Remaining Defects).

[61] It submits that the circumstances here are like those in cases such as *Sayles v Sayles*[15] and *Herring v Herring*[16]. In the former case, Justice Wylie found that he was "entitled to look at the practicalities of the situation" to determine whether injustice may be caused or whether the summary judgment procedure is being used, whether intentionally or not, as an instrument of oppression.

[62] In *Herring* Justice Ellen France had regard to *Sayles* when deciding that the Court should exercise its residual discretion to decline summary judgment because:[17]

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15 *Sayles v Sayles* (1986) 1 PRNZ 95 (HC).
16 *Herring v Herring* [2010] NZCA 500, [2011] 2 NZLR 433.
17 At [29].

> …of the nature of the underlying issues and the desirability of resolving all of the issues between the parties, we consider summary judgment should be declined. **This is a case where, as in *Sayles*, the grant of summary judgment will entail "some injustice" and, "whether intentionally or not"[18] an oppressive use of the procedure of the Court.** Accordingly, we dismiss the appeal.
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> (emphasis added)

[63] The Body Corporate submits that if summary judgment is not declined, it will be unable to afford to bring its counterclaim, resulting in the real issues (completeness of the construction works) being unresolved:

(a) the Body Corporate's Committee and the unit owners are "financially strapped";

(b) there is a suggestion that the remedial project is one of the most expensive in New Zealand (or was at the time);

(c) there are outstanding general levies owed by unit owners to the Body Corporate totalling approximately $47,739, and remedial levies outstanding of $460,325; and

(d) raising levies any further would almost certainly result in several unit owners being forced by their banks to sell their units in mortgagee sales.

[64] Consequently, the Body Corporate submits that there is a high likelihood that if TBS obtains summary judgment and/or can delay the Body Corporate pursuing its counterclaim, the Body Corporate will be unable to gain support from unit owners or be unable afford to pursue TBS for the Remaining Defects through the counterclaim.

[65] The Body Corporate also submits that summary judgment will not determine the substantive issues between the parties; and will not meet the objective of the High Court Rules 2016 to secure the just, speedy and inexpensive determination of any proceeding or interlocutory application.[19] Other parties (namely Maynard Marks and

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18 At 8.
19 High Court Rules 2016, r 1.2.

HOBANZ) are tied up in TBS's failures and are part of the Body Corporate's counterclaim.

[66] The Body Corporate contends that the most just outcome is for TBS to address and deal with the Body Corporate's concerns in its counterclaim, relating to the Remaining Defects. Further, the quickest way for the substantive dispute (being the existence/remedy of the Remaining Defects) to be solved is not summary judgment, but for TBS to address the substantive issues.

[67] The Body Corporate is also concerned that if the remainder of the contract price is paid to TBS, TBS will simply pay the money to Hellaby and walk away without remedying the Remaining Defects. It says that Hellaby, an Australian financial company, has no incentive to assist the Body Corporate to remedy the Remaining Defects. It also notes that there is no evidence before the court about TBS's solvency position following its sale.

Discussion

[68] Before addressing the Body Corporate's submissions, I consider closely the two authorities on which it relies, where the court exercised its residual discretion to decline summary judgment.

[69] *Sayles* was a dispute between former de facto partners over property. The plaintiff, Mr Sayles, sought summary judgment on a claim for an order under s 140 of the Property Law Act 1952 directing the sale of a house property owned by him and the defendant, Mrs Sayles, as tenants-in-common in equal shares. In separate proceedings commenced just prior to the summary judgment proceeding, Mrs Sayles sought a declaration as to the ownership of various assets, including the house property, which she said had been acquired with a cash deposit she provided and with the common intention that the property be shared equally. From Mr Sayles' defence it was clear that all the assets acquired during their relationship were in dispute. Mrs Sayles wanted all outstanding disputes concerning their property to be resolved at one time and to have the opportunity to buy Mr Sayles' interest in the house property, in which she still lived with her children from a former relationship, using the proceeds

of sale of other assets. It was common ground that under s 140 the court must direct sale or division and that the latter was impracticable.

[70] His Honour Wylie J observed that the whole of the property acquired by Mr and Mrs Sayles during their cohabitation was now the subject of two separate proceedings but which, had they been married, would have been proceedings under the Matrimonial Property Act 1976. His Honour proceeded on the assumption that Mr Sayles was entitled to his order and continued:[20]

> The real issue which I have to consider is whether on that assumption it is nevertheless appropriate for me not to enter summary judgment in the exercise of the discretion conferred on the Court by r 136. It is to be observed that under that rule even though the plaintiff satisfies the Court that a defendant has no defence to a claim the Court *may* give judgment against the defendant, but is not directed to do so. Because the whole issue of what, had the parties been married, would have been termed matrimonial property is in dispute between the parties my inclination is not to allow the plaintiff to take advantage of the summary judgment procedure in order to resolve one of the matters in dispute in such a way that it can no longer be brought into account in balancing the ultimate resolution of the other matters in dispute between the parties.
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> The question I have to resolve is whether that inclination is a sufficient basis on which I can exercise my discretion to refuse summary judgment notwithstanding that the plaintiff may have satisfied the requirements of r 136. In considering that question I have to bear in mind that at any rate, as the defendant's statement of claim in her proceedings at present stands the ownership of the house property is not itself in dispute…
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> The net result of those considerations is that if the present application is declined so that the plaintiff's claim proceeds as an ordinary action and takes its place in the hearing lists either before, at the same time as, or subsequent to, the defendant's own proceedings, there will still be no opportunity or jurisdiction for the Court to do other than order a partition or sale. More specifically the Court will not be able to exercise the sort of jurisdiction to deal with the property that it could had proceedings been truly related to matrimonial property. That must militate strongly against the exercise of the discretion not to grant summary judgment.
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> On the other hand I think I am entitled to look at the practicalities of the situation and in particular to take into account whether the application of the summary judgment procedure to one aspect of the matters in dispute between the parties may result in some injustice to the party against whom summary judgment is given in relation to the other aspects of the overall dispute. In my view it ought to be a material factor in the exercise of the discretion as to whether some injustice may be caused or whether the procedure of the Court may be used whether intentionally or not as an instrument of oppression.

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20 *Sayles*, above n 16, at 97–98.

> If the plaintiff obtains an order for sale it may well be on terms that the sale be by auction and that the defendant be allowed to bid thereat and become the purchaser… If that proves to be the outcome it would seem to me to be wrong that the streamlined summary judgment procedure should be used to achieve that outcome so far ahead of the resolution of the other disputes in the ordinary course of trial. A likely consequence of that would be that the defendant may be deprived of the opportunity to exercise the right to bid for and purchase the property, by reason of her inability to finance the purchase of the plaintiff's half share because of lack of resolution of their other disputes.
>
> …
>
> In the absence of authority, I would be content to exercise the discretion given by r 136 to refuse summary judgment on that ground. I am not aware of any authority yet in New Zealand as to the exercise of the discretion (the procedure having been introduced only at the beginning of this year) but the matter is discussed by reference to English authority in *McGechan on Procedure* in note (7) to r 136. In considering the English cases under O 14 r 3 it is to be noticed that O 14 r 3(i) contains express reference to the defendant satisfying the Court either that there is an issue in dispute which ought to be tried, "or that there ought for some other reason to be a trial". Although the latter provision is not included in r 136 I think that the discretionary "may" in r 136 encompasses the same concept, and is not to be read in the restricted way indicated by Robert Goff LJ (as he then was) in *European Asian Bank v Punjab and Sind Bank* [1983] 2 All ER 508 at 515 e-h…In my view it must be given its full discretionary meaning.
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> (emphasis added)

[71] Wylie J considered the alternative of adjourning the application until the defendant's claim could be heard. His Honour decided that while that course had its attractions, it would be avoiding the issue of exercise of the discretion and might unfairly disadvantage the plaintiff by putting his action on hold. He concluded that should not be the result of a decision that the summary judgment procedure is not appropriate. Rather, the plaintiff's action should be returned to the ordinary list. That gave the defendant the option, if she thought fit, to seek that the actions be consolidated or heard together, or in immediate succession, and the plaintiff could oppose.

[72] *Herring* also concerned the financial affairs of a couple after their separation. Mr and Mrs Herring were married, and during the marriage they set up a family trust and transferred ownership of their family home and the majority interests in three companies to the trust. The trust's acquisitions were funded by advances from Mr and Mrs Herring to the trust. They then gifted part of the debt owing to them to the trust each year. The couple had a family company called Webpower Ltd. Each owed a considerable debt to Webpower in their personal capacities.

[73] Following the breakup of their marriage, Mr Herring demanded repayment of the sum owed to him personally by the trust. When payment was not forthcoming, he applied to the High Court for summary judgment. Mrs Herring resisted summary judgment. One of the grounds for her opposition was that the debt Mr Herring owed Webpower had been assigned to her in her capacity as trustee, and that this afforded her an equitable set-off against the debt owed to Mr Herring by the trust.

[74] In the High Court, Fogarty J considered it arguable there was an equitable set-off and refused summary judgment.[21] The Court of Appeal disagreed, concluding that it was not arguable that Mrs Herring had an equitable set-off. The Court then considered whether to exercise the residual discretion. The Court said:[22]

> [26] There is precedent for exercising the residual discretion to decline summary judgment in circumstances similar to the present. In *Sayles v Sayles,* Wylie J confirmed that there was a residual discretion and that the Court can look at the injustice to the defendant arising out of other aspects of the overall dispute between the parties. A similar approach has been taken in the United Kingdom. The relevant rule is worded differently,[23] but there too a concern that all matters relevantly of dispute should be determined together has provided a basis for exercising the discretion to decline to grant summary judgment.[24]
>
> [27] We understand that if summary judgment is entered, then [Mrs Herring] will have to realise some assets. That may involve the sale of the matrimonial home. **Given that the parties are unable to reach agreement, how their relationship property is to be divided and how the trust property is to be dealt with are matters that should be resolved in the context of proceedings under the Property (Relationships) Act 1976 and s 182 of the Family Proceedings Act 1980. Such proceedings will enable a comprehensive assessment of the parties' respective positions to be undertaken, which is to be contrasted with the limited focus of the present proceedings**.
>
> …
>
> [29] Because of the nature of the underlying issues and the desirability of resolving all of the issues between the parties, we consider summary judgment should be declined. This is a case where, as in *Sayles,* the grant of summary judgment will entail "some injustice", and "whether intentionally or not" an oppressive use of the procedure of the Court. Accordingly, we dismiss the appeal.

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21 *Herring*, above n 17.

22 *Herring*, above n 17.

23 Rule 24.2(b) of the Civil Procedure Rules 1998 (UK) provides the court may give summary judgment only if "there is no other compelling reason why the case or issue should be disposed of at trial".

24 *Trafalgar House Ltd v General Surety Co* [1996] 1 AC 199 (HL) at 210; Miles *v Bull* [1969] 1 QB 258 (QB) at 266.

[75] Of note, Harrison J dissented on the residual discretion finding. He said:

> [33] The grounds upon which a Court may exercise its discretion in a defendant's favour once a plaintiff has proven there is no defence to a claim are very limited.[25] The discretion is only of the most residual kind.[26] The ground relied upon by Arnold and Ellen France JJ is the possibility of oppression or injustice to [Mrs Herring]. However, the circumstances will be rare where a plaintiff who has shown there is no arguable defence will be denied summary judgment.[27] An example of such a rare case is *Sayles v Sayles.*
>
> [34] In my judgment the discretion is residual in the sense that it should only be invoked to prevent an oppression or injustice **which results from or is incidental to the use of the summary judgment procedure itself, normally where it would deprive a defendant of an opportunity to avail himself or herself of a material procedural right.** That is why, for example, the discretion may be available where entry of summary judgment might pre-empt rights of discovery of documents going to the underlying merits of the claim or defence, or rights of joinder of third parties, possibly affecting the overall incidence of liability. In *Sayles* the defendant had already issued a proceeding seeking a declaration as to ownership of assets acquired together with the plaintiff during their relationship; the plaintiff responded by applying for summary judgment, relying on a different legal entitlement, which if granted might defeat or prejudice the defendant's existing claim to the same property. It was the use of the summary judgment procedure in those unusual circumstances which was potentially unjust or oppressive in *Sayles.*
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> (emphasis added)

[76] These cases were decided in a very different context to the present. Both cases were relationship property cases where an overall reconciliation of the issues between the former couples was considered strongly desirable. In *Herring*, the Court of Appeal concluded that the division their relationship property and resolution of issues relating to trust property should be resolved at the one time as part of a comprehensive assessment of their respective positions.

[77] Here, the CCA works in the opposite direction. Parliament's purpose in enacting the legislation was to facilitate the efficient resolution of claims for payments under construction contracts. To achieve this, the CCA separates out the resolution of counterclaims, set-off and cross-claims from straightforward claims for recovery of debts crystallised through the payment claim / payment schedule process.

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25 *Bromley Industries Ltd v Martin and Judith Fitzsimons Ltd* [2009] NZCA 382, (2009) 19 PRNZ 850 at [65].

26 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 5.

27 *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [30].

[78] The Body Corporate's submissions about the objective of the High Court Rules (to achieve a just, speedy and inexpensive resolution of the dispute), and the desirability of resolving the substantive issues (the Body Corporate's counterclaims) at the same time as TBS's claim to the Claimed Debt, need to be seen in that context. While hearing all the issues between parties at one time is typically preferable, the specific statutory context here does not permit it. Specifically, s 79 of the CCA prevents the Court from giving effect to the Body Corporate's counterclaim when determining TBS's claim to be paid under the Construction Contract.

[79] This highlights an important difference to the situation faced by Wylie J in *Sayles.* In that case, his Honour acknowledged that the outcome of the plaintiff's claim would not be any different if he declined summary judgment: the Court could only order sale or division of the property (this latter option being impractical). However, he considered the practical reality and the fact that an order for sale so far in advance of determination of the defendant's proceedings would unjustly deprive her of the opportunity to participate in the auction. Whereas if summary judgment was declined, the plaintiff's proceeding would return to the normal list and the defendant would have the option of applying for consolidation of the two proceedings, or that they be heard in immediate succession, thereby addressing that injustice.

[80] Here, there is no prospect of the Body Corporate's counterclaim against TBS being determined as part of TBS's proceedings for the Claimed Debt, even if summary judgment is declined. In that event, TBS's claim would progress according to the normal timeline, requiring the parties to go through the usual interlocutory processes and on to a trial. The Body Corporate would still face the insurmountable obstacle of s 79 of the CCA which prevents it raising its counterclaim against TBS's claim to the Claimed Debt. Indeed, TBS has protested the jurisdiction of the Court to hear the counterclaim based on the existence of an arbitration agreement *and* s 79 of the CCA, a protest which would surely result in an application for a stay or strike-out based on s 79 if TBS's present application is unsuccessful.[28] I conclude that the Body Corporate's arguments about the desirability of having all the issues between the

[28] Appearance and Protest to Jurisdiction, dated 12 October 2020, at [2(k)].

parties resolved together do not provide a foundation for me to exercise my residual discretion to decline summary judgment.

[81] I consider the situation is rather more analogous to that in *Westgate Town Centre Ltd v Auckland Council*.[29] There, Auckland Council sought summary judgment for a debt said to be due and owing pursuant to two contracts relating to the development of a new town centre. Justice Wylie granted the application. Relevant for our purposes, he refused to exercise his r 12.2(1) residual discretion. Westgate Town Centre Ltd had argued that the discretion should be exercised to avoid oppression or injustice; entering summary judgment would impose significant costs on it and the third plaintiff as they would need to borrow funds to satisfy the judgment, pending determination of their own substantive claims against Auckland Council and Auckland Transport.[30] Justice Wylie disagreed, citing *Dominion Breweries Ltd v Countrywide Banking Corp Ltd* and *Bromley Industries Ltd v Martin & Judith Fitzsimons Ltd*.[31] There could be no oppression or injustice to Westgate Town Centre Ltd, in the light of the no-set-off provision in one of the contracts. In *Bromley*, the Court of Appeal had observed:[32]

> The principle of [*Dominion Breweries*] was that once the Court accepted that the parties had contracted out of the right of set-off, to then use the residual discretion to defeat the application for summary judgment because of the potential claim for set-off would be to frustrate entirely the commercial purpose of the contractual bargain the parties had made.

[82] Similarly, the Body Corporate could be said to have contracted out of the right to counterclaim by entering into a contract governed by the CCA. For me to then use the residual discretion to defeat the application for summary judgment because of the counterclaim would be to frustrate the purpose of the CCA.

[83] There is a second thread to the Body Corporate's appeal to the Court's discretion – that the Body Corporate may be unable to advance its counterclaim against TBS (and perhaps Maynard Marks and HOBANZ) if summary judgment is ordered, as it may be unable to raise the funds to support the litigation and/or gain the support

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29 *Westgate Town Centre Ltd v Auckland Council* [2018] NZHC 2489.
30 At [86].
31 *Dominion Breweries Ltd v Countrywide Banking Corp Ltd* CA314/91, 18 August 1992; *Bromley Industries Ltd v Martin & Judith Fitzsimons Ltd* [2009] NZCA 382, (2009) 19 PRNZ 850.
32 At [64].

of the unit holders. This submission really goes to possible injustice arising out of the Body Corporate being required *to pay* the judgment sum, rather than having judgment entered against it. In my view, given the specific statutory and contractual context of this case, that possible injustice is more appropriately considered in the context of the Body Corporate's application to stay enforcement of the summary judgment, if ordered.

[84] Accordingly, I am not persuaded that the circumstances of this case justify me exercising my residual discretion to decline summary judgment. I have concluded that the Body Corporate has no arguable defence. The effect of giving summary judgment is that TBS's claim to the Claimed Debt is determined separately and ahead of the Body Corporate's counterclaim. As I have already discussed, that counterclaim cannot be raised in relation to TBS's claim anyway. That is regrettable for the Body Corporate, but that is the effect of the CCA payment regime. The cases relied on by the Body Corporate do not have this feature – a statutory payment scheme which expressly prohibits counterclaims from being raised to defeat the plaintiff's claim.

[85] In my assessment, the real risk of injustice and/or oppression arises out of the Body Corporate being required to pay the judgment sum in circumstances where that may prevent it being able to advance its counterclaim against TBS (and others). I will consider this issue next.

The Body Corporate's application for stay of enforcement

Legal principles

[86] Rule 17.29 of the High Court Rules 2016 states:

> A liable party may apply to the court for a stay of enforcement or other relief against the judgment upon the ground that a substantial miscarriage of justice would be likely to result if the judgment were enforced, and the court may give relief on just terms.

[87] Rule 17.29 is concerned with the risk of substantial injustice resulting from enforcement of the judgment, not from the judgment itself.[33]

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[33] *Palmerston North City Council v Birch* [2012] NZHC 3248 at [17].

[88] The principles of applications for stay of enforcement under r 17.29 are explained in *McGechan on Procedure*,[34] referencing *Bay Cities Real Estate Ltd v Re/Max New Zealand Ltd*.[35] In summary they are:

(a) The onus is on the applicant for a stay of enforcement to persuade the Court to exercise its discretion.

(b) A "substantial miscarriage of justice" must be involved. This means something more than minor or insubstantial.

(c) The substantial miscarriage of justice must be "likely to result" if the judgment were enforced. This means that such a miscarriage is probable rather than possible.[36] The test may be expressed as "a real and substantial risk".[37]

(d) The Court must undertake a balancing exercise where it recognises and reconciles the conflicting interests of both parties in such a manner as will best serve the overall interests of justice.[38]

(e) A miscarriage of justice is unlikely to result where a party is required to pay to another an amount that is owing to it and the paying party is free to pursue its counterclaim in the normal way.[39]

(f) Other factors including:[40]

(i) the apparent strength or weakness of the claim or counterclaim;

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34 *McGechan on Procedure* (online ed, Thomson Reuters) at [HR17.29.02].
35 *Bay Cities Real Estate Ltd v Re/Max New Zealand Ltd* HC Napier CIV-2010-441-134, 8 June 2011, at [19].
36 *Crawford v Odin Enterprises Pty Ltd* [2009] NZCA 199 at [29].
37 *Bay Cities Real Estate*, above n 36, at [28].
38 *Enright v Gold Metal Exports Ltd* (1989) 3 PRNZ 243 (HC) at 245–246.
39 *Econotek Construction Ltd v Kale* HC Gisborne CP8/87, 7 January 1988 at [8].
40 *Raffles Education Corporation Ltd v Mills* HC Auckland CIV-2008-404-5258, 16 February 2009; *Goldsmith v Drummond* HC Christchurch CP201/97, 21 July 1998; *New Zealand Apple and Pear Marketing Board v Wallis* (1990) 4 PRNZ 713 (HC).

(ii) any explanation as to why the counterclaim was not raised as an answer to the claim on which the judgment is based;

(iii) the ability of the applicant for the stay to meet the judgment that is being enforced;

(iv) the potential bankruptcy or liquidation of a party seeking to pursue an apparently strong claim.

[89] In *Roberts Family Investments Ltd v Total Fitness Centre (Wellington) Ltd*, McGechan J observed:[41]

> As to counterclaim, it is not in itself a defence, although the rules provide for offsetting judgments. Without more, therefore, the existence of a mere counterclaim does not foreclose summary judgment. This is where r 142(2) comes in. Rather than give an immediately enforceable judgment to the plaintiff on the plaintiff's claim, perhaps allowing the plaintiff to bankrupt the defendant before the latter's counterclaim can be brought to judgment and offset, the Court may and commonly does grant the plaintiff summary judgment accompanied by stay of execution of such judgment pending resolution of the counterclaim, or occasionally dismisses the summary judgment application, directing trial of both claim and counterclaim.

[90] Similarly, in *Wroxton Finance Ltd v Walton* a stay was ordered for a period based on a plea of hardship by the defendant pending the outcome of proceedings he had against other entities.[42]

[91] This Court may also order a stay of enforcement relying on its inherent jurisdiction to make any order necessary to enable it to act effectively. That inherent jurisdiction may be exercised even in respect of matters regulated by the rules of the Court, if it does not contravene those rules.[43] In *Pinson v Pinson,* Smellie J relied on the Court's inherent jurisdiction to stay enforcement of a judgment in the Family Court. In doing so he referred to the classic lecture delivered by Master Jacob of the Supreme Court of the United Kingdom on the inherent jurisdiction of superior courts:[44]

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41 *Roberts Family Investments*, above n 14, at 92.
42 *Wroxton Finance Ltd v Walton* [2013] NZHC 1399.
43 *Pinson v Pinson* (1991) 5 PRNZ 177.
44 Master Jacob "The inherent jurisdiction of the Court" [1970] CLP 23 at 51, as cited in *Pinson v Pinson* (1991) 5 PRNZ 177 at 178.

> The inherent jurisdiction of the Court may be defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure fair trial between them.

The Body Corporate's submissions

[92] The Body Corporate's reasons for applying for a stay of enforcement of summary judgment echo those given in support of its appeal to the Court's residual discretion to decline to order summary judgment. They can be summarised as:[45]

(a) The remedial work is incomplete and defective, despite unit owners having paid $32 million to TBS. Unit holders should not have to pay TBS more for work that is incomplete and/or defective.

(b) Concerns that TBS is now a shell company and will pay the Claimed Debt to Hellaby and walk away once it is paid, without remedying the Remaining Defects.[46]

(c) Many Body Corporate members are "cash-strapped" and cannot afford to meet the judgment debt. A requirement to pay more would almost certainly result in some owners being forced to sell or see their bank sell in mortgagee sales. The Body Corporate currently has outstanding general levies owing by unit owners totalling approximately $47,739, and remedial levies outstanding at $460,325. It has commenced formal debt collection measures against one owner for non-payment of levies.

(d) Recent indications from banks that they will not lend to purchasers wanting to purchase units at the Complex because of the ongoing defects and the litigation.

(e) Enforcement of the judgment will mean that the Body Corporate will be unable to afford to pursue its counterclaim or unable to gain support

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45 Affidavit of Melanie Jayne Norris, sworn 11 September 2020.
46 Affidavit of Michael Shane Flood-Smith, sworn 6 May 2019, at 38(a).

from unit holders to pursue its counterclaim against TBS for defective and incomplete remedial works.

(f) A belief that TBS and Hellaby are aware of the financial constraints of the Body Corporate and are using this to their advantage to pursue summary judgment to prevent the counterclaim being advanced.

[93] The Body Corporate submits that the circumstances of this proceeding are in many aspects analogous to those in *New Zealand Apple and Pear Marketing Board v Wallis*.[47] The NZ Apple and Pear Marketing Board sought judgment against the defendant for goods supplied to him. The Court concluded that there was no basis for not entering summary judgment against Mr Wallis. The defendant requested a stay of execution of any judgment or order to enable him to prosecute a counterclaim. The defendant was financially struggling, and it was suggested that if the plaintiff could enforce its summary judgment, the defendant may be forced into bankruptcy prior to his counterclaim reaching a hearing. Master J H Williams QC referred to the judgment of Wylie J in *Amalgamated Finance Ltd v Fairlie*[48] and said that:[49]

> The onus is on Mr Wallis to establish both the likelihood and the substantial nature of any miscarriage of justice and he needs to show that it is probable rather than possible.

[94] The Court also referred to the decision of Tompkins J in *Econotek Construction Ltd v Kale*[50] and said:[51]

> There is, of course, no question but that the Apple and Pear Board will be able to meet any judgment which Mr Wallis might ultimately obtain against it on his counterclaim. But the converse is unlikely to be the case. Such evidence as there is before the Court suggests that Mr Wallis has been unable to obtain alternative employment since the termination of his contract with the Apple and Pear Board in May of this year and that he has little in the way of assets.
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> …
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> It follows therefore, that if a stay of execution is not entered, then as McGechan pointed out in the *Roberts Family Investment* case, there will be nothing to prevent the Apple and Pear Board moving to execution or to any

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47 *New Zealand Apple and Pear Marketing Board*, above n 41.
48 *Amalgamated Finance Ltd v Fairlie* HC Auckland A1232/AB3, 3 September 1986.
49 At 716.
50 *Econotek*, above n 40.
51 At 716–717.

> other of its creditors' remedies against Mr Wallis, and perhaps even bringing about his bankruptcy prior to his counterclaim reaching a hearing. As Tompkins J put it in *Econote[k] Construction*, the defendant must "be free to pursue his claim against the plaintiff in the normal way", but it seems clear in this case, the defendant would not be free to pursue his claim because of the financial circumstances in which he finds himself.
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> The Court, having found therefore that none of the aspects of Mr Wallis' counterclaim are capable of rejection at this stage, and having reviewed the financial circumstances on the evidence such as it is, the Court is driven to the conclusion that if no stay of execution is entered in respect of the judgment in the board's favour, there is every chance of a substantial miscarriage of justice occurring. In those circumstances there will be an order that execution on the judgment entered against the defendant in this matter be stayed pending resolution of Mr Wallis' counterclaim.

TBS's submissions

[95] TBS's grounds for opposing the application for stay of enforcement can be summarised as:

(a) TBS should have the fruits of the summary judgment;[52]

(b) The effect of a stay of enforcement of summary judgment would be to give effect to a counterclaim, contrary to s 79 of the CCA;

(c) The onus is on the party applying for a stay of enforcement to show a substantial miscarriage of justice would be likely, not simply possible, to result if the judgment were enforced;[53]

(d) A substantial miscarriage of justice is unlikely to result where a party is required to pay another an amount that is owing to it and the paying party is free to pursue a claim in the normal way;[54]

(e) It is not a miscarriage of justice for a party that has had the use of another's money to be required to repay that money or for a creditor to be able to take whatever steps it sees fit to pursue recovery.[55]

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52 *Raffles Education*, above n 41, at [12].
53 *Marac Finance v Twilight Trustee Ltd* HC Auckland CIV-2008-404-7291, 25 February 2009 at [9].
54 *Econotek*, above n 40, at [6].
55 *Marac*, above n 52, at [9].

(f) It is unjust for a creditor that is entitled to payment of a debt to wait for payment to be made while the debtor pursues their claim for an even greater sum of money.[56]

(g) A party applying for a stay of enforcement must provide detailed and credible evidence of impecuniosity to satisfy the Court that a substantial miscarriage of justice is likely if judgment is executed.[57]

[96] TBS maintains that the evidence does not justify a stay:

(a) The Body Corporate has received substantial taxpayer contributions towards the work from the Ministry of Business, Innovation and Employment (**MBIE**) under the Government's financial assistance package (**FAP**) scheme, totalling $10,289,498. This includes a final FAP contribution of $2,086,981.15 paid by MBIE on 14 December 2018. The Body Corporate has confirmed to MBIE that the funds will be used to pay the specified suppliers, including TBS,[58] but continues to withhold the funds.

(b) The Body Corporate has the benefit of a building warranty insurance policy with Stamford Insurance (providing a 10-year warranty to rectify major defects, including structural and weather-tightness issues, and cover for work carried out under the building consents, and all unforeseen work).[59] The Body Corporate appears not to have claimed under that policy.

(c) The unit holders have obtained enough funding to issue separate proceedings against Maynard Marks (CIV-2020-404-513).

(d) The evidence of impecuniosity is weak. It has not reached the standard required by r 17.29 to justify a stay of enforcement.

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56 *Heaven Farms Ltd v Aylett* HC Auckland CP480/87, 10 March 1998 at [7].
57 *Raffles Education*, above n 41, at [36].
58 Affidavit of Roger Henry Levie, affirmed 18 September 2020, at exhibit B.
59 Affidavit of Roger Henry Levie, affirmed 22 August 2019, at 51.

Discussion

[97] In assessing whether a substantial miscarriage of justice is likely to result if the judgment is enforced against the Body Corporate, I need to consider and balance the competing interests of TBS and the Body Corporate.

[98] For TBS, I accept that in the ordinary course a successful party should receive the fruits of a judgment entered in their favour. That must be the starting point. However, r 17.29 and the Court's inherent jurisdiction allows for exceptional situations where a stay of enforcement is warranted to prevent a substantial miscarriage of justice occurring. The question is whether there is a "real and substantial risk" that a miscarriage of justice may occur in the present situation.

[99] The essence of the Body Corporate's claim is that it has a credible counterclaim against TBS that the remediation work is incomplete and/or defective and unit holders should not be required to pay TBS before those defects are remedied or its counterclaim determined. Further, there is a real risk that it will be unable to afford to pursue that counterclaim if TBS enforces its judgment against it; or if it is able, it will be prolonged, more expensive and possibly fruitless as TBS is now a shell company and will immediate pay the judgment sum to Hellaby. Hellaby has no interest in assisting the Body Corporate by remedying the defects and completing the work.

[100] In terms of the counterclaim, the Body Corporate has filed affidavit expert evidence by a passive fire consultant (Ronald Peter Green), an expert quantity surveyor (Jeffrey Robert Bayley), and a senior project manager (Antony Clune). These experts identify, with reference to photographs, the aspects of the remedial work which they say are defective. Mr Green, a highly experienced passive fire consultant and building compliance expert, concludes that some of the passive fire protection works are defective. Mr Bayley identifies, with reference to photographs, numerous locations in two blocks where the required passive fire protection to the plasterboard lining is non-existent or contravenes the Building Code. He states that he has serious doubts that TBS in fact carried out the work that was required. Mr Bayley and Mr Clune quantify the cost to address these defects. Remedial works to the inter-tenancy

walls are quantified at approximately $25,600 per unit, or $2.5 million for all 99 units. Particle board floor replacement is quantified at approximately $1.8 million. In addition, Mr Bayley estimates work to the passage ceilings of each floor to rectify the passive fire defects, at $1.3 million. Other items quantified by Mr Clune are fire stopping power ($540,562), fire collars ($500,000), and fire stopping to car park ($70,000).

[101] TBS's General Manager, Michael Flood-Smith, gives evidence that many of the areas of work identified by the Body Corporate were outside the agreed scope of works. Mr Flood-Smith points out a number of alleged flaws in the evidence of Mr Clune. He says that TBS complied with the scope of works, architectural details, and council requirements for a code compliance certificate.

[102] My impression from the competing evidence, and it can only be an impression at this stage, is that the Body Corporate has a credible counterclaim against TBS in relation to the identified defective and incomplete repair work.

[103] I also consider that, given the dramatic cost escalation that occurred, the Body Corporate's claims about inadequate supporting information for variations and reliable cost information deserve to be heard.

[104] As to the risk that the Body Corporate will be unable to advance its counterclaim against TBS if summary judgment is enforced against it, I agree that the evidence of the financial position of the Body Corporate and/or individual unit holders is not as comprehensive or specific as it could be. The current chairperson of the Body Corporate attests to its poor financial position and the financial pressure unit holders are under.[60] The only evidence to support the assertion that Body Corporate members are "cash-strapped" is the schedule recording outstanding remedial levies owing to the Body Corporate of $460,325. However, there can be no doubt that the remediation costs to date will have placed a significant financial burden on unit owners. The cost of repair work to date is some $41 million. The Body Corporate has received an FAP contribution from MBIE of $10,289,498. That leaves a cost to unit owners of approximately $31 million; an average across the 99 units of over $300,000 each. It

[60] Affidavit of Melanie Jayne Norris, sworn 11 September 2020, at [13]–[14].

is not hard to imagine that a demand for further levies to meet the judgment sum could present a serious financial challenge to some if not many unit owners.

[105] There is uncontested evidence that the Body Corporate received a final FAP contribution of $2,086,981 from MBIE on 14 December 2018.[61] The Body Corporate holds the funds for payment of specified suppliers: TBS, HOBANZ and Maynard Marks and has undertaken as much to MBIE.[62] I accept that that would go some way to meet the judgment sum. However, the amount claimed by TBS including contractual interest is in the order of $3.6 million,[63] leaving the Body Corporate to find a further $1.4 million from unit owners.

[106] Further, there remains the risk that if the Body Corporate is required to pay the judgment sum to TBS (if it were able to raise the full amount) its ability to hold TBS to account for the alleged defective and incomplete works will be frustrated by the fact that TBS has been sold to an Australian-owned company[64] and is expected to immediately pay the judgment sum to Hellaby,[65] for whom it is enforcing the debt. Hellaby is not liable to the Body Corporate to repair defects nor to pay damages; as emphasised by Associate Judge Lester, the burden of a contract cannot be assigned.[66]

[107] As to TBS's submission that the Body Corporate has obtained funding to issue separate proceedings against Maynard Marks, it is reported in the news article in evidence that those proceedings are being funded by a litigation funder.[67] The existence of this litigation does not therefore dissuade me from accepting the Body Corporate's evidence of the financial constraints that it and individual unit owners are under. Nor does the suggestion that the Body Corporate is the beneficiary of a

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61 Affidavit of Roger Henry Levie, sworn 22 August 2019, at [29]; Affidavit of Melanie Jayne Norris, sworn 9 October 2010, at [4].

62 Affidavit of Roger Henry Levie sworn 18 September 2020 exhibit A.

63 TBS's Amended Statement of Claim, dated 3 August 2020, puts the sum contractual debt and interest at $3,574,301.16 as at 31 July 2020.

64 TBS is now called SRG Global Remediation Services (NZ) Ltd and is owned by SRG Global (Australia) Ltd: New Zealand Companies Office "SRG GLOBAL REMEDIATION SERVICES (NZ) LIMITED (4464559) Registered" (13 April 2021) Companies Register <http://app.companiesoffice.govt.nz>.

65 Affidavit of Michael Shane Flood-Smith sworn 6 May 2019 exhibit M at [2].

66 *Hellaby Resource Services Ltd v Body Corporate 197281* [2019] NZHC 2641 at [19], [20] and [27], citing *Xu v IAG New Zealand Ltd* [2019] NZSC 68 at [29] and *Linden Gardens Trust v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL) at 103.

67 Affidavit of Melanie Jayne Norris sworn 11 August 2020 Exhibit A.

building warranty insurance policy which it has allegedly not claimed on. There is no evidence before me of such a policy aside from a reference in a Body Corporate presentation and update to owners.[68] There is insufficient evidence for me to draw any conclusions from this reference.

[108] For all these reasons, I am not satisfied that if the Body Corporate is required to pay the Claimed Debt to TBS that it will be "free to pursue its claim in the normal way".

[109] I also bear in mind the following contextual factors when assessing whether there might be a miscarriage of justice if the Body Corporate is required to pay the judgment sum before its claims of defective and incomplete works are addressed one way or another.

[110] Unit owners have already paid TBS a sizeable sum: $32,500,000 of the contracted $35,000,000. This is against the background of an initial agreed contract value for the remedial works of $7.5 million. I note the opinion of Mr Clune, for the Body Corporate, that an increase of this magnitude, 500 per cent, over the life of a construction contract is quite extraordinary.

[111] It is true that the present circumstances fall outside the typical situation contemplated by the CCA payment regime. The intention behind the "pay now argue later" approach of the scheme, as discussed, is to keep cash flowing through a construction project. Here, construction is long finished, so that imperative does not exist. TBS has been sold to an overseas company and is bringing the action on behalf of the purported assignee, Hellaby. In addition, there is a real risk that unit owners will not be able to "argue later" (that is, advance their counterclaim). Individual unit owners have been pushed to their financial limit by considerable payments they have already made. This is not the typical set of circumstances for which the CCA regime is designed. The situation is indeed very similar to that faced by Master J H Williams QC in the *NZ Apple and Pear Marketing Board* case. If no stay of enforcement is entered in respect of the judgment in TBS's favour, there is a real prospect that a substantial miscarriage of justice will occur.

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[68] Affidavit of Roger Henry Levie sworn 18 September 2020 at [14]–[15].

[112] I do not accept TBS's submissions that the effect of a stay of enforcement would be to give effect to the counterclaim, contrary to s 79 of the CCA. Section 79 prevents the Court from giving effect to the counterclaim in TBS's proceeding under the CCA for recovery of the Claimed Debt. Judgment will be entered in TBS's favour on the basis that the Court cannot give effect to that counterclaim when reaching a judgment in that proceeding. The stay relates to enforcement of that judgment and is based on a real risk of miscarriage of justice. The Court's inherent jurisdiction provides the flexibility for the practical effect of a judgment to be managed in this way.

[113] Overall, when I balance the interests of TBS in being able to immediately enforce its summary judgment award (for the benefit of Hellaby) against the interest of the Body Corporate in being able to bring its counterclaim and have the claimed defects in the repair work addressed, I am compelled to conclude that the Body Corporate's interests prevail.

TBS's application for a stay of the Body Corporate's counterclaim

[114] TBS applies for a stay of the Body Corporate's counterclaim against it. The grounds for seeking a stay are that the Construction Contract contains an arbitration agreement that covers the counterclaim against TBS.

[115] The Body Corporate opposes the stay on the basis that the arbitration agreement in the Construction Contract is inoperative and incapable of being performed. Further, that it is a consumer arbitration agreement to which the Body Corporate has not agreed, which is required by the Arbitration Act 1996. It relies on a decision of this Court, *Ministry of Education v PXA Ltd,* to say that the arbitration agreement only applies for the duration of the remedial works. The Body Corporate also maintains that allowing the application will not promote the just, speedy and inexpensive resolution of the substantive matters at issue between the parties.

Issues

[116] Article 8(1) of Schedule 1 to the Arbitration Act 1996 provides:

> A court before which proceedings are brought in a matter which is the subject of an arbitration agreement **shall**, if a party so requests not later than submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration **unless it finds that the agreement is null and void, inoperative, or incapable of being performed**, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.
>
> (emphasis added)

[117] The Body Corporate does not dispute that its counterclaim has been brought in a matter which is the subject of an arbitration agreement.[69] Nor does it formally dispute that TBS has met the timing requirement.[70]

[118] Therefore, the two issues to be resolved in this application are:

(a) Is the arbitration agreement inoperative or incapable of being performed?

(b) Is the Body Corporate a "consumer" so the arbitration agreement is only enforceable if it agreed after the dispute arose?

Is the arbitration agreement inoperative or incapable of being performed?

A TBS's submissions

[119] TBS submits that:

(a) The burden of proving that an arbitration agreement is null and void, inoperative or incapable of being performed lies on the party seeking to litigate its claim (here, the Body Corporate).[71] Where there is an

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69 Notice of Opposition to Second Plaintiff's Application for Stay of Defendant's Counterclaim, dated 9 October 2020, at 3(e)–(f).

70 The Body Corporate submitted that TBS had been engaging with the Body Corporate about its claims for defective/incomplete work for over a year but did not oppose the application on this ground. The Body Corporate's counterclaim was not filed and served until 1 September 2020 and the first document TBS filed in relation to it was its appearance and protest to jurisdiction on 12 October 2020, followed by this application one week later.

71 *Downing v Al Tameer Establishment* [2002] EWCA Civ 721, [2002] 2 All ER (Comm) 545 at [20], cited with approval in *Savvy Vineyards 4334 Ltd v Weta Estate* Ltd [2017] NZHC 1111 at [24] and [39].

arguable case in favour of the validity of the arbitration agreement, a stay should be granted.

(b) The fact that there are prerequisites before arbitration can commence under the arbitration agreement that have not been completed does not affect the validity or operability of the arbitration agreement.

(c) *Minister of Education v PXA Ltd* can be distinguished as it was concerned with a different standard form contract, under which an architect has an adjudicative role. Further, there was no issue as to outstanding payments or alleged outstanding contractual works in that case. Here, both parties maintain that the contract is on foot: TBS as it says there are unpaid payment claims and the Body Corporate as it says that the repair work is incomplete and/or defective.

(d) The time periods for the pre-arbitration steps in the dispute resolution clauses have not expired. Time for taking the pre-arbitration steps does not expire as long as adjudication may be brought. Adjudication can be brought at any time within the statutory limitation period for the contract.

(e) Even if the time periods for compliance with the pre-arbitration steps have expired, the High Court or District Court may extend these.[72]

(f) The High Court has held that a party seeking to resist a stay cannot rely on non-compliance with a time provision to contend that the arbitration provision is inoperative.[73]

(g) The case of *Miro Properties Ltd v The Fletcher Construction Co Ltd*[74] is to be preferred, where Associate Judge Gendall found that despite significant unexplained delays, the construction contract "continues to

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72 Arbitration Act 1996, sch 2 art 7.

73 *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 (HC), and *Miro Property Holdings Ltd v Fletcher Construction Co Ltd* HC Wellington CIV-2010-485-2540, 31 May 2011.

74 Ibid.

> run" and the arbitration agreement contained in the contract was not "inoperative" or "incapable of being performed" simply because of delays on the part of the parties.

B Body Corporate's submissions

[120] The Body Corporate relies on the decision of Associate Judge Matthews in *Ministry of Education v PXA Ltd*, which involved a dispute arising out of the design, development and construction of a school. The plaintiffs were the school and the defendants were the construction company and the design/project management company. There was agreement that a standard construction contract applied to the works, being a precedent from the New Zealand Institute of Architects: NZIA SCC1 2000. Clause 94 of section K of that contract contained an arbitration clause.

[121] The plaintiffs maintained that a claim for damages for negligence based on various defects with the construction works which necessitated investigative and remedial building works was not contemplated by cl 94 of the contract. Associate Judge Matthews considered the mandatory steps required by cl 94 and concluded that these indicated that the process only applied when the contract was current. He said:[75]

> In my opinion, these terms are consistent with this clause applying only during the currency of the contract. First, the architect has a primary role in ruling on the dispute promptly after it arises. It is unlikely that the architect would have this role after completion of the building. Secondly, there is a very limited period within which mediation is to take place, and a limited period within which an arbitration must be commenced, if mediation fails. These time limits are consistent with a level of urgency, which in itself suggests a dispute resolution process which is taking place while the current contract continues. Thirdly, there is a very limited right to take proceedings in court, with that right reserved only to recovered undisputed payments, or to take urgent injunctive or declaratory proceedings. Both of these options are, again, consistent with the process being engaged during the currency of the contract. Finally, the contractor cannot suspend works and if it has done so, must return to work. This speaks for itself.
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> If this clause applied after the contract works had been completed, there would not be any reason for the project architect to have a primary adjudicative role, for urgency in conducting a mediation or an arbitration, or a requirement that the contractor return to work. In my opinion the Board is correct in its submission that cl 94 applies only during the currency of the contract and is not intended to prevent the parties from having recourse to litigation in respect

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75 *Ministry of Education v PXA Ltd* [2015] NZHC 1330 at [31]–[32].

> of allegedly defective professional services on the part of its architect, and defective building work on the part of its builder, after the contract has been concluded. I therefore find that cl 94 is inoperative in the context of the present dispute and therefore that the exception to the direction in art 8 of Chapter 2 of the Arbitration Act is established.

[122] The Body Corporate maintains that this case is on all fours with this proceeding, and that the dispute resolution clauses in this proceeding are almost identical to those in *PXA*.

[123] The Body Corporate further submits that it is extraordinary to suggest that the Body Corporate could take the pre-arbitration steps now, many years after construction has finished, when the counterclaim against TBS overlaps with counterclaims against Maynard Marks and HOBANZ, and it is suing the Project Engineer (Maynard Marks) for negligence.

C The Arbitration Agreement

[124] The agreement to arbitrate is the final step in a staged dispute resolution process contained within s 13 of the General Conditions of the Construction Contract (set out in full at the end of this judgment). The following features of that section are notable:

(a) Every dispute or difference "concerning the Contract" must be dealt with under the dispute resolution process, unless otherwise precluded by the provisions concerning Final Payment Claims, Final Payment Schedules and Engineer's decisions, valuations or certificates.[76]

(b) The starting point for every dispute or difference is that it must be referred to the Engineer for review and a decision.[77] The Engineer must give his or her decision in writing.

(c) Disputes or differences must be referred to the Engineer no later than **one month** after provision of the Final Payment Schedule under the

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[76] 13.1.2.
[77] 13.2.1

Construction Contract; or **one month** after any relevant Adjudicator's determination under the CCA is given to the parties, whichever is the later.[78]

(d) If requested, the Engineer and the Contractor will meet as soon as possible to endeavour to resolve the dispute amicably. The Engineer and the Contactor may, with the consent of the Principal, jointly submit the dispute or question to an agreed expert for a recommendation to assist them to resolve the matter.

(e) The Engineer may at any time, and must **within 20 days** if requested, issue a "formal decision" on the matter.[79] A formal decision is final and binding, except if the matter is subject to adjudication proceedings under the CCA or mediation or arbitration under the Contract.

(f) If the Principal or Contractor is dissatisfied with a formal decision of the Engineer or no formal decision is given by the Engineer within the prescribed time, then either the Principal or the Contractor can require that the matter be referred to mediation.[80] Notice must be given within **one month** of the time prescribed for the Engineer's formal decision.[81]

(g) If the Principal and Contractor invite the mediator to give a binding decision, the decision will be binding on the parties unless either party rejects it **within 10 working days**.[82]

(h) The Principal or Contractor may refer the dispute or difference to arbitration, but only if:

(i) The Principal or Contractor have given notice requiring the matter to be referred to mediation, and mediation has not been agreed upon or the parties have been unable to agree on a

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78 Ibid.
79 13.2.4
80 13.3.1
81 13.3.2
82 13.3.4

mediator, or no agreement was reached in mediation and no decision given by the mediator within two months, or either party has within the prescribed time rejected the mediator's decision; or

(ii) They are dissatisfied with the Engineer's formal decision, or the Engineer has not given a formal decision.

(i) The matter must be referred to arbitration **within one month** of the Engineer's formal decision or time prescribed for the Engineer's formal decision, or the failure of mediation, or in either of those events if an adjudication determination is subsequently given, within one month of that determination.

(j) The arbitrator has the full power to open, review, and revise "any decision, opinion, instruction, direction, certificate or valuation of the Engineer or any Payment Schedule." The award in the arbitration is final and binding on the parties.

(k) No dispute entitles the Contractor to suspend the execution of the Contract Works, except in accordance with the instructions of the Engineer.[83]

(l) No Payment Schedule nor payment due or payable may be withheld because of dispute proceedings. If an item is in dispute, the Engineer will certify such amount as is properly payable in their view and include such amount in a Progress Payment Schedule and the process in the contract shall apply.[84]

(m) The Contractor's rights under the Construction Contracts Act are unaffected by the above two provisions.[85] However, neither Principal

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[83] 13.5.1
[84] 13.5.2
[85] 13.5.3

or Contractor can unilaterally suspend dispute resolution under the Contract due to adjudication proceedings under the CCA.[86]

[125] The following provisions concerning the Final Payment Claim and Final Payment Schedule are also relevant:

(a) The Contractor must submit a final account of all the Contractor's payment claims to the Engineer within one month of issue of the Final Completion Certificate (or such further time as the Engineer may allow).[87] This final account is the "final payment claim" and must cover the period up to completion of all the Contractor's obligations under the Contract. Submission of the final payment claim by the Contractor is conclusive evidence that the Contractor has no outstanding claim against the Principal other than as contained therein, except for any item which has been referred to arbitration under the Contract or to adjudication under the CCA. The Principal is not liable to the Contractor for any matter in connection with the Contract unless contained within the final payment claim.[88]

(b) The Engineer must assess the final payment claim, may amend it, and must, following the process set out in the Contract, provide a Final Payment Schedule in response, not later than 35 working days after service of the final payment claim.[89] If that is not possible, the Engineer may issue Progress Payment Schedules and the Final Payment Schedule may be provided no later than six months after the date of the Final Completion Certificate.[90] The amount stated in the Final Payment Schedule is the "scheduled amount" and must be paid by the Principal to the Contractor within 10 working days of the date of the Final Payment Schedule.[91] Upon issue of the Final Payment Schedule the Principal ceases to be liable to the Contractor in respect of any of

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86 13.1.1
87 12.5.1
88 12.4.3
89 12.5.1
90 12.5.6
91 12.5.9

> the Principal's obligations under the Contract, except the obligation to pay the scheduled amount, any retention monies, interest payable, or any amounts which become payable through the dispute resolution process.[92]

D Discussion

[126] Service of the final payment claim followed by the Final Payment Schedule represents an important endpoint in the Contract. Once the Final Payment Schedule is issued, the Principal's obligations set out in the Contract are at an end, except for the final obligation on the Principal to pay the scheduled amount and any other amounts payable or found to be payable.

[127] Further, it provides the reference point by which the Contract defines the requirement to refer disputes to the Engineer and potentially on to arbitration. Issues already referred into the dispute resolution process in the Contract before issuance of the Final Payment Schedule run their course. For a further **one month** after issuance of the Final Payment Schedule, the requirement in s 13.1.2 that disputes or differences are dealt with under the Contract's dispute resolution provisions, commencing with referral to the Engineer, continues to apply. My assessment is that after that date, the window for referral to the Engineer closes and the mandatory referral of disputes and differences into the dispute resolution process in s 13 ceases to apply.

[128] The Engineer issued the Final Payment Schedule in July 2019. My assessment is that one month later the requirement for referral to the Engineer ended and the mandatory dispute resolution process ceased to apply.

[129] TBS submits that because the dispute resolution process can be "re-enlivened" by an adjudication determination under the CCA, the arbitration agreement remains operative. The Contract allows a further month for referral to the Engineer after such a determination. Mr Wilson submits that this is necessary because the adjudication procedures under the CCA cannot be contracted out of so an adjudication can be brought effectively at any time within the statutory time for the underlying claim. So,

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[92] 12.6

the Contract needs to permit the dispute resolution process to be re-enlivened by an adjudicator's determination.

[130] I am not attracted to that submission. It is a purely theoretical argument: there is no CCA adjudication on foot or contemplated here. The Body Corporate plainly does not intend to re-enliven the dispute resolution provisions in the Construction Contract and cannot be compelled to refer its counterclaim to adjudication under the CCA. It is a voluntary procedure: s 25 of the CCA provides that "any party to a construction contract *has the right* to refer a dispute to adjudication…" It is questionable whether its counterclaim is amenable to resolution through this process anyway. It is intended to provide a simple and expeditious preliminary determination of relatively simple claims between parties to construction contracts.[93] Adjudicators do not need to be legally qualified or experienced and the process involves tight time limits and constraints on what the adjudicator can consider.

[131] But the decisive point is that the interpretation of the Contract suggested by Mr Wilson would, in my view, run counter to the intention expressed by the parties in s 13. That is that the escalating dispute resolution process in the Contract, culminating in arbitration, will be mandatory while the contract is being performed and up until one month after the Final Payment Schedule is issued. After that date, the Principal is free to pursue its claims in the courts if its wishes to do so.

[132] TBS further submits that the arbitration is not inoperative because time periods in relation to arbitrations can be extended by the High Court or District Court under art 7 of sch 2 of the Arbitration Act. I reject that submission, as it would mean that an arbitration agreement will never become inoperative due to the expiry of pre-arbitration time periods, when plainly the parties intended that the arbitration agreement would have a limited lifespan.

[133] TBS then submits that the Body Corporate cannot rely on its own failure to refer the dispute (its counterclaim) to the Engineer within the permitted time, to argue that the arbitration agreement is inoperative. Mr Wilson says that the situation is analogous to that in *Marnell Corrao Associates Inc v Sensation Yachts Ltd*, where Mr

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93 Construction Contracts Act 2002, s 25(2).

Marnell attempted to rely on the fact that a mandatory pre-arbitration step in the contract was not complied with, and therefore the arbitration clause was not binding.[94] Wild J referred to a number of authorities that support "the general principle that Courts should uphold arbitration, by striving to give effect to the intention of parties to submit disputes to arbitration, and not allow any inconsistencies or uncertainties in the wording or operation of the arbitration clause to thwart that intention".[95]

[134] The mandatory step which had not been completed, and on which Marnell sought to rely, was referral of the dispute to the Chief Executives of each party. On the facts, it was Mr Marnell who had rejected attempts by Sensation Yachts' Chief Executive to negotiate. Wild J found that Mr Marnell, in those circumstances, could not be permitted to take advantage of his own default, noting that the law does not permit that.[96]

[135] I do not accept that the situation here is analogous to that faced by Wild J. The evidence suggests that the Body Corporate became aware of issues with the remedial work conducted by TBS in late 2018, crystallising when it involved experts in July/August 2019. There were some discussions between the Body Corporate and TBS about these issues throughout this time.[97] Neither party invoked the contract's s 13 dispute resolution process. The circumstances are quite distinguishable from those in *Sensation Yachts* where one party deliberately rebuffed the attempts of the other to undertake a mandatory step in the dispute resolution process and then later sought to rely on the non-completion of that step.

[136] The second authority on which TBS relies is *Miro Property Holdings Ltd v Fletcher Construction Co Ltd*.[98] The dispute resolution provisions in the contract in that case are the same as those in the present Construction Contract. But an important distinguishing feature of that case is that notwithstanding practical completion of the contract works, the first defendant had never issued a Final Payment Claim for the works, and the plaintiff had never issued a Final Payment Schedule. Associate Judge

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94 *Marnell Corrao Associates*, above n 74.
95 At [61].
96 At [65], citing *Moreton v Montrose Ltd* (1986) 2 NZLR 496 (CA) at 503.
97 Affidavit of Victor Li-Chan Tsai sworn 7 August 2019.
98 *Miro Property Holdings Ltd*, above n 74.

Gendall concluded at [29] that since no Final Payment Schedule had yet been issued, time was still running under s 13.2.1 of the contract, and therefore disputes must still be referred to the Engineer.

[137] Associate Judge Gendall rejected the plaintiff's case that the arbitration agreement was both "inoperative" and "incapable of being formed" because the plaintiff had paid the sum awarded by the adjudicator, the defendant had been off the site of the works for over four years, the Engineer had failed to issue a formal decision and the time for direct referral to arbitration because of that failure had expired. Associate Judge Gendall concluded that these contentions had little substance:[99]

> The arbitration agreement clearly formed part of the Contract which, as I see it, continues to run. Although there may have been significant unexplained delays here, **both parties accept that the first defendant has not submitted its Final Claim nor has there been any Final Payment Scheduled issued.** Even if there may be some issue as to the timing surrounding the third defendant engineer's failure to give a decision on the September 2007 dispute referred to her by the plaintiff, in my judgment it is still potentially within the power of the plaintiff (or the first defendant) to commence the process of resolving disputed claims under the Contract under the s 13 procedures. This would involve first referring them to the engineer for a decision under s 13.2 and, if dissatisfied with the outcome, referring those claims either to mediation or arbitration. In other words, I am satisfied that, even if the plaintiff is regarded as having failed to give the requisite notice within time during 2007 and as a result of its failure there is no present right for it to proceed directly to arbitration on the dispute raised then, the plaintiff can create that right now by following the processes set out in the Contract.
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> In my view, it is quite wrong to suggest that the Arbitration Agreement in the Contract is "inoperative" or "incapable of being performed" simply because of delays on the part of any parties.
>
> (emphasis added)

[138] The obvious and critical difference between the circumstances in *Miro* and the present case is that in that case a final payment claim and Final Payment Schedule had not been issued. Critically, that meant that the mandatory requirement that differences and disputes be referred to the Engineer under s 13.2 remained in force. The delays discussed meant that there was no present right to proceed directly to arbitration, but the plaintiff could create that right by following the process set out in the contract, beginning with a referral to the Engineer (or a replacement Engineer).

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99 At [48]–[49].

[139] The third case on which both Mr Wilson and Mr Hollyman QC addressed me is *Minister of Education v PXA*. Mr Hollyman QC submitted that it is on all fours with the present situation. Mr Wilson sought to distinguish it and submitted that the findings were in some important ways unclear.

[140] Associate Judge Matthews was concerned with a different contract and set of dispute resolution provisions than those in NZS3910. I have reached a different conclusion because of the specific terms of the NZS3910 construction contract, which in my assessment make it quite clear that the mandatory dispute resolution process ends one month after issuance of the Final Payment Schedule. But the case is still relevant for its conclusion that the features of the process support the view that it is intended to deal with everyday disputes and differences that arise between the Principal and Contactor while construction is underway. These include: the central role of the Engineer to the Contract and the mandatory referral to him or her of every dispute or difference for review and decision; the tightly prescribed time limits for each stage of the dispute resolution process which are consistent with a level of urgency; the emphasis on a swift resolution to any issues, to avoid protracted disputes, delays to the works and the Principal/Contractor relationship being irretrievably damaged; and the explicit requirement that contracted works must continue even when the dispute resolution process is engaged and payments due must be paid. In my view, these features support the proposition that the dispute resolution process is intended to be mandatory only during the currency of the contract and shortly thereafter, namely one month after the Final Payment Schedule is issued.

[141] The Body Corporate referred to a fourth decision: *Blaine v Evan Jones Construction Ltd.*[100] The Court of Appeal was concerned with the issue of whether there existed a cause of action in negligence against the contractor; and specifically, whether the terms of the contract were inconsistent with a duty of care in tort and whether the CCA was relevant to the existence of a duty of care in tort. In examining these questions, the Court made comments to the effect that the dispute resolution procedure in the contract is an exclusive process only during the construction period,[101] and the CCA dispute resolution procedure is intended to allow the efficient

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100 *Blaine v Evan Jones Construction Ltd* [2013] NZCA 680.
101 At [61].

functioning of the contract during and just after construction, with no relevance to the determination of rights and obligations after the building is completed.[102] These comments were obiter, the issue of the currency of the dispute resolution procedure not being an issue that was before the Court for determination. Further, it is unclear the extent to which the Court relied on concessions by counsel for both parties on these points. For these reasons I do not place great weight on it, other than to note that it broadly supports the conclusion I have reached.

[142] I conclude therefore that the dispute resolution process contained in s 13 of the Construction Contract ceased to be operational one month after issuance of the Final Payment Schedule in July 2019. At that point, the parties were no longer required to refer disputes into the process, beginning with referral to the Engineer. Theoretically, the provisions could be re-enlivened by an adjudication determination but unless and until such an adjudication takes place, the door to arbitration is closed.

[143] This finding is enough to determine the application, but in deference to the arguments of counsel I will deal briefly with the final issue.

Is the arbitration agreement enforceable under s 11 of the Arbitration Act?

[144] Under s 11 of the Arbitration Act 1996, a consumer arbitration agreement is only enforceable if the consumer specifically agrees. The Body Corporate contends that it is a consumer within the definition of s 11 and deserving of this protection. TBS denies this, saying that the qualification inserted into the definition of consumer in s 11 in 2007 was intended to make clear that only natural persons are consumers.

[145] Section 11 of the Arbitration Act 1996 provides:

> **11 Consumer arbitration agreements**
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> (1) Where—
>
> (a) a contract contains an arbitration agreement; and
>
> (b) a person enters into that contract **as a consumer**,—

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[102] At [66].

the arbitration agreement is enforceable against the consumer only if—

(c) the consumer, by separate written agreement entered into by the consumer and the other party to the contract after a dispute has arisen out of, or in relation to, that contract, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it; and

(d) the separate written agreement referred to in paragraph (c) discloses, if it is the case, the fact that all or any of the provisions of Schedule 2 do not apply to the arbitration agreement.

(2) For the purposes of this section, a person enters into a contract as a consumer if—

(aa) **that person is an individual**; and

(a) that person enters into the contract otherwise than in trade; and

(b) the other party to the contract enters into that contract in trade.

(3) Subsection (1) applies to every contract containing an arbitration agreement entered into in New Zealand notwithstanding a provision in the contract to the effect that the contract is governed by a law other than New Zealand law.

(4) For the purposes of article 4 of Schedule 1, subsection (1) shall be treated as if it were a requirement of the arbitration agreement.

(5) Unless a party who is a consumer has, under article 4 of Schedule 1, waived the right to object to non-compliance with subsection (1), an arbitration agreement which is not enforceable by reason of non-compliance with subsection (1) shall be treated as inoperative for the purposes of article 8(1) of Schedule 1 and as not valid under the law of New Zealand for the purposes of articles 16(1), 34(2)(a)(i), and 36(1)(a)(i) of Schedule 1.

…

(emphasis added)

[146] The Body Corporate contends that it is a "consumer". It says that it is unique in that it is a single "individual" entity, made up of natural persons, all of whom by themselves would be entitled to protection. It submits that the policy of the Act means that the Body Corporate of a residential complex is exactly the type of legal entity which should be afforded the consumer protection of s 11. It relies on the *PXA* decision, where Associate Judge Matthews considered the activities of a school board

and concluded that there being little, if any, commercial flavour to those activities, a school board is a consumer for the purposes of s 11.

[147] In my assessment, I begin with the general interpretative principle that one should begin with the plain meaning of the words of the statute.[103] Focusing on the plain meaning of the words in s 11(2)(aa), the section says "individual", not "individual or group of individuals". I do not consider that there can be a serious suggestion that "an individual" encompasses a group of individuals or an entity composed of a group of individuals.

[148] That interpretation is supported by the Parliamentary material associated with the amendment, to which both Mr Hollyman QC and Mr Wilson referred. Section 11(2)(aa) was inserted on 18 October 2007 by s 5(2) of the Arbitration Amendment Act 2007. It was cl 5(2) of the Arbitration Amendment Bill 2006. The Bill aimed to improve the operation of the Act by implementing the principal recommendations of the Law Commission's 2003 report, *Improving the Arbitration Act 1996*.[104]

[149] In that report, the Commission considered the question of whether the definition was appropriate to meet the needs of consumers in the context of contemporary New Zealand society:[105]

> 154 The Ministry of Consumer Affairs recommended partial adoption of the definition of "consumer" to be found in Article 7 of the Draft Convention on Jurisdiction and Recognition of Foreign Judgments…The definition it suggests is in the following terms: *A natural person who concludes a contract primarily for personal, family or household purposes.*
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> …
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> 157 Other submissions made the following points:
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> …
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> (b) The current definition is too wide. Reference was made to a judgment of Wild J in *Marnell Corrao Associates Inc v Sensation Yachts Ltd* where it had been argued that a large corporation which signed a contract for the building of a $20 million yacht was, for the

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103 Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 311–312.

104 Arbitration Amendment Bill 2006 (72-1) (explanatory note) at 1.

105 Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003).

> purposes of the Act, a "consumer"…**It is suggested that it would be preferable to redraft section 11 to address directly Parliament's intention to protect consumers who are genuinely uninformed.** It is suggested that section 11, in its departure from the principle of party autonomy, should be restricted to situations in which parties genuinely require legislative protection.
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> After the closing date for submissions, another decision was delivered which provides a striking example of the potential width of section 11. In *Bowport Ltd v Alloy Yachts International Ltd*[106] the purchaser of a $7 million yacht, a company, was held to be entitled to rely on the section 11 protection, despite the fact that the owner of the company was legally advised, and aware of the arbitration clause.
>
> …

[150] The Commission ultimately decided against a fundamental change to the definition of "consumer", as the existing definition was adequate, the alternatives presented were no better, and the term "in trade" was relatively well understood:

> 158 Criticisms of the current definition can be broadly categorised under two headings: First, it fails to target adequately genuine consumers. Second, other models are more accessible to consumers, in terms of being easier to understand. We consider these criticisms now. We will consider more specific suggestions separately.
>
> 159 With respect to the [criticism] of not properly targeting consumers, we understand the force of the submission that only parties who genuinely require legislative protection should be covered by the definition of "consumer" for the purposes of section 11. We think, however, that it will be too difficult in practice to achieve a workable definition which will truly address those who genuinely require protection. Consumer law recognises that, in some circumstances, those who are better off than others will receive a protection even though they might be expected to bring more business acumen to a transaction. That recognition is based primarily on pragmatic considerations. In order to protect those who require protection it is necessary to ensure that the term is defined sufficiently widely.
>
> 160 On balance, we consider that the existing definition is adequate with regard to this particular issue, particularly given the wide interpretation of the term "in trade" in relation to section 9 of the Fair Trading Act 1986. Further, we are not persuaded that the alternatives overcome the problem of targeting any better than the present definition. For example, an experienced businessperson buying a $20 million yacht for recreational purposes would still seem to come within the definition suggested in paragraph 154.
>
> 161 With respect to the lack of accessibility in the present definition, we do not consider that it is overly difficult for consumers to understand. And, as stated above, traders and judges should be familiar with the

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106 *Bowport Ltd v Alloy Yachts International Ltd* (14 January 2002) HC Auckland CP 159-SD01.

> term "in trade" as a result of its prominence in the Fair Trading Act 1986. We agree with the Ministry's point that it is undesirable that definitions are expressed in negative terms. However, this has been done to ensure that transactions between consumers are not caught. We consider that this is appropriate. The object of the consumer protection provision is to provide protection to consumers who may be vulnerable when dealing with businesses in a stronger bargaining position. If two consumers wish to enter into a private contract, and also wish to agree to arbitrate any disputes, they should be free to do so without legislative interference or form requirements being imposed. As it stands, the definition suggested in paragraph 154 would require a proviso to exclude such transactions, which would reduce the accessibility of that definition.
>
> 162 In summary, we consider that the basic definition of consumer is adequate and do not recommend any fundamental change.

[151] However, the Commission did consider that the definition of "consumer" should be amended to refer only to natural persons:

> 164 **We do think it appropriate to amend the definition of the term "consumer" to ensure that it refers only to natural persons. This meets the objection that, as currently framed, the definition may reach too far and include bodies such as schools, churches and local authorities**. Such a definition would also have resulted: in the purchaser being bound by the arbitration clause in *Bowport Ltd v Alloy Yachts International Ltd*.
>
> …
>
> 167 We do not recommend any changes to the present definition of consumer, other than:
>
> - the term should only apply to natural persons;
> - all leases should be excluded from the ambit of the term.
>
> (emphasis added)

[152] Ultimately the Bill used the term "individual" rather than "natural person". There is no discussion in the Bill or the Select Committee Report as to why that term was chosen over the one discussed by the Commission, but one might surmise that it was thought to be more modern and accessible. I see no grounds to support the Body Corporate's submission that the use of the word "individual" was intended to connote a different meaning to the words "natural persons". Certainly, the Bill was intended to implement the recommendations of the Law Commission.[107]

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[107] Arbitration Amendment Bill 2006 (72-1) (explanatory note) at 1.

[153] As for *PXA*, as Mr Hollyman QC acknowledged, that case was decided on an earlier version of s 11 of the Arbitration Act which applied when the Board of Trustees and HOBANZ entered into the contract. That version did not contain the further definition that a person is an individual. Associate Judge Matthews was focused on the question of whether the Board of Trustees, in building the administration block, was acting "in trade" or not. Concluding that it was not, that was the end of the matter. As Associate Judge Matthews did not consider or reach a finding on the question of whether the school board could be considered "an individual", the case does not provide any authority on this issue.

[154] I reject the Body Corporate's submission that it is an "individual" and therefore a consumer within the meaning of s 11 of the Arbitration Act. The plain meaning of the words and the legislative history do not support that submission. Accordingly, the arbitration agreement is not a consumer arbitration agreement.

Result

[155] I make the following orders:

(a) summary judgment is entered against the defendant, Body Corporate 197281 on the second plaintiff's claim contained in the Amended Statement of Claim dated 3 August 2020;

(b) the defendant will pay the second plaintiff's costs associated with the application for summary judgment;

(c) enforcement of the order for summary judgment and associated costs is stayed until the counterclaim of Body Corporate 197281 dated 1 September 2020 is determined or until further order of the Court;

(d) the second plaintiff will pay the defendant's costs associated with the defendant's application for a stay of enforcement;

(e) the second plaintiff's interlocutory application dated 16 September 2020 for a stay of the counterclaim of Body Corporate 197281 is dismissed;

(f) the second plaintiff will pay the defendant's costs associated with its application for a stay of the counterclaim.

[156] If costs cannot be agreed, I will receive memoranda on behalf of TBS within 21 working days, and on behalf of the Body Corporate within a further 14 days. I will determine costs on the papers.

_____
Associate Judge Gardiner

Solicitors:

Bell Gully, Auckland
Farry & Co, Auckland
McElroys, Auckland
DLA Piper, Auckland

13 DISPUTES

13.1 General

13.1.1 No decision, valuation, or certificate of the Engineer shall be questioned or challenged more than 3 Months after it has been given o more than 1 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. Every decision, valuation, or certificate of the Engineer shall be final and binding if neither party has referred it to the Engineer under 13.2.1 or to Adjudication within 3 Months after it has been given, unless notice has been given to the Engineer within that time. This subclause 13.1.1 shall not apply to a Progress Payment Schedule.

13.1.2 Every dispute or difference concerning the Contract which is not precluded by the provisions of 12.4, 12.6, 13.1.1 or 13.2 shall be dealt with under the following provisions of this Section.

13.1.3 The Principal and the Contractor may at any stage agree to suspend any dispute resolution under this Section 13 due to any Adjudication proceedings, but in the absence of any such agreement the provisions of Section 13 shall continue to apply and neither party shall be entitled to suspend or delay any dispute resolution under this Section 13 due to any Adjudication proceedings.

13.2 Engineer’s review

13.2.1 Every dispute or difference under 13.1.2 shall be referred to the Engineer not later than 1 Month after the provision of the Final Payment Schedule under 12.5.1, 12.5.3, or 12.5.4, or more than 1 Month after the date on which any relevant Adjudicator’s Determination is given to the parties, whichever is the later. The Engineer shall give his or her decision in writing.

Except in the case of a decision under 13.2.4 the Engineer may correct or modify his or her decision by a subsequent decision in writing.

13.2.2 The Engineer or the Principal or the Contractor may, before or after the Engineer has given a decision (other than a decision under 13.2.4), ask for a meeting, and in such case the Engineer and a representative of the Contractor shall meet as soon as practicable and endeavour to resolve the dispute amicably.

13.2.3 The Engineer and the Contractor may, with the consent of the Principal, jointly submit the dispute or any question arising in connection with it to an agreed expert, with a request to make a recommendation to assist them to resolve the matter. The Principal and the Contractor shall each pay one half of the costs of the agreed expert.

13.2.4 Unless the dispute or any question arising in connection with it has been referred under 13.2.3 and is awaiting a recommendation from the agreed expert, the Engineer may, at any time, in respect of any dispute or difference under 13.2.1 give a decision (in this Section called 'a formal decision') which states expressly that it is given under this subclause. The Engineer shall give a formal decision on the matter within 20 Working Days of receiving notice in writing from the Principal or the Contractor requiring him or her to give a formal decision and expressly referring to this subclause 13.2.4. Upon making a formal decision the Engineer shall forthwith send copies of it to both the Principal and the Contractor. The Engineer's formal decision shall, subject to 13.3 and 13.4 or any Adjudication proceedings, be final and binding.

13.3 Mediation

13.3.1 If either:

(a) The Principal or the Contractor is dissatisfied with the Engineer's formal decision under 13.2.4; or

(b) No formal decision is given by the Engineer within the time prescribed by 13.2.4,

then either the Principal or the Contractor may by notice require that the matter in dispute be referred to mediation.

13.3.2 A notice requiring mediation shall be in writing and shall be given by the Principal or the Contractor to the other of them within 1 Month after the time prescribed for the giving of the Engineer's formal decision under 13.2.4.

13.3.3 Where a request for mediation is made and is acceded to by the other party then the Principal and the Contractor shall endeavour to agree on a mediator and shall submit the matter in dispute to him or her. The mediator shall discuss the matter with the parties and endeavour to resolve it by their agreement. All discussions in mediation shall be without prejudice, and shall not be referred to in any later proceedings. The Principal and the Contractor shall bear their own Costs in the mediation, and shall each pay half the costs of the mediator.

13.3.4 The Principal and the Contractor may at any stage agree to invite the mediator to give a decision to determine the matter. The mediator's decision shall in such case be binding on both parties unless within 10 Working Days either party notifies the other in writing that it rejects the mediator's decision.

13.3.5 If:

(a) Mediation has been requested, but has not been agreed upon within 10 Working Days of the request;

(b) The parties have agreed upon mediation but have been unable within 10 Working Days of such agreement to agree upon a mediator;

(c) No agreement has been reached in mediation and no decision has been given by the mediator within 2 Months of the request for mediation, or within such further time as the parties may agree; or

(d) Either party has within the prescribed time rejected the mediator's decision,

then either the Principal or the Contractor may by notice require that the matter in dispute be referred to arbitration.

13.4 Arbitration

13.4.1 If either:

(a) The Principal or the Contractor is dissatisfied with the Engineer's formal decision under 13.2.4; or

(b) No formal decision is given by the Engineer within the time prescribed by 13.2.4,

then either the Principal or the Contractor may by notice require that the matter in dispute be referred to arbitration.

13.4.2 A notice requiring arbitration shall be in writing and shall be given by the Principal or the Contractor to the other of them:

(a) Within 1 Month after the Engineer's formal decision under 13.2.4 or after the time prescribed for the giving of the Engineer's formal decision, whichever shall be the ear 1er;

(b) Within 1 Month after the happening of the event described in 13.3.5 which gives rise to the right to arbitration; or

(c) Where the Engineer has issued a formal decision under 13.2.4, or an event has happened under 13.3.5 which gives rise to the right to arbitration, and a relevant Adjudicator's Determination is subsequently given to the parties, within 1 Month after any such determination is given.

13.4.3 The dispute shall be referred to a sole arbitrator. If the parties cannot agree upon the arbitrator, the arbitrator shall be nominated by the Person identified in the Special Conditions and the provisions of the Arbitration Act shall apply.

13.4.4 The arbitrator shall have full power to open up, review, and revise any decision, opinion, instruction, direction, certificate, or valuation of the Engineer or any Payment Schedule and to award upon all questions referred to him or her. Neither party to the arbitration shall be limited to the evidence or arguments put before the Engineer for his or her review or put before a mediator or adjudicator or included in any payment claim or Payment Schedule.

13.4.5 No decision given by the Engineer in accordance with his or her duties under the Contract shall disentitle him or her from being called as a witness and giving evidence before any hearing on any matter relevant to the dispute.

13.4.6 Where the matter has been referred to mediation, the mediator shall not be called by either party as a witness. No reference shall be made to the decision, if any, given by the mediator in respect of the matter in dispute.

13.4.7 The award in the arbitration shall be final and binding on the parties.

13.5 Suspension during dispute

13.5.1 No dispute proceeding shall entitle the Contractor to suspend the execution of the Contract Works, except in accordance with the instructions of the Engineer.

13.5.2 No Payment Schedule nor payment due or payable shall be withheld on account of dispute proceedings. Where any item is in dispute, the Engineer shall certify such amount as is properly payable according to his or her view as to the terms of the Contract and his or her valuation in accordance with 12.2

and include such amount in a certificate in the form of a Progress Payment Schedule and the process under 12.2.1 to 12.2.9 shall apply. No payment due under Section 12 shall be withheld by reason of the existence of any dispute.

13.5.3 Nothing in 13.5 shall affect the Contractor's rights under the Construction Contracts Act.

13.6 Award of interest

The arbitrator may award interest on the whole or any part of any sum which:

(a) Is awarded to any party, for the whole or any part of the period up to the date of the award; or

(b) Is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.