IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-1706

UNDER	the Judicature Amendment Act 1972, the Construction Contracts Act 2002 and the New Zealand Bill of Rights Act 1990
IN THE MATTER OF	an adjudicator's determination dated 8 July 2008 under the Construction Contracts Act 2002
BETWEEN	SPARK IT UP LIMITED Plaintiff
AND	DIMAC CONTRACTORS LIMITED First Defendant
AND	JAMES W CORNISH Second Defendant

Hearing: 21 May 2009

Counsel: D A Laurenson for plaintiff
E M S Cox & D J Anderson for defendants

Judgment: 12 June 2009

RESERVED JUDGMENT OF DOBSON J

Introduction

[1] The plaintiff (Spark It Up) applies for judicial review of the determination of the second defendant (the Adjudicator) which ordered it to pay the first defendant (Dimac) $92,517.24 as an amount owing under contract, plus, interest and costs after the Adjudicator was referred a dispute under the Construction Contracts Act 2002 (the Act). Spark It Up argues that the Adjudicator's determination:

- was invalid for want of jurisdiction;
- was in breach of the principles of natural justice;
- did not take into account a relevant consideration; and
- was unreasonable.

[2] Accordingly, Spark It Up seeks the quashing of this determination.

Factual background

[3] Spark It Up purchased a Carterton property in 2006 with the intention of sub-dividing it into 25 lots. This required the construction of an access road through the property. Spark It Up accepted a tender from Dimac to construct the access road, and provided to Dimac a layout plan and various other documents. Dimac provided a quotation to Spark It Up on 7 March 2007, which the latter accepted.

[4] Dimac commenced its work in March 2007. The scope of the work expanded as it progressed. However, by November 2007, Spark It Up identified concerns that Dimac's work did not meet standards promulgated by the Carterton District Council. Dimac agreed to remedy certain deficiencies to meet these standards by 6 December 2007. Spark It Up alleges that when its engineer visited the site on 13 December 2007, those deficiencies had not been remedied and further deficiencies had been identified. Accordingly, Spark It Up verbally cancelled the contract with Dimac on 19 December 2007, alleging breach of the oral agreement to complete the construction by 6 December.

[5] On 23 April 2008, Dimac served Spark It Up with a payment claim for $99,984.27 under s 20 of the Act. The claim related to the work charged for by Dimac in invoices numbered '1161' and '1162'. Dimac served a notice of adjudication under s 28 of the Act, which described the nature of the dispute with reference to the payment claim earlier served. On 5 May 2008, Dimac applied under

ss 33 and 53 of the Act for nomination of an adjudicator, attaching a copy of the notice of the adjudication.

[6] Spark It Up chose to defend the adjudication proceedings by counter-claiming against Dimac for the cost of Dimac's alleged negligence and delay in breach of the contract, which totalled $138,602.12.

[7] Dimac and Spark It Up filed their pleadings on 22 May and 4 June 2008 respectively, and Dimac filed amended pleadings on 6 June 2008. On 30 June 2008 Dimac's solicitors advised the Adjudicator that it had made an error in the payment claim, and the proceedings should relate to invoices numbered '1201' and '1206'. Dimac had by then discovered that it had in fact been paid for invoices 1161 and 1162. The new invoices were for different work.

[8] On Friday, 4 July 2008, the Adjudicator requested Dimac file a "final corrected statement of claim and copies of all payment claims indicating those which had not been paid". Dimac did so the same day, stating that Spark It Up had paid invoices 1161 and 1162, but not 1201 and 1206. Early on Tuesday, 8 July 2008, the Adjudicator advised that he had completed his determination and had found in favour of Dimac. The Adjudicator held that Spark It Up did not have grounds to terminate the contract and nor could it sustain the argument that Dimac's work was negligent or defective because Spark It Up had provided only limited information to Dimac when it engaged their services. Spark It Up subsequently filed its application for judicial review of this determination on 4 August 2008.

Grounds of review

[9] Spark It Up applies for judicial review on four grounds.

Lack of jurisdiction

[10] Spark It Up argues that the Adjudicator lacked jurisdiction and thus the subsequent determination was unlawful, because his adjudication related to invoices 1201 and 1206, and not invoices 1161 and 1162. Spark It Up states that the latter

invoices were the subject of the payment claim, payment schedule and the notice of adjudication. Accordingly, that particular non-payment constituted 'the dispute', and consideration of any other invoices is irrelevant and the Adjudicator could not base his decision on them. The first formal mention of invoices 1201 and 1206 was only in Dimac's second amended statement of claim, yet the Adjudicator based his entire consideration of the dispute on this amended statement of claim (in the absence of any response from Spark It Up.)

[11] Dimac responds to this by stating that the true nature of 'the dispute' – whether Spark It Up was justified in withholding payment – was not contingent on particular invoices. Dimac made an error in identifying which invoices were unpaid, but this does not affect the substance of the proceedings and therefore could not affect the jurisdiction of the Adjudicator.

Natural justice

[12] Closely related to its first pleaded ground of review, Spark It Up argues that the lack of opportunity afforded by the Adjudicator to respond to Dimac's second amended statement of claim amounts to a breach of natural justice. Although it had notice of Dimac's error, it did not realise that the Adjudicator would rely upon the different invoices until 4 July 2008, and the speed of the Adjudicator's deliberations after this point was such that Spark It Up had no reasonable opportunity to respond.

[13] Dimac responds by stating that the scheme of the Act, and its purpose of facilitating efficient and prompt provisional resolution of disputes in the construction industry, necessarily requires modification of the conventional scope of natural justice. In the context of the Act, the length of the timeframe in which Spark It Up could have challenged the Adjudicator's decision to base his determination on invoices 1201 and 1206 was not too short, even if it would have been so in other contexts.

Relevant considerations

[14] The Adjudicator made his determination partially on the basis that there was 'no evidence' sustaining Spark It Up's claim that Dimac was negligent. Spark It Up argued that this indicates the Adjudicator cannot have considered the statutory declaration of Michelle Rafferty, an engineer whose evidence identified deficiencies in Dimac's work. This was a relevant consideration because of the requirement under s 45(d) of the Act to consider all relevant documentation filed by Spark It Up.

[15] Dimac argues that the Adjudicator's statement that "there is no evidence" was not intended literally and instead referred to the merits of the claim. Moreover, Ms Rafferty's statutory declaration did not necessarily justify Spark It Up's refusal to pay, and nor was she an expert witness whose standing required the Adjudicator to give it primacy or greater weight. On this basis, the Adjudicator did indeed consider it as required.

Unreasonableness

[16] Closely tied to the issues reviewed above, Spark It Up argued that the Adjudicator's determination was unreasonable insofar as it:

- was made without giving it an opportunity to respond to Dimac's second amended statement of claim;
- was made without considering expert evidence within Ms Rafferty's statutory declaration; and
- lacked logic and an evidential basis.

[17] Spark It Up's submission that the Adjudicator's decision was illogical stems from his finding that Dimac could not have been negligent because Spark It Up had not furnished Dimac with sufficient information and an engineer was only employed seven months into the contract. Spark It Up argued that Dimac did not claim at any relevant stage that it had insufficient information, and that the timing of the

engineer's involvement could not have material relevance. Accordingly, the Adjudicator could not have arrived at the conclusion he did and it was therefore unreasonable.

[18] Dimac's response was that it was not in breach of the contract nor negligent and thus Spark It Up's submission must fail. However, even if the internal logic of the Adjudicator's decision is in question, this is insufficient to meet the high standard that the ground of unreasonableness requires.

Approach to judicial review

What is the scope of judicial review available under the Construction Contracts Act 2002?

[19] Dimac argues that the scheme of the Act prevents the Court from engaging in judicial review except in the most extreme circumstances. It relies on *Willis Trust Co Limited v Green* HC AK CIV 2006-404-809 25 May 2006 Harrison J at [20] as justifying the summary nature of the relevant process under the Act, and the restrictive approach to judicial review:

> […] the statute was designed to protect a contractor through a mechanism for ensuring the benefit of cashflow for work done on a project, thereby transferring financial risk to the developer. The scheme of the Act is to provide interim or provisional relief while the parties work through other, more formal, dispute resolution procedures.

[20] In the event, Harrison J did not need to decide whether the premium the Act places on efficiency had a restrictive impact upon the amenability of adjudicators' determinations under the Act to judicial review. However, Dimac notes that in *Tayler v LaHatte* HC AK CIV-404-6843 24 June 2008 Stevens J the Court stated at [19] that "there are significant and appropriate limitations" to judicial review as a remedy.

[21] Conversely, Spark It Up relies on the paragraph immediately following in *Tayler*:

> [20] I am satisfied that, in appropriate cases, an application for judicial review of an adjudicator's determination may be available pursuant to the Judicature Amendment Act. Whether suitable grounds can be established by an applicant, and whether relief should be granted by the Court in the exercise of its discretion, will depend upon all the circumstances of the particular case. It will, of course, be necessary for an applicant to demonstrate that the Court should intervene on the basis of a breach of natural justice or fairness, procedural errors, or other errors usually associated with administrative review.

[22] Stevens J's comments appear to be the latest on this contentious point. The contention arises from the practice in the United Kingdom under that jurisdiction's similar statutory scheme. In *Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWHC 778 (QBD), after reviewing other decisions considering the regime in the United Kingdom, Jackson J distilled the following principles, which were upheld on appeal:

> 82 In my view, it is helpful to state or restate four basic principles:
>
> 1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
>
> 2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: […]
>
> 3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: […]
>
> 4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 [Housing Grants, Construction and Regeneration] Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: […]

[23] Jackson J's judgment was interpreted by counsel in *Willis Trust* and for Dimac in these proceedings as amounting to a restriction on amenability of an adjudicator's determination to judicial review, to only those errors that go to jurisdiction. Dimac argues that therefore the Court's jurisdiction to consider Spark It Up's grounds referring to unreasonableness and relevant considerations is ousted, although it does concede the ground of natural justice is tenable.

[24] However, I do not accept that the scheme of the Act necessarily restricts the grounds on which this Court may entertain applications for judicial review. I would respectfully adopt Stevens J's approach in *Tayler*. I do not consider it helpful to draw rigid lines as to what grounds are available, and nor do I accept that this is what Jackson J did in *Carillion*. Rather, Jackson J acknowledged that the purpose of such schemes – the efficient and prompt determination of construction disputes – will necessarily reduce the intensity of scrutiny that this Court applies on judicial review. This means, for example, that simple errors of fact and law, which would justify intervention by the Court in normal applications for judicial review, will be insufficient to justify intervention by the Court under the Act.

[25] Requiring a higher threshold as to error before intervening is different from denying that the Court has jurisdiction to consider the grounds of unreasonableness or irrelevant considerations. The reality is that these grounds will not often justify intervention. It is entirely possible that some determinations will be so unreasonable that they amount to an adjudicator acting beyond his jurisdiction, which cases like *Carillion* treat as a legitimate basis for intervention. Thus instead of any absolute exclusion of grounds that might be pleaded in applications for judicial review of decisions under the Act, I am content to agree with Stevens J that the Court's approach must be context-dependent. All the traditional grounds of judicial review are available to applicants, but given the scheme of the Act, a low-intensity approach to review is appropriate, which means it will be harder for applicants to prove that such grounds justify intervention by the Court.

[26] Notwithstanding the numerous indications of the appropriateness of a low intensity approach to review, Mr Laurenson submitted for Spark It Up that the Court should apply *high*-intensity to the Adjudicator's determination, which should manifest itself in applying a 'lower' test of reasonableness, and for intervening with the decision. Spark It Up relies on *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601 (HC) per Baragwanath J at 606:

> While Judges of this Court do not in general claim the specialist qualifications and experience of the Environment Judges […] the business of construing documents and of assessing the prospects of success in injunction proceedings is very much the business of the High Court. The present case is towards the opposite end of the spectrum considered by the President in *Wellington City Council v Woolworths* [*(No. 2)* [1996] 2 NZLR 537]. I

> prefer therefore to employ the lower-level test applied in *Re Erebus Royal Commission* [1983] NZLR 662 (PC) at p 681, namely whether the decision is "based upon an evident logical fallacy".

[27] Spark It Up argues that since the Adjudicator was not democratically elected (thus not dealing with policy matters per *Woolworths*) and is exercising a quasi-judicial function, this lower standard per *Ports of Auckland* is justified.

[28] The scheme of the Act is a sufficient answer to this argument. Despite the dictum in *Ports of Auckland*, Parliament has made it clear that the Court should be slow to intervene. Moreover, there are material differences between potential judicial review of the Environment Court, and these proceedings which deal with a specialist method of dispute resolution with no right of appeal. Lightman J in *R v Director-General of Telecommunications ex parte Cellcom and Ors* [1999] ECC 314 at [26] was quoted by Wild J in *Powerco Ltd v Commerce Commission* HC WN CIV-2005-485-1066; CIV-2005-485-1220 24 December 2007 at [370]:

> … The applicants have no right of appeal; in these judicial review proceedings so long as he directs himself correctly in law, (the Director's) decision may only be challenged on *Wednesbury* grounds. The Court must be astute to avoid the danger of substituting its views for the decision maker and of contradicting (as in this case) a conscientious decision maker acting in good faith and with knowledge of all the facts. …

[29] Accordingly, while I do not consider the scheme of the Act ousts the jurisdiction of the Court to consider the full gamut of grounds for judicial review, it does mean a higher standard of review is justified, and thus anything less than a rigorous *Wednesbury* standard of reasonableness would be inappropriate. Guided by that standard, I turn to consider each ground of challenge.

Did the Adjudicator act beyond his jurisdiction?

[30] The question is whether in basing his determination on invoices 1201 and 1206, and not invoices 1161 and 1162 as initially submitted, the Adjudicator acted beyond his jurisdiction. Section 38 of the Act provides for the scope of adjudicators' jurisdiction:

> **38 Jurisdiction of adjudicators**
>
> (1) An adjudicator's jurisdiction in relation to any dispute that has been referred to adjudication is limited to determining—
>
> (a) the matters referred to in sections 48, 49(1)(c), and 50(1)(c); and
>
> (b) any other matters that are of a consequential or ancillary nature necessary to exercise or complete the exercise of the jurisdiction conferred by paragraph (a).
>
> (2) However, the parties to an adjudication may, at any time, by written agreement, extend the jurisdiction of an adjudicator to determine any matters in addition to those mentioned in subsection (1).

[31] The issue is whether the consideration of different invoices amounted to a change in the 'dispute', or whether the underlying dispute was unaffected by the different invoices.

[32] In *Horizon Investments Limited v Parker Construction Management (NZ) Limited and Anor* HC WN CIV 2007-485-332 4 April 2007, Simon France J declined to take a broad approach to the concept of 'dispute':

> [40] In one sense the answer depends upon the level of specificity with which one describes the dispute. At its broadest, the approach urged by [counsel for the contractor], in this case it is whether the payment claims must be paid in full. However, I consider such an approach pays too little regard to the purposes of the Act. It is to provide the parties with a means of quick decisions that facilitate cash flow pending more final determination by whatever means the parties choose. It makes some sense then to respect the capacity of the parties to identify what points of dispute they would like an answer on. […]

[33] The points of dispute referred to are identified in the notice of adjudication, the contents of which are regulated by s 28(2) of the Act:

> (2) The notice of adjudication must state—
>
> (a) the date of the notice:
>
> (b) the nature and a brief description of the dispute and of the parties involved:
>
> (c) details of where and when the dispute arose:
>
> (d) the relief or remedy that is sought:

(e) whether approval for the issue of a charging order under section 29 is being sought:

(f) whether a determination of an owner's liability under section 30(a) and an approval for the issue of a charging order under section 30(b) are being sought:

(g) details sufficient to identify the construction contract to which the dispute relates, including—

(i) the names and addresses of the parties to the contract; and

(ii) if available, the addresses that the parties have specified for the service of notices.

[34] In its notice of adjudication, Dimac described the nature of the dispute as:

1. We claimed the sum of $99,984.27 being the amount owing under our payment claim dated 23 April 2008 (the claim).

2. The respondent denies that they owe any sum to us for the reasons listed in their solicitors letter to us dated 8 February 2008.

[35] The amount of $99,984.27 is based on the payment claim and invoices 1161 and 1162, which were for $97,063.29 and $2,920.98 respectively. The solicitor's letter referred to the alleged negligence on the part of Dimac.

[36] In contrast, the Adjudicator's determination was based on invoices 1201 and 1206, which were for $96,381.24 and $1,755.00 respectively, a combined total of $98,136.24. The amended claim was therefore for some $1,800 less. The substantive content of each set of invoices is fundamentally different, involving different work. For instance, the latter invoices charged for construction work on right of ways which Spark It Up would argue were for an adjoining owner.

[37] I am mindful that the Court of Appeal held in *George Developments Ltd v Canam Construction Ltd* [2005] 1 NZLR 177 that technical defects in the form in which payment claims were presented were insufficient to invalidate the claims lest the intent of the Act be frustrated. However, it also upheld the interpretation of the Court below that the requirements of the contents of payment claims are 'cumulative and mandatory'. The same approach can be applied to notices of adjudication.

[38] The differences between the two sets of invoices are more than a substitution of different numbers and amounts. The construction work to which they relate and the amounts charged for it are different. The latter invoices relate to work including some that Spark It Up would dispute was done for it at all. This is a fundamental difference to the reason for resisting the earlier invoices on the basis of a counterclaim.

[39] Dimac argues for a broad approach to the 'dispute', namely that Spark It Up had refused to pay Dimac any sum owed. However, I find that the notice of adjudication specifically depends upon invoices 1161 and 1162. Accordingly, in relying upon invoices 1201 and 1206, the Adjudicator was no longer within his jurisdiction, as this was not the dispute referred to him. I agree with Simon France J in *Horizon* that it is up to the parties to determine what is at issue, and thus without consent or response from Spark It Up, the Adjudicator was constrained to consider invoices 1161 and 1162 only. It is not a situation in which the parties can be taken to have impliedly consented to transposing the arguments they had made in relation to the earlier invoices, as if presented in relation to the later invoices, when different work was involved and therefore different issues likely to arise.

[40] Accordingly, I find the Adjudicator acted in excess of his jurisdiction and Spark It Up succeeds on this ground of review.

Did the Adjudicator breach the principles of natural justice?

[41] There is no question that the Adjudicator was required to follow the tenets of natural justice: s 41(c) of the Act. Moreover, failure to follow the tenets of natural justice is an established ground of judicial review. The level of adherence to such rules may vary depending on the forum, and as this is very much a summary jurisdiction, without final consequences for the parties, a measure of "rough justice" may be tolerated, relative, for example, to the standards reasonably expected in the High Court. However, the core obligations are immutable.

[42] After citing s 41(c), Simon France J in *Horizon* stated:

> [28] It is plain, I consider, that if an adjudicator decides to determine an adjudication on the basis of an issue not submitted to her by either party, and concerning which the parties have provided no specifically focused evidence nor had an opportunity to make submissions, adequate notice must be given and an appropriate opportunity afforded to do those things.

Failure to do so in that case led to the Court quashing the decision.

[43] The circumstances in these proceedings are similar. The Adjudicator accepted a second amended statement of claim from Dimac and continued with his determination in the absence of any response from Spark It Up. Prima facie, this amounts to a clear breach of natural justice: see *Discain Project Services Limited v Opecprime Development Limited* [2000] BLR 402 (QBD) where the adjudicator had oral and written communications and the other party was excluded and this was held to amount to a breach.

[44] Dimac submitted that the scheme of the Act means that an adequate timeframe for response was provided to Spark It Up. Dimac relies on s 37 of the Act:

> **37 Response to adjudication claim**
>
> (1) A respondent may serve on the adjudicator a written response to the adjudication claim—
>
> (a) within 5 working days after receiving that claim; or
>
> (b) within any further time that the parties to the adjudication agree; or
>
> (c) within any further time that the adjudicator may allow if the adjudicator considers that, in the circumstances, the additional time is reasonably required to enable the respondent to complete the written response.
>
> (2) The response may be accompanied by any other documents.
>
> (3) The respondent must serve a copy of the response and any accompanying documents on the claimant and every other party to the adjudication either before or immediately after they are served on the adjudicator.

[45] Dimac served its second amended statement of claim on a Friday. At 7.25am on the following Tuesday, the Adjudicator informed the parties that he had made his decision. At best, Spark It Up had two working days to complete its response. The

Act provides for five working days for a response, and with potential for extension of this limit. Five working days should have been afforded to Spark It Up and it was not. I do not accept Dimac's argument that if Spark It Up considered that the second amended statement of claim had changed matters, it could have challenged the Adjudicator's decision not to receive a response from Spark It Up. The opportunity afforded to Spark It Up to respond was not a reasonably adequate one.

[46] Accordingly, I find there to have been a material breach of natural justice. Spark It Up is also entitled to relief on this ground.

[47] Having found two relatively fundamental errors requiring the determination to be quashed, it is preferable not to analyse the further alleged errors exhaustively, because this judgment should not have any influence on the merits. However, in assessing inadequacies in process, brief comments on the other grounds of challenge are appropriate.

Did the Adjudicator fail to take account of a relevant consideration?

[48] Section 45 of the Act states which matters must be considered by an Adjudicator:

> **45 Adjudicator's determination: matters to be considered**
>
> In determining a dispute, an adjudicator must consider only the following matters:
>
> (a) the provisions of this Act:
>
> (b) the provisions of the construction contract to which the dispute relates:
>
> (c) the adjudication claim referred to in section 36, together with all submissions (including relevant documentation) that have been made by the claimant:
>
> (d) the respondent's response (if any) referred to in section 37, together with all submissions (including relevant documentation) that have been made by the respondent:
>
> (e) the report of the experts appointed to advise on specific issues (if any):
>
> (f) the results of any inspection carried out by the adjudicator:

(g) any other matters that the adjudicator reasonably considers to be relevant.

[49] The question is whether the Adjudicator had sufficient regard, if any, to Ms Rafferty's statutory declaration on engineering matters. Spark It Up argued that the Adjudicator was required to have regard to the declaration under s 45(d) of the Act, and that his conclusion that Dimac was not negligent necessarily means that he cannot have had regard to the declaration.

[50] I am not convinced of the logic of this submission. The Adjudicator held that there was "no evidence that the Claimant (Dimac) acted 'negligently or unreasonably'". Yet Ms Rafferty's declaration did not state any conclusions as to the negligence or unreasonableness of Dimac's actions. In fact, her letter only identified the remedial work that would need to be completed. It does not go so far as to say that the fact such work was required means that Dimac acted negligently. Nor is that the inevitable conclusion of her evidence.

[51] Accordingly, there is no indication that the Adjudicator did not have regard to Ms Rafferty's statutory declaration. I accept that it may have been preferable for the Adjudicator to refer to Ms Rafferty's declaration. However, given the short length of the Adjudicator's decision and in the absence of any other indication that the Adjudicator did not consider that declaration, Spark It Up could not succeed on this ground.

Did the Adjudicator act unreasonably?

[52] Success on this ground would require Spark It Up to prove that no reasonable adjudicator could have arrived at the determination of the Adjudicator in these proceedings. Spark It Up argued that the preceding issues of natural justice and relevant considerations plus the logical inconsistency of the determination acting in concert make it unreasonable.

[53] However, I am not convinced that the Adjudicator did act unreasonably in this sense, particularly bearing in mind the high threshold appropriate to review of such adjudications.

[54] Spark It Up also argued that Ms Rafferty's declaration was expert evidence, and in the absence of any expert evidence from Dimac, the Adjudicator should have appointed his own expert on Dimac's behalf. Spark It Up relies on *Tayler* for this proposition:

> [36] Mr McLennan argued that, given the extreme variance between the two estimates, the adjudicator should have directed an independent engineer to make an assessment and accurately determine the extent of the work required along with the cost. It is unfortunate that the adjudicator did not follow this course. Early in his determination the adjudicator noted that both parties had suggested that there should be an expert to determine the cost of completing the contract. But, for reasons which are not explained in the adjudication, this course was not followed. In my view this resulted in considerable difficulties with the determination.

[55] The circumstances in which Stevens J suggested a preference for an expert to be appointed are easily distinguishable from the present ones. In any event, even the approach adopted in a very different factual context could hardly justify elevating the absence of an initiative by the present Adjudicator, in the situation confronting him, into a reviewable error.

[56] Nor do I see the alleged lack of logical or evidential basis for the determination as amounting to unreasonableness. Spark It Up claims that the Adjudicator held that Dimac could not have been negligent because it provided it with inadequate plans, yet Dimac never complained about these plans. This is patently a factual issue, where reasonable adjudicators could disagree as to the relevance of the lack of Dimac's complaint or the adequacy of the plans. It is therefore insufficient to meet the standard of reasonableness.

Conclusion

[57] The Adjudicator's decision to base his determination on invoices that did not form the basis of the notice of adjudication or previous pleadings was beyond his jurisdiction, and therefore the subsequent determination is in error. Moreover, the lack of opportunity afforded to Spark It Up to respond to the second amended statement of claim is a breach of natural justice and thus the determination is in error in that regard also. The grounds of relevant considerations and unreasonableness are not made out.

Relief

[58] Dimac has requested that this Court exercise its power under s 4(5) of the Judicature Amendment Act 1972. I do not see this as an appropriate remedy. The nature of the dispute changed throughout the determination process and it would be more appropriate for Dimac to make a fresh claim under s 20 of the Act, should it want to do so. I note that this was the same approach taken by Simon France J in *Horizon*.

[59] Accordingly, I quash the determination of the Adjudicator and the subsequent award is set aside.

[60] Spark It Up had paid into Court the extent of the claim, in terms of a previous Court order. I anticipate that the outcome of this decision is that Dimac will promptly pursue a further determination under the Act. Against that prospect, I direct that the amount presently paid into Court is to remain for 30 days. If indeed Dimac has commenced and is promptly pursuing a further determination within those 30 days, then the amount is to remain in Court pending the outcome of that determination. If such a step is not taken, then Spark It Up would be entitled to have the sum paid out after the expiry of 30 days from delivery of this judgment.

Costs

[61] In the event that he was successful, Mr Laurenson requested the Court to reserve costs, foreshadowing an application for indemnity costs on the basis of his instructing solicitor's letter of 3 November 2008. Without in any way acknowledging the appropriateness of such a claim in the circumstances of this determination, I accede to his request to reserve the issue of costs.

Dobson J

Solicitors:
Luke Cunningham & Clere, Wellington for plaintiff
Gibson Sheat, Lower Hutt for first defendant