IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA487/2021
[2022] NZCA 518

BETWEEN	SRG GLOBAL REMEDIATION SERVICES (NZ) LIMITED Appellant
AND	BODY CORPORATE 197281 First Respondent
AND	MAYNARD MARKS LIMITED Second Respondent
AND	HOBANZ PROJECT ASSIST LIMITED Third Respondent
AND	HELLABY RESOURCE SERVICES LIMITED Fourth Respondent

Hearing:	22 June 2022 (further submissions received 20 July 2022)
Court:	French, Courtney and Dobson JJ
Counsel:	A R Galbraith KC, J Q Wilson and D J Brinkman for Appellant R J Hollyman KC, N G Lawrence and W J Revell for First Respondent No appearance for Second, Third and Fourth Respondents
Judgment:	2 November 2022 at 3 pm

JUDGMENT OF THE COURT

A The appellant's appeal against the High Court decision staying enforcement of its judgment against the first respondent is allowed and the High Court decision quashed.

B **The appellant's appeal against the High Court decision declining to stay the first respondent's counterclaim is dismissed and the High Court decision confirmed.**

C The first respondent's cross-appeal is dismissed.

D The first respondent must pay the appellant costs on the cross-appeal calculated on the basis of a standard appeal, Band B together with usual disbursements. We certify for second counsel.

E There is no award of costs in relation to the appeal.

F Costs in the High Court are remitted to that Court for determination in light of this judgment.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] Body Corporate 197281 (the Body Corporate) and SRG Global Remediation Services (NZ) Ltd (SRG) are parties to a construction contract under which the Body Corporate is the Principal and SRG the Contractor.

[2] They are in dispute and each has filed claims in the High Court against the other. SRG is seeking payment from the Body Corporate for money owing to it for construction work under the contract. The Body Corporate is resisting payment and has filed a counterclaim alleging that the construction work undertaken by SRG was defective and incomplete.

[3] In the High Court, Associate Judge Gardiner held that the Body Corporate had no arguable defence to SRG's debt claim and entered summary judgment for the amount owing. However, at the same time she stayed enforcement of the judgment pending the outcome of the Body Corporate's counterclaim. It is currently scheduled for hearing in July next year.[1]

[4] In addition to seeking summary judgment in respect of its own claim, SRG also applied for an order staying the Body Corporate's counterclaim proceedings in the High Court and referring the proceedings instead to arbitration. The Associate Judge declined that application.[2]

[5] Both parties were dissatisfied with aspects of the High Court decision and now appeal to this Court.

[6] SRG appeals the decision to stay enforcement of its judgment. It also appeals the decision declining to refer the counterclaim to arbitration. Both those decisions being interlocutory in nature, SRG required leave to appeal which it obtained from the Associate Judge in a separate leave judgment.[3] For its part, the Body Corporate cross-appeals the decision to grant summary judgment.

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1 *Hellaby Resource Services Ltd v Body Corporate 197281* [2021] NZHC 554 [Judgment under appeal] at [155].
2 At [155(e)].
3 *SRG Global Remediation Services (NZ) Ltd v Body Corporate 197281* [2021] NZHC 1929 [High Court leave decision].

[7] Before turning to discuss the background of the case, we record that during the events at issue SRG had a different name. It was called TBS Remcon Ltd (TBS). TBS was identified as the party in the High Court judgment under appeal. The judgment refers throughout to TBS and does not mention SRG. The name SRG only first appears in the leave decision. To avoid confusion, we therefore refer to TBS throughout this judgment.

Background

[8] The Body Corporate is the body corporate for a 99-unit apartment complex in Auckland. In 2008 it was discovered that the complex was suffering from water damage. Then followed a number of investigations and varying estimates of the cost of repairs. One of the investigations was undertaken by the second respondent Maynard Marks Ltd in 2010. Maynard Marks is an engineering firm and was engaged by the Body Corporate.

[9] In 2014 the Body Corporate entered into the construction contract with TBS to carry out remediation work. The contract incorporated the general conditions of contract under NZS 3910:2013[4] with Maynard Marks named as Engineer to the Contract. The contract (described as lump sum with a portion of cost reimbursement items) recorded 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 also provided that the repair work was to be carried out in five stages, one stage for each of the five blocks comprising the complex.

[10] NZS 3910:2013, which as mentioned was incorporated into the contract, sets out a process for the making of progress payments to a contractor during the course of building work. The process is based on a system of payment claims and payment schedules and is an adaptation of the payment regime contained in the Construction Contracts Act 2002 .

[11] We address the relevant provisions of the Construction Contracts Act later in this judgment but at this juncture it is sufficient to note that the only difference between

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4 New Zealand Standard: Conditions of contract for building and civil engineering construction.

the statutory regime and the contract between TBS and the Body Corporate is the provision of provisional payment schedules.[5]

[12] The contract provided that on service of a payment claim from TBS, Maynard Marks was to issue a Provisional Progress Payment Schedule. The payment schedules were provisional for 12 working days[6] during which time the Body Corporate as Principal was able to notify Maynard Marks and TBS in writing of any amendments or deductions it intended to make from the sum certified by Maynard Marks. In the absence of any such notification, the Provisional Progress Payment Schedule became the Final Progress Payment Schedule. The scheduled amount was payable by the Body Corporate within 17 working days of service of TBS's payment claim.

[13] TBS commenced the remediation work in late 2014. The first block was completed in December 2016. The final block was completed in June 2018.

[14] During the course of the work, it was discovered that the damage was far greater than had previously been thought due to the existence of hitherto unknown additional defects. This resulted in a very large number of variation claims approved by Maynard Marks. The Body Corporate paid for the work undertaken to rectify the further defects on a "cost plus agreed margin basis".

[15] As a result of the variations, the remediation costs escalated dramatically, prompting the Body Corporate to seek a fixed price guarantee. At a meeting held in December 2017, TBS advised the Body Corporate that it estimated the total costs to be $32 million.

[16] Subsequently in March 2018 the Body Corporate and TBS agreed a credit term extension enabling the Body Corporate to defer payments after the due date, the interest rate on any deferred payments to be 9.75 per cent per annum, compounding monthly.

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5 Construction Contracts Act 2002, s 22.

6 Working Day is defined in the Contract as a "calendar day other than any Saturday, Sunday, public holiday, or any day falling within the period from 24 December to 5 January both inclusive, irrespective of the days on which work is carried out".

[17] The Body Corporate continued to request a fixed price guarantee and in June 2018, the Body Corporate and TBS agreed a total fixed contract price of $35 million. The agreement was documented by way of a deed of variation (the variation agreement).

[18] As at September 2018, the Body Corporate had paid TBS the sum of $32,188,700.35 leaving a balance owing of $2,711,299.65 plus interest. The outstanding amount represented the total of eight Final Progress Payment Schedules issued between December 2017 and July 2018.[7]

[19] In December 2018, two important things happened.

[20] The first was that TBS's parent company Hellaby Resource Services Ltd (Hellaby) sold TBS to SRG Contractors NZ Ltd (SRG Contractors).[8] SRG Contractors is an Australian-based company.

[21] The second was that on 12 December 2018, a deed of assignment was entered into by TBS, its old owner Hellaby and its new owner SRG Contractors. Hellaby agreed to pay SRG Contractors the amount owing by the Body Corporate under the construction contract on the basis that TBS would assign the debt to Hellaby and assist Hellaby in recovering it.

[22] The Body Corporate was advised of the assignment of the debt and on 19 December 2018, 22 February 2019 and 7 March 2019, Hellaby served the Body Corporate with demands for payment.

[23] The Body Corporate's justification for not paying was that it claimed certain areas of the remediation work had not been completed and that some of the work that had been done was defective (the remaining defects).

[24] When payment was not forthcoming, Hellaby filed proceedings against the Body Corporate seeking recovery of what it said was an accrued debt.

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7 In each case those Progress Payment Schedules became final because no amendments were made.
8 Now called SRG Global Group (NZ) Ltd.

Hellaby asserted that the Body Corporate had no arguable defence to its claim and applied for summary judgment. The Body Corporate opposed the application for summary judgment.

[25] A preliminary issue arose and that was whether a clause in the construction contract prohibiting assignment of contractual rights without the consent of the other party meant that the deed purporting to assign TBS's rights to Hellaby was ineffective. The Body Corporate had never consented to the assignment. Associate Judge Lester held the deed was ineffective and that accordingly Hellaby had no standing to apply for summary judgment. Its application was accordingly dismissed.[9]

[26] TBS was then joined as a second plaintiff to the proceeding. An amended statement of claim was filed on 3 August 2020 and leave obtained under r 12.4(2AA) of the High Court Rules 2016 to bring a second application for summary judgment.[10]

[27] On 1 September 2020, the Body Corporate filed a statement of defence to TBS's claim. It also filed a counterclaim against TBS as well as Maynard Marks and the third respondent HOBANZ Project Assist Ltd (HOBANZ).

[28] The counterclaim against TBS pleads five causes of action: breach of contract, negligence, money had and received, breach of s 9 of the Fair Trading Act 1986 and breach of s 35 of the Contract and Commercial Law Act 2017. The central allegations in respect of all the pleaded causes of action are that the repair work was carried out improperly and that inadequate information was provided regarding the variations and the cost of the remediation works. The action for money had and received is based on a claim that had the Body Corporate been aware of the remaining defects it would never have accepted the payment claims and paid the amounts it did in relation to the remaining defects.

[29] The remedies sought include the cost of remedying the remaining defects or an order for specific performance requiring TBS to do everything and meet all costs necessary to repair the remaining defects to the required standard as well as damages

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9 *Hellaby Resource Services Ltd v Body Corporate 197281* [2019] NZHC 2641 at [31] and [47].
10 *Hellaby Resource Services Ltd v Body Corporate 197281* [2020] NZHC 2131 at [32].

for consequential losses. As at the date of the judgment under appeal, the cost of the further remedial work was said to be unknown without further invasive testing but was estimated to be $5,235,910. That exceeded the amount of TBS's debt claim, which at the date of the judgment under appeal was $2,826,299.65.

[30] The Body Corporate's claim against Maynard Marks pleads three causes of action: breach of contract, negligence and breach of the Fair Trading Act. The central allegations are that Maynard Marks breached its obligations to the Body Corporate by failing to identify all the defects, failing to properly advise the Body Corporate about the most economical option of demolishing and rebuilding the complex, and failing to properly advise it about the wisdom of the contractual arrangements it was entering into with TBS. It is further alleged that Maynard Marks breached its obligations to the Body Corporate by continually approving TBS's variation orders and requests.

[31] The remedies sought against Maynard Marks are similar to those sought against TBS but also include a claim for an inquiry into damages caused by the lost opportunity to demolish and replace the complex.

[32] The third counterclaim defendant HOBANZ is a consulting firm engaged by the Body Corporate to provide design, procurement and implementation services regarding the remediation work. Three causes of action are pleaded: breach of contract, negligent misstatement and breach of s 9 of the Fair Trading Act. As noted by the Associate Judge,[11] these causes of action focus on alleged failures by HOBANZ when advising the Body Corporate to proceed with the repair works, to enter into its contractual arrangements with TBS and to pay the variations. The same remedies claimed against Maynard Marks are also claimed against HOBANZ.

[33] On 18 September 2020, TBS filed a protest to jurisdiction, protesting the Court's jurisdiction to hear the counterclaim on the grounds of an arbitration agreement.

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11 Judgment under appeal, above n 1, at [39].

[34] The hearing before Associate Judge Gardiner was limited to the summary judgment proceeding and the application for a stay of the counterclaim against TBS. The other counterclaim defendants took no part in the hearing.

[35] Both the Body Corporate and TBS filed extensive affidavit evidence. The evidence filed by the Body Corporate included evidence from experts identifying by reference to photographs those aspects of the remedial work they say are defective.

[36] As mentioned, the Associate Judge held that the Body Corporate had no arguable defence to TBS's application for summary judgment. She accordingly entered judgment in the latter's favour but stayed enforcement of it pending determination of the counterclaim. The Associate Judge declined to refer the counterclaim between the Body Corporate and TBS to arbitration.[12]

[37] We turn now to address the issues on appeal, dealing first with the finding that the Body Corporate had no arguable defence to the application for summary judgment.

Was the Associate Judge correct to find no arguable defence?

[38] The Associate Judge's ruling was based on certain provisions of the Construction Contracts Act. In order to understand the arguments on appeal, it is necessary to provide a more detailed exposition of the key sections.

The Construction Contracts Act

[39] The purpose of the Act, as stated in s 3, is to reform the law relating to construction contracts and in particular:

> (a) to facilitate regular and timely payments between the parties to a construction contract; and
>
> (b) to provide for the speedy resolution of disputes arising under a construction contract; and
>
> (c) to provide remedies for the recovery of payments under a construction contract.

[12] Judgment under appeal, above n 1, at [155].

[40] The payment regime allowing a party to recover a payment by making a written payment claim to which the party liable for that payment may respond by means of a written payment schedule is set out in ss 19–24.

[41] Sections 20 and 21 detail the information that must be provided in payment claims and payment schedules.

[42] Section 22, headed "liability for paying claimed amount", provides that a payer becomes liable to pay the claimed amount in the event that the payer does not provide a payment schedule to the payee within the time required by the construction contract or, if the contract does not provide for the matter, 20 working days after the payment claim is served.

[43] Under s 23, if the payer does not provide a payment schedule in time and then fails to pay the claimed amount, the consequences are that the payee is entitled to recover the unpaid portion of the claimed amount from the payer together with costs as a debt due in any court.

[44] Section 24 governs what happens if a payment schedule is provided to the payee in time and indicates a scheduled amount that the payer proposes to pay. In the event of non-payment of the scheduled amount or part thereof, the payee may recover from the payer the unpaid portion of the scheduled amount and costs as a debt due to the payee in any court.

[45] At the centre of this part of the appeal is s 79. It relevantly states:

> **Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**
>
> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, 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—
>
> (a) judgment has been entered for that amount; or
>
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

[46] The policy underpinning the payment regime and in particular s 79 has often been described as "pay now, argue later".[13]

The High Court decision

[47] The Body Corporate did not dispute that the payment claims underpinning the amount sued for were made by TBS in accordance with the Construction Contracts Act, that provisional payment schedules were issued and that it never notified Maynard Marks of any deductions or amendments.[14]

[48] In those circumstances, the Associate Judge was satisfied that a liability arose under s 24 in respect of which no undetermined counterclaim, set-off or cross-demand could be raised. Section 79 of the Act applied and the Body Corporate therefore had no arguable defence.

Discussion

[49] In its cross-appeal, the Body Corporate advances four reasons as to why the Associate Judge was wrong to reach this conclusion.

[50] The first is that the Body Corporate's claim against TBS could and should have been characterised as an abatement which would take it outside the scope of s 79. In support of that contention, the Body Corporate relied on an oral judgment of the High Court in *Coffee Culture Franchises Ltd v Home Straight Park Trustees Ltd*.[15]

[51] Like the Associate Judge, we reject this submission. In our view, the Body Corporate's claim against TBS is clearly both in form and substance a counterclaim or cross-demand within the meaning of s 79. It is untenable to suggest otherwise. *Coffee Culture* was a very different case involving the interpretation of an abatement clause in the lease of a café.

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13 See *Tailored Building Solutions Ltd v Evans* [2020] NZHC 2208 at [34]–[36], citing *Gill Construction Co Ltd v Butler* [2010] 2 NZLR 229 (HC) at [9] and *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243 at [52].

14 Judgment under appeal, above n 1, at [52].

15 *Coffee Culture Franchises Ltd v Home Straight Park Trustees Ltd* [2021] NZHC 577.

[52] The second argument advanced by the Body Corporate is that the Associate Judge should not have invoked the provisions of the Construction Contracts Act for summary judgment purposes when the particular circumstances of this case are not the sort of circumstances the statutory payment scheme is designed to address. According to the Body Corporate, the statutory scheme is all about maintaining the contractor's cash flow during the course of construction so they can pay their sub-contractors. Cash flow, so the argument runs, is not an issue in this proceeding because the project is completed, these were final payments and the Contractor has in any event already received full value by assigning the debt.

[53] In our view, there is however nothing in the Act or the case law which would justify such limitations being superimposed on the Contractor's statutory rights. The Act does not draw any distinctions between recovery of a final payment claim and an earlier one. Nor does it contemplate the court needing to inquire into how the contractor intends to use the money it receives. The wording of s 79 is clear and unequivocal.

[54] This argument, in our view, is also untenable.

[55] The third argument advanced is that the Body Corporate does have an arguable defence arising out of the conduct of Maynard Marks. There are, it is said, reasons to be concerned about the engineer's conduct in approving the variation requests which in turn bears on the legitimacy of the amounts being claimed by TBS.

[56] A fourth and related argument is that the payment claims are unreliable due to defective workmanship and the uncertainty of the variations.

[57] In our view, to accede to these arguments would be to seriously undermine the statutory scheme and its policy of "pay now, argue later". Under the Construction Contracts Act, TBS's entitlement to payment arises from the duly issued payment schedules. A dispute between the Body Corporate and the Engineer cannot affect those entitlements. Nor, as s 79 makes very clear, can the existence of allegations of defective workmanship.

[58] We conclude that the combined effect of ss 21–23 and 79 of the Construction Contracts Act means the Associate Judge's ruling of "no arguable defence" is unassailable.

Did the Associate Judge err in declining to exercise her residual discretion to withhold the entry of judgment?

Arguments on appeal

[59] It is well-established that the court has a residual discretion not to enter summary judgment, even if satisfied the defendant has no arguable defence. The existence of this discretion arises from the use of the word "may" in r 12.2(1) of the High Court Rules.[16]

[60] Mr Hollyman KC for the Body Corporate referred us to the following statement of the relevant principles in *McGechan on Procedure*:[17]

> (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.
>
> (b) The residual discretion may be invoked to avoid oppression or injustice to the defendant where:
>
> (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.

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16 *Bromley Industries Ltd v Martin & Judith Fitzsimons Ltd* [2009] NZCA 382, (2009) 19 PRNZ 850 at [57]–[67].

17 Robert Osborne and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR12.2.11].

> 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.

[61] In Mr Hollyman's submission, this case comes within the categories identified above, particularly (b)(ii) and (iii), and it was therefore an error for the Associate Judge to decline to exercise her residual discretion.

[62] Developing this central contention, Mr Hollyman argued that the applications for summary judgment and the grant of summary judgment are oppressive and unjust because:

(a) TBS has applied for summary judgment in the face of clear evidence from the Body Corporate about incomplete/defective works.

(b) There is evidence that unless summary judgment is declined, the Body Corporate will struggle to be able to afford and/or gain support for its counterclaim. That will result in the real issue — completeness of the construction works — being unresolved.

(c) It makes logical sense for a claim for money owing based on construction work to be decided after the Court has made a decision about whether or not the construction work was properly carried out or carried out at all.

(d) The applications for summary judgment are an oppressive use of court procedure because they apply financial and emotional pressure to the Body Corporate and individual unit owners while avoiding the substantive issue.

(e) The complex nature of the law and facts at issue in this proceeding has resulted in TBS taking advantage of legislation which was not intended for the purpose for which it is now being used.

[63] Mr Hollyman further argued that a grant of summary judgment also contravened the purpose of the High Court Rules "to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application".[18]

[64] In support of these submissions, Mr Hollyman referred us to the cases of *Sayles v Sayles*[19] and *Herring v Herring*[20] as examples of decisions where the residual discretion has been invoked.

Discussion

[65] We are not persuaded by these submissions. In our view, withholding the entry of summary judgment would be contrary to s 79 and unjustified.

[66] The submission that it makes logical sense for a claim for money owing based on construction work to be decided after the Court has made a decision about the quality of the work runs directly counter to the Act. The exact opposite is what the Act says must happen. The whole purpose of the statutory regime is to facilitate the efficient and speedy resolution of claims for payments under construction contracts.[21] And for the reasons already identified we reject the proposition that the particular circumstances of this case somehow take it outside the purview of the Act.

[67] It is, in our view, instructive that the Body Corporate has not been able to refer us to any case where the residual discretion has been exercised in the construction context. The two cases that are relied on involved the division of relationship property which is governed by a radically different statutory scheme. As the Associate Judge noted, a more pertinent decision is the decision of *Westgate Town Centre Ltd v Auckland Council* where the existence of a no set-off clause in the parties' contract was held to preclude the exercise of the residual discretion.[22]

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18 High Court Rules 2016, r 1.2.
19 *Sayles v Sayles* (1986) 1 PRNZ 95 (HC).
20 *Herring v Herring* [2010] NZCA 500, [2011] 2 NZLR 433.
21 Construction Contracts Act, s 3.
22 Judgment under appeal, above n 1, at [81], citing *Westgate Town Centre Ltd v Auckland Council* [2018] NZHC 2489.

[68] Quite apart from s 79, we are also not persuaded that the summary judgment procedure is being used in an oppressive or unjust manner.

[69] As Mr Galbraith KC for TBS points out, TBS was promised payment of an agreed fixed sum under the variation agreement, a contract the Body Corporate entered into following detailed negotiations and after taking legal advice. There is also evidence that a full discussion about the pros and cons of accepting the fixed price took place at an extraordinary general meeting of the Body Corporate before TBS's offer was put to the vote.

[70] Further, and importantly, the evidence shows the Body Corporate received a significant Government contribution towards the cost of the remedial work based on a representation that the Body Corporate would use the money to pay suppliers including TBS.

[71] On 29 November 2018, the Ministry of Business Innovation and Employment (MBIE) that was administering the financial assistance package emailed the Body Corporate that it was in the process of considering the final claim for the remediation project. It asked the Body Corporate to confirm the total of the accounts relating to the assistance package that remained unpaid and also to confirm that the funds generated from the final claim would be used to pay those accounts. The email ended with a reminder that MBIE payments qualifying for the assistance package were only to be utilised in paying accounts relating to the remediation.[23]

[72] The Body Corporate responded on 5 December 2018 with the names of the suppliers involved in the remedial project, which it identified as HOBANZ, Maynard Marks and TBS, and said it could:

> … confirm that funds the body corporate receives as a result of the [assistance package] final payment Claim will be used to pay these suppliers

[73] Following receipt of that confirmation, MBIE advised that based on that information it was able to process and pay the final claim. That was actioned on

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[23] There was also an email from MBIE to HOBANZ (as representative for the Body Corporate) dated 27 November 2018 which said that the final payment claim had been reviewed and approved.

14 December 2018 when the Body Corporate received the sum of $2,086,981.15. Of that sum $100,000 was earmarked for other suppliers, leaving approximately $2 million for payment to TBS.

[74] The receipt of the assistance payment is significant in our view for two reasons. The first is that had the Body Corporate paid the money to TBS it would have reduced a significant portion of the debt owing under the payment schedules. It chose not to but has instead retained the money.

[75] The second reason why the assistance payment is significant is that despite not having paid the money to TBS and being unable to use it for any other purpose, the Body Corporate has still been able to advance its counterclaim. This obviously undermines the suggestion that it will be prevented from prosecuting the counterclaim by having summary judgment entered against it.

[76] We accept that the amount now owing under the summary judgment well exceeds $2 million because of the high rate of contractual interest continuing to run. However, that is the result of a decision the Body Corporate chose to make, not the result of oppressive conduct by TBS. Had the Body Corporate chosen to do what it represented to MBIE it would do, the debt would have been significantly reduced. According to Mr Galbraith's calculations, which were not contested, had the assistance money been paid to TBS in December 2018, the shortfall could have been met by a levy of around only $8,350 per unit owner.

[77] We acknowledge that this long drawn-out project, the unexpected escalation in costs, the large sums already paid and the prospect of yet more remedial work will be extremely stressful for the individual unit owners and will inevitably have impacted on their financial positions as well as the saleability of their homes. However, it is also noteworthy that according to evidence from the Home Owners and Buyers Association of New Zealand Inc, $35 million is comparable to the costs incurred in the remediation of other buildings of comparable size and complexity.[24] Further,

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[24] The source of this information is an affidavit of Roger Levie dated 22 August 2019. Mr Levie is the co-founder and the Chief Executive of the Home Owners and Buyers Association of New Zealand Inc and also a director of HOBANZ.

the Body Corporate's own evidence falls short of establishing it would be unable to bring its counterclaim were it required to pay the amount owing. It does not itself assert that.

[78] Noteworthy too is its failure to address the existence of a defects insurance policy raised by TBS in its evidence and discovered by HOBANZ. According to a Body Corporate newsletter from 2015, the Body Corporate committee voted to obtain the insurance policy following a resolution at an extraordinary general meeting. The policy is said to have provided for a ten-year warranty to rectify major defects including structural and weathertightness defects, as well as providing cover in relation to all work being completed under current building consents. The existence of this policy and the extent of its cover is information within the knowledge of the Body Corporate. Yet it has provided no evidence about it.

[79] An additional point is that Mr Hollyman's submissions are premised on the basis that the counterclaim is strong. However, at this preliminary stage it is not possible to assess the merits of the counterclaim with any degree of accuracy. It is certainly arguable but there are also counter-arguments.

[80] According to the affidavit evidence filed by TBS, the allegedly uncompleted work was outside the scope of the work it was contracted to do. The work it was contracted to undertake was completed and was certified by the Engineer as complete, with certificates being issued for the end of the defects liability period. The construction project was also certified by the Auckland City Council as being completed in accordance with the building consents as well as the Building Code. Code compliance certificates were issued for each stage between August 2017 and July 2018. The evidence filed by TBS also challenges the cost estimates for the further repair work, which TBS considers are significantly inflated.

[81] In all these circumstances, we are not persuaded that the financial circumstances of the Body Corporate and the fact of its counterclaim justify withholding summary judgment.

[82] We conclude the Associate Judge was correct to decline to withhold the entry of judgment.

[83] The Body Corporate's cross-appeal is accordingly dismissed.

Did the Associate Judge err in staying enforcement of the summary judgment?

[84] Rule 17.29 of the High Court Rules provides that:

> 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.

[85] The following general principles can be distilled from the case law:

(a) The starting point is that the successful party is entitled to the fruits of its judgment.[25]

(b) The onus is on the applicant seeking a stay of enforcement to persuade the court to exercise its discretion.[26]

(c) A substantial miscarriage of justice must be involved, substantial being more than minor or insubstantial.[27]

(d) It is not sufficient that a miscarriage of justice might result if the judgment were enforced. It must be probable rather than possible.[28] The test is whether there is a "real and substantial risk".[29]

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25 *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZCA 377, (2017) 23 PRNZ 598 at [10].

26 *Bay Cities Real Estate Ltd v Re/Max New Zealand Ltd* HC Napier CIV-2010-441-134, 8 June 2011 at [19(a)].

27 At [19(b)]; and *Marac Finance Ltd v Twilight Trustee Ltd* HC Auckland CIV-2008-404-7291, 25 February 2009 at [9].

28 *Crawford v Odin Enterprises Pty Ltd* [2009] NZCA 199 at [29].

29 *Bay Cities Real Estate Ltd v Re/Max New Zealand Ltd*, above n 26, at [28]–[29].

(e) The court must undertake a balancing exercise where it recognises and reconciles the conflicting interests of both parties in such manner as will best serve the overall interests of justice.[30]

(f) The mere existence of a counterclaim is not sufficient. A miscarriage of justice is unlikely to result where a party is required to pay to another an amount owing and the payer is otherwise free to pursue its claim against the other party in the normal way.[31]

(g) Other relevant factors may include the apparent strength or weakness of the claim; the ability of the applicant to meet the judgment that is being enforced; and the potential bankruptcy or liquidation of a party seeking to pursue an apparently strong claim.[32]

[86] In granting the stay, the Associate Judge accepted the same arguments advanced by the Body Corporate that she had previously rejected when it came to the issue of the residual discretion.[33] The Associate Judge justified the different response on the basis there was a distinction between judgment and enforcement.[34]

[87] On appeal, Mr Galbraith challenged the distinction drawn by the Associate Judge between judgment and enforcement. In his submission, the statutory prohibition against giving effect to a counterclaim in any proceedings for the recovery of a debt logically encompasses both the determination of the debt claim and its enforcement. It was thus an error to split judgment and enforcement.

[88] Developing this central contention, Mr Galbraith argued that the Associate Judge's stay decision is inconsistent with the language, scheme and purposes of the Construction Contracts Act and hence inconsistent with the Associate

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30 At [19(d)]; and *Enright v Gold Metal Exports Ltd* (1989) 3 PRNZ 243 (HC) at 245–246.

31 *Bay Cities Real Estate Ltd v Re/Max New Zealand Ltd*, above n 26, at [19(e)]; and *Econotek Construction Ltd v Kale* HC Gisborne CP8/87, 7 January 1988 at 8.

32 *Bay Cities Real Estate Ltd v Re/Max New Zealand Ltd*, above n 26, at [19(f)]; and see *Raffles Education Corporation Ltd v Mills* HC Auckland CIV-2008-404-5258, 16 February 2009 at [13]; *Goldsmith v Drummond* HC Christchurch CP201/97, 21 July 1998 at 15; and *New Zealand Apple and Pear Marketing Board v Wallis* (1990) 4 PRNZ 713 (HC) at 716–717.

33 Judgment under appeal, above n 1, at [99]–[113].

34 High Court leave decision, above n 3, at [15].

Judge's own rulings on summary judgment and the residual discretion. The same reasoning that led the Associate Judge to decline to exercise her residual discretion applied with equal force to the stay application. Just as the exercise of the residual discretion would frustrate s 79 of the Construction Contracts Act so too, he argued, does the granting of a stay. A stay prevents enforcement which prevents payment. Yet the Act is all about payment and ensuring payment is not anchored to the determination of separate disputes. That is exactly what the stay granted by the Associate Judge has done, the very thing the Construction Contracts Act is designed to prevent.

[89] It followed, in Mr Galbraith's submission, that the Act and particularly s 79 adds another dimension to the general law relating to the granting of stays. It was an additional hurdle, a hurdle so high it was, he said, "impossible to jump".

[90] We accept that none of the authorities cited on appeal by the Body Corporate directly addresses the issue of the extent to which s 79 is an impediment to a stay.[35] Further, unlike the present case, none of them concerns a court exercising its powers to stay enforcement of a final as opposed to an interim determination in the absence of a concession from the judgment creditor. One case — an Australian decision — was also based on legislation that did not have a provision similar to s 79.[36]

[91] We also accept for the reasons already discussed at [53], [57] and [66], that the Associate Judge was wrong to agree with the Body Corporate that the Construction Contracts Act had limited relevance in this case because construction had "long finished" and the debt had been assigned.[37]

[92] On the other hand, as even Mr Galbraith conceded in response to a question from us, it must be too absolute a proposition to say that s 79 precludes the court from ever granting the stay of a judgment debt based on a payment schedule. In our view, express words would be required before the Court would be willing to contemplate ascribing any such intention to Parliament.

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35 See *Concrete Structures (NZ) Ltd v Palmer* [2006] NZAR 513 (HC); *Kariiti Ltd v Donovan Drainage & Earthmoving Ltd* HC Whangārei CIV-2010-488-613, 19 November 2010; *Concrete Structures (NZ) Ltd v NMHB Ltd* [2019] NZHC 268; and *Cummins v Body Corporate 172108* [2021] NZCA 145, [2021] 3 NZLR 17.

36 *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico & Ors* [2004] NSWSC 344.

37 Judgment under appeal, above n 1, at [111].

[93] As we see it, the correct approach in this case was to regard the statutory context and the purpose of the Construction Contracts Act as highly relevant considerations in weighing the competing interests. The Act is not determinative but it is a cogent factor pointing away from granting a stay. It meant the case for granting a stay needed to be particularly compelling. And in our view, it was not.

[94] The case for a stay rested on two arguments. The first was that the Body Corporate, if required to pay the summary judgment now, would not be free to pursue its counterclaim; and the second was that if the Body Corporate paid now and was later successful in its counterclaim, there was a real risk it would never recover a refund of the money from TBS.

[95] As to the first point, the Associate Judge concluded the counterclaim was "credible"[38] and that she was "not satisfied that if the Body Corporate is required to pay the Claimed Debt to TBS that it will be 'free to pursue its [counterclaim] in the normal way'".[39]

[96] By "credible" we assume the Associate Judge meant "arguable and made in good faith" (as opposed to "strong") and therefore take no issue with that description of the counterclaim. But in so far as the Associate Judge's statement suggests the onus of proof regarding the ability to bring the counterclaim was on TBS, that was plainly wrong. The onus of proof was on the Body Corporate, whose evidence about its financial circumstances was, as the Associate Judge recognised, not as comprehensive and as specific as it could (and we would add "should") have been.[40] Indeed, as already mentioned, the Body Corporate itself stopped short of saying it would be unable to bring the counterclaim if it had to pay the judgment debt.

[97] The Body Corporate was not in a position to be able to say that because while still retaining the assistance money, it has in fact been able to advance the counterclaim. The Associate Judge was cognisant of the assistance payment but in our view wrongly placed limited weight on it, reasoning that it does not cover the

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38 At [102].
39 At [108].
40 At [104].

entire amount of the debt now in the vicinity of $3 million.[41] However the Associate Judge failed to take into account the fact that the reason there was now a gap of that order between the judgment debt and the assistance payment was due to a deliberate choice on the part of the Body Corporate itself. In our assessment, the assistance money was a significant piece of evidence bearing on the overall interests of justice.

[98] We also consider it was an error for the Associate Judge to decline to take into account the existence of the insurance policy. The Associate Judge held there was insufficient evidence of its existence apart from the reference in the newsletter and she could not draw any inferences from that reference.[42] However, as mentioned the policy was a discovered document and the reason there was no evidence about the detail of the policy was because the Body Corporate had chosen not to adduce it.

[99] We conclude that the decision to grant a stay on the basis of the Body Corporate's inability to pursue its counterclaim was arrived at as the result of a number of errors and was wrong.

[100] Turning to the concerns about the solvency of TBS. The Body Corporate has concerns that when TBS was sold, it ceased trading and is now just a shell company. It says that were the judgment debt to be paid to TBS, TBS will then immediately pay it to Hellaby and as a result put it beyond the reach of the counterclaim.

[101] The only evidence on this issue is first a bare assertion by the Chair of the Body Corporate to the effect that TBS has ceased trading and is a shell company and secondly a bare denial of the correctness of both those statements by TBS's general manager. The latter deposes in his affidavit that "TBS continues to trade".

[102] On appeal Mr Hollyman argued the absence of any information or documentation to support the general manager's bland assertion tends to reinforce the concerns of the Body Corporate. He further submitted it was incumbent on TBS to provide this information and it should not be allowed to benefit from its own wrong.

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41 At [105].
42 At [107].

[103] In support of that submission, Mr Hollyman referred us to a passage in a decision of the English Technology and Construction Court *Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd*.[43] In that case, a partial stay of the execution of a summary judgment was granted on the grounds of the judgment creditor's probable inability to repay the judgment debt. In the passage relied upon by Mr Hollyman, the Judge, Coulson J, stated:[44]

> It is not appropriate for a party to recover £10 million by way of an adjudication and then, in answer to legitimate concerns raised by the other side as to their financial position, effectively stonewall the requests until the last minute and beyond.

[104] The passage quoted actually follows after the Judge has concluded a partial stay should be granted for other reasons, the stonewalling being seen as confirming his decision. More importantly, it was made against a quite different factual background to the one at issue here.

[105] The comments quoted were made in relation to an entity known as an SPV (or special purpose vehicle), that is to say an entity created specifically for a one-off project. Due to delays, the SPV terminated the construction contract between it and the contractor at a time when the work had not moved beyond the preparatory stage. It subsequently notified the contractor it was no longer proceeding with the project and then, relying on a clause in the contract regarding accounting after termination, issued an interim account. There was then a dispute about the validity of the termination and the basis and accuracy of the interim account. The dispute was referred to an adjudicator who found in favour of the SPV and made an award of approximately £10 million, 80 per cent of which was comprised of the first four milestone payments which the SPV had originally paid to the contractor for preparatory work.[45] The stay was sought pending the outcome of a final accounting between the parties which the Judge said could possibly be "years down the line".[46]

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43 *Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd* [2018] EWHC 177 (TCC).
44 At [78].
45 At [25].
46 At [72].

[106] The fact the judgment creditor was an SPV was a critical factor in the granting of a partial stay[47] as well as the fact that any final reckoning between the parties was "far off in time".[48] As the Judge pointed out, not only did the SPV have "no possible incentive to remain in existence for a minute longer than it need[ed] to", it was also " overwhelmingly likely" it would be wound up "sooner rather than later".[49] Further, there was also evidence that, in breach of its statutory obligations, the SPV had failed to file certain financial information with the Companies Office.[50]

[107] In short, there was a proper evidential basis for the judgment debtor's claims of probable insolvency which is lacking in this case. The fact TBS has been sold to an Australian entity of itself is not enough. While it would have been better had TBS provided a detailed response, we are not persuaded that the failure to do so of itself justifies a stay.

[108] For all these reasons, we consider that TBS's appeal against the stay decision must succeed.

Did the Associate Judge err in declining to grant a stay of the counterclaim?

The High Court decision

[109] TBS's application to stay the counterclaim and refer it to arbitration for resolution was made in reliance on art 8(1) of sch 1 of the Arbitration Act 1996.

[110] Article 8(1) 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 when 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.

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47 The contractor was ordered to make immediate payment to the SPV of £4.5 million, with a further £1 million to be paid into court. The stay of execution was over the remaining £4.5 million plus.

48 At [73].

49 At [71].

50 At [66].

[111] The construction contract between TBS and the Body Corporate contained an arbitration agreement by virtue of its incorporation of s 13 of NZS 3910:2013. The full text of s 13 is attached as an appendix to the judgment under appeal. For our purposes it suffices to identify the salient features of what is a step by step dispute resolution process. Those features are as follows:

(a) Subject to certain exceptions which do not apply here, s 13.2.1 states that every dispute or difference concerning the construction contract "shall be referred to the Engineer not later than 1 Month after the provision of the Final Payment Schedule … or more than 1 Month after the date on which any relevant Adjudicator's Determination is given to the parties, whichever is the later".

(b) The Engineer must give a written decision.

(c) If either party requests a formal decision, the Engineer must provide a formal decision within 20 working days of receiving that request.

(d) In the event either party is dissatisfied with the Engineer's formal decision or no formal decision is given within the 20-working-day time period, either party may within one month[51] thereafter give notice that the matter be referred to mediation or arbitration.

(e) Mediation will only take place if the other party agrees within 10 working days of receiving the request for mediation.

(f) If a mediation is requested but does not take place due to lack of agreement, or takes place but fails to resolve the matter in dispute, then within one month either party may by notice require the dispute to be referred to arbitration.

[51] Defined in the Contract as a calendar month.

(g) Unlike mediation, arbitration does not require the consent of both parties. The dispute must be referred to a sole arbitrator whose decision shall be final and binding on the parties.

(h) The parties may at any stage agree to suspend any dispute resolution under s 13 due to any adjudication proceedings under the Construction Contracts Act.

[112] The Associate Judge described the agreement to arbitrate as "the final step in a staged dispute resolution process".[52] In her view, the intention underlying s 13 is that the escalating dispute resolution process culminating in arbitration is only mandatory while the construction contract is being performed and up until one month after the Final Payment Schedule is issued. After that date, the arbitration agreement is no longer operative for the purposes of art 8(1) and the Body Corporate was therefore free to pursue its counterclaim in the courts if it wished to do so.[53]

[113] The Associate Judge accordingly declined the application for a stay.[54]

Discussion

[114] Article 8(1) contains three prerequisites to the grant of a stay. TBS therefore needed to persuade the Associate Judge that:

(a) the counterclaim was a proceeding which had been brought in a matter which is the subject of an arbitration agreement;

(b) the request for a stay was made no later than TBS's first statement on the substance of the dispute; and

(c) the arbitration agreement was not null and void, inoperative or incapable of being performed.

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52 Judgment under appeal, above n 1, at [124].
53 At [128], [131] and [140]–[142].
54 At [155(e)].

[115] In the High Court, the Associate Judge found the first two prerequisites were met but, as already mentioned, not the third.

[116] On appeal, it is common ground that the counterclaim is a dispute or difference concerning the construction contract within the meaning of s 13.2.1. It has thus been brought in a matter which is the subject of an arbitration agreement and therefore the first requirement for a stay and mandatory referral to arbitration under art 8(1) is satisfied.

[117] According to TBS, the second prerequisite was also not disputed in the High Court. However, the Body Corporate now contends[55] that because TBS had engaged on the merits of what was then a proposed counterclaim in correspondence and affidavit evidence in the first summary judgment application, it was out of time in filing its stay application.

[118] We disagree. TBS filed its application to stay the counterclaim and its protest to jurisdiction promptly after the counterclaim was filed on 1 September 2020. It would not make sense to find that communications prior to the filing of the counterclaim could amount to the first statement on the substance of the dispute for the purposes of art 8(1). Until the counterclaim was filed, there was no proceeding to protest or stay.

[119] The Associate Judge was therefore correct in our view to find that the first two prerequisites under art 8(1) of the Arbitration Act were satisfied.

[120] The key issue is whether she was correct to find that mandatory referral of disputes to the dispute resolution process in s 13 ended one month after the Final Payment Schedule was issued and that thereafter the arbitration agreement was no longer operative or capable of being performed.

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55 The Body Corporate raised this argument in a memorandum headed Notice of Intention to Support the Judgment on Other Grounds. However, because the Judge made an express ruling on the issue, the correct vehicle for challenge on appeal was a cross-appeal. TBS has not however been prejudiced and we therefore address the merits of the argument.

[121] The Final Payment Schedule in this case was issued in July 2019 and was not challenged. The Body Corporate filed its counterclaim in the High Court more than a year later in September 2020.

[122] In contending that the Associate Judge erred in concluding the arbitration agreement became inoperable one month after the Engineer issued a Final Payment Schedule, Mr Galbraith advanced the following arguments:

(a) Both the District and High Courts have the power under art 7 of sch 2 of the Arbitration Act to extend the time specified in an arbitration agreement for commencing arbitral proceedings for such period as the court thinks fit if in its opinion undue hardship would otherwise be caused to the parties. That power is available even if the time specified in the arbitration agreement has expired.

(b) Either party could also initiate an adjudication under the Construction Contracts Act which would result in a determination, which in turn would also enable an arbitration to be commenced. The right to refer disputes to adjudication under s 25 of the Construction Contracts Act is not subject to any time limitation.

(c) In any event, an earlier decision of the High Court *Miro Property Holdings Ltd v The Fletcher Construction Company Ltd* indicates that the Body Corporate's failure to give a timely notice does not render the arbitration agreement inoperative.[56]

(d) The Associate Judge's decision in this case is contrary to the general principle that courts should not allow any inconsistencies or uncertainties in the wording or operation of the arbitration clause to thwart the parties' intention to submit disputes to arbitration.[57]

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[56] *Miro Property Holdings Ltd v The Fletcher Construction Company Ltd* HC Wellington CIV-2010-485-2540, 31 May 2011.

[57] *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 (HC) at [61].

(e) The decision in this case also leads to the undesirable outcome that a principal can circumvent the arbitration agreement by the simple expedient of delaying to invoke the s 13 process. That would be to allow it to take advantage of its own wrong, something the courts have said should not be allowed.[58]

(f) Arbitration is the ideal forum for resolution of building disputes. The fact there are other counterclaim defendants who are not parties to the arbitration agreement does not preclude arbitration.

(g) Both parties view the construction contract as still on foot with contractual obligations to be performed.

[123] We acknowledge that in principle arbitration would have been a suitable forum for resolution of the Body Corporate's counterclaim and also agree that the existence of other counterclaim defendants would not of itself have been an impediment.[59] Nor would the fact that one of those other counterclaim defendants has now made a cross-claim against TBS. Once the three prerequisites of art 8(1) are satisfied, there is no room for any residual discretion. The court must order a stay.[60]

[124] We acknowledge too that when interpreting an arbitration agreement, the general approach is that courts should where possible uphold arbitration and the parties' intention to submit disputes to that process.[61]

[125] However, in our view, the present case is not one where the Associate Judge has allowed inconsistencies and uncertainties in the arbitration agreement to thwart the parties' intentions. Contrary to Mr Galbraith's submissions, we consider the wording of the time limits in s 13.2.1 is clear and unambiguous and permits of only one interpretation, being the interpretation adopted by the Associate Judge. We are

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58 At [65].

59 Construction Contracts Act, s 40 permits adjudicators to consolidate adjudication proceedings with the written consent of all parties.

60 *Opus International Consultants Ltd v Projenz Ltd* HC Auckland CIV-2003-485-1387, 17 March 2004 at [19]; and Barbara Hunt and others *Green & Hunt on Arbitration Law and Practice* (online ed, Thomson Reuters) at [ARSch1.8.06].

61 *Ursem v Chung* [2014] NZHC 436, [2014] NZAR 1123 at [35].

not persuaded by any of the arguments raised, whether viewed individually or collectively, that the Associate Judge was wrong to deny a stay.

[126] The existence of the right to refer disputes to adjudication and the existence of the right to apply to the court for an extension of time is undoubted. However, the fact of the matter is that TBS has not taken either of those steps. That is hardly surprising. An application for an extension of time would appear unlikely to succeed given the length of time that has now passed and the requirement to prove "undue hardship" to the *parties,* plural.

[127] Adjudication is similarly problematic. Undergoing what would be a lengthy adjudication hearing solely for the purposes of securing a determination as a means of getting to an arbitration otherwise out of time is simply impractical and might well be viewed as an abuse of the adjudication process. Additional complications would also be likely to arise as a result of the existence of potential liabilities to other counterclaim defendants and the impact that factor would have on the parties' respective positions.

[128] Nor in our view does the existence of these alternative pathways — as Mr Galbraith termed them — bear on the plain meaning of the words "shall be referred to the Engineer not later than 1 Month after the provision of the Final Payment Schedule" or somehow impose some superadded gloss on those words.

[129] As for relevant case law, there appear to be very few decisions which have considered the time limits in s 13 and those that have are of limited relevance. But, in our view, what authority there is does not support TBS's position.

[130] Counsel referred us to three cases.

[131] The first is a decision of this Court in *Blain v Evan Jones Construction Ltd*.[62] There a party to a construction contract with the plaintiff was resisting being joined to the proceeding as a third party on the basis of being a joint tortfeasor with other participants in the building process whom the plaintiff had sued. One of the arguments

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62 *Blain v Evan Jones Construction Ltd* [2013] NZCA 680.

raised by the proposed third party was that s 13 of NZS 3910:2003[63] provided a mandatory dispute resolution process for determining its liability to the plaintiff and therefore it was wrong to join it to court proceedings.

[132] This Court rejected that argument on the basis that the s 13 process was "an exclusive process only during the construction period".[64]

[133] We accept that limited weight can be afforded this ruling because counsel for the third party had conceded that at the end of the construction period, s 13 would not have precluded the plaintiff from suing the builder in contract.[65] However, the fact the Court endorsed the concession is not without some significance.

[134] The second case is a decision of Associate Judge Matthews in *Minister of Education v PXA Ltd*. There, the Court held that the arbitration agreement in a construction contract had ceased to be operative for the purposes of art 8(1) because the mandatory steps in the relevant dispute resolution process indicated the process did not apply once the contracted work had been completed.[66]

[135] There are a number of distinguishing aspects which render this decision also of limited relevance. The first is that unlike the present case, the arbitration agreement in question was not derived from NZS 3910:2013 but from a New Zealand Institute of Architects standard form contract. The second distinguishing feature is the reference in the judgment to the construction contract being no longer current. If that was intended to mean the contract had been discharged by performance/termination, that is also different from this case where the Body Corporate is seeking specific performance and so treating the contract as still on foot.

[136] However, the mandatory steps in the dispute resolution process on which the Associate Judge relied to support his conclusion are common to both cases. For example, the Associate Judge attached significance to the fact that it was the person supervising the construction, the architect (in our case the Engineer) that had a

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63 This was an earlier iteration of NZS 3910:2013.
64 At [61].
65 At [61].
66 *Minister of Education v PXA Ltd* [2015] NZHC 1330 at [32].

primary role in ruling promptly on disputes as soon as they arise. Reliance was also placed on the short time periods attaching to each of the mandatory steps and on the existence of a prohibition — also to be found in s 13 — preventing the Contractor from suspending work as a result of a dispute proceeding.[67]

[137] We agree with the Associate Judge in this case that these same features do tend to lend support to the proposition that the dispute resolution process in s 13 is intended to only be mandatory during construction and shortly thereafter, namely only one month after the Final Payment Schedule is issued.

[138] The third case is the decision on which Mr Galbraith relies to support his contention that earlier High Court authority indicates that the Body Corporate's failure to give timely notice does not render the arbitration agreement inoperable or ineffective. The decision in question is *Miro Holdings Ltd v The Fletcher Construction Company Ltd.*

[139] In *Miro Holdings*, Associate Judge Gendall granted a stay of a court proceeding and referred the matter to arbitration despite the fact it had been some five years since practical completion of the building works had been certified.[68] The Associate Judge held that despite the length of time, the arbitration agreement contained in the contract by virtue of s 13 of NZS 3910:2003 continued to run and therefore it was still potentially within the power of either party to commence the process of resolving disputed claims under the s 13 procedures by seeking a decision from the Engineer.[69]

[140] Critically for present purposes, on our reading of the judgment, the reason why the Associate Judge considered the arbitration agreement continued to run was because no final payment claim and no final payment schedule had ever been provided. In our view, it is clear the Associate Judge would never have granted the stay had that not been the case.

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67 At [31].

68 *Miro Property Holdings Ltd v The Fletcher Construction Company Ltd*, above n 56, at [12]–[13] and [64].

69 At [48]–[49].

[141] It follows that in our view this decision does not assist TBS. Quite the contrary.

[142] Nor are we persuaded that to deny a referral to arbitration is to allow the Body Corporate in the circumstances of this case to take advantage of its own wrong. As the Associate Judge pointed out, neither party in this case chose to invoke the s 13 dispute process even though there had been some discussions between them about the issues which, from the Body Corporate's perspective, only crystallised when it involved experts in July and August 2019.[70] The evidence does not support any inference that it deliberately delayed doing so in order to avoid arbitration. The reality is that it was not in a position to formulate any claim with precision within time.

[143] We also doubt that the decision will incentivise future claimants to keep their claims under wraps and deliberately delay for a month. The advantages of arbitration are too well-known, including in the construction world.

[144] In so far as the Associate Judge's decision limits the opportunity to arbitrate on issues that do not become apparent until well after the Final Payment Schedule, we consider that is simply a consequence of the plain wording of s 13.

[145] Concerns about the hardship this might cause are tempered by the fact that relief is available in the form of the courts' jurisdiction to extend time and the adjudication process. If credible concerns at a deliberate delay are present, then the merits of an application for extending time to invoke the arbitral process would be viewed quite differently. Our decision simply applies the clear meaning of s 13 to the particular facts of this dispute.

[146] For all these reasons we agree with the Associate Judge that, as she put it:[71]

> … 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.

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70 Judgment under appeal, above n 1, at [135].
71 At [142].

[147] TBS's appeal against the grant of a stay of the Body Corporate's counterclaim and mandatory referral to arbitration is accordingly dismissed.

[148] In light of our decision it is strictly speaking unnecessary for us to address a further argument raised by the Body Corporate based on s 11 of the Arbitration Act.[72] Under s 11 a consumer arbitration agreement cannot be enforced after a dispute has arisen without the agreement of both parties. Section 11 only applies if one of the parties is an individual and entered into the arbitration agreement "otherwise than in trade" with a party who was "in trade". The first of those requirements — that the party be an individual — was inserted by a 2007 amendment.[73]

[149] The Body Corporate was not in trade but TBS was. The application of s 11 to this case therefore turns on whether the Body Corporate is an individual. The Body Corporate emphasises that it is the body corporate of a residential complex and although it is a corporate entity, the word "individual" is apt to comprise a group of individuals or a single entity comprising a group of individuals all of whom would in their own right be entitled to consumer protection.

[150] The Associate Judge rejected that argument. She held having regard to the plain meaning of the word "individual" and the Parliamentary materials relating to the 2007 amendment[74] that it meant "natural persons".[75]

[151] We agree for the same reasons. A corporate entity cannot be an individual for the purposes of s 11.

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72 This argument was also raised in Memorandum Supporting the Judgment on Other Grounds. For the same reasons identified above at [117], n 55, it should have been raised by way of cross-appeal.

73 Arbitration Amendment Act 2007, s 5(2).

74 Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at [154]–[167]. As the Associate Judge noted at [152] of the Judgment under appeal, the Bill was intended to implement the recommendations of the Law Commission: Arbitration Amendment Bill 2006 (72-1) (explanatory note) at 1.

75 Judgment under appeal, above n 1, at [152]–[154].

Outcome

[152] The appellant's appeal against the High Court decision to stay enforcement of the summary judgment against the first respondent is allowed and the High Court decision quashed.

[153] The appellant's appeal against the High Court decision declining to stay the first respondent's counterclaim is dismissed and the High Court decision confirmed.

[154] The first respondent's cross-appeal is dismissed.

Costs

[155] As regards costs, the parties were able to reach agreement on the basis on which they should be calculated. In accordance with that agreement, we therefore make the following orders:

(a) The first respondent must pay the appellant costs on the cross-appeal calculated on the basis of a standard appeal, band B together with usual disbursements. We certify for second counsel.

(b) The honours being evenly divided on the appeal, we make no award of costs in relation to the appeal.

(c) We remit the question of costs in the High Court to that Court to be reconsidered in light of this judgment.

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Farry Law Ltd, Auckland for First Respondent