

Take care to avoid conflict of interest when appointing an adjudicator

[Charlotte von Dadelszen](#), [Daniel Kelleher](#), [Tom Bennett](#), [John Buchan](#), [Stephen Whittington](#), [Bassam Maghzal](#), [Brannavan Gnanalingam](#), [Jonathan Simons](#), [Stephanie Snedden](#), [Caitlin Olsen](#)

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There is a high threshold for judicially reviewing an adjudicator's determination under the Construction Contracts Act 2002 (CCA). A recent case indicates how, if adjudicators are not careful, the close-knit nature of New Zealand's construction industry may lead to an adjudicator having a conflict of interest and, consequently, having an apparent bias to one party to the adjudication leading to a disqualification of the adjudicator's decision.

In the case of *Youssef v Maiden* [2019] NZHC 3471, Ahmed Amin Mahmoud Youssef (as Trustee of the Jamesef Trust) and Stephyn St James (the Applicants) entered into a residential build contract with the respondent, Bespoke Design and Build Limited (Bespoke), but later terminated the agreement alleging that Bespoke repudiated and breached the contract. Bespoke rejected this cancellation and itself terminated the contract. This led to the parties appointing an adjudicator, Mr Maiden, who determined that the Applicants' cancellation was unlawful, Bespoke's cancellation was lawful, and that both parties were indebted to each other.

However, the Applicants discovered that the adjudicator had failed to disclose that during the adjudication, on the recommendation of Martelli McKegg (the solicitors acting for Bespoke), Mr Maiden acted as an expert witness on multiple cases for another client of Martelli McKegg. Counsel for the Applicants discovered the conflict after they became aware of litigation on which the adjudicator was engaged.

Sections 34 and 41 of the CCA provide that a prospective adjudicator must disclose any conflict of interest (financial or otherwise) and must not act until all parties agree to the adjudicator's appointment despite the conflict of interest. This did not occur in this case. The High Court found that the adjudicator had a conflict because his engagement and fees derived from Martelli McKegg and, accordingly, he breached his statutory duty by failing to disclose the conflict. Moreover, the Court found that the close-knit nature of the construction industry does not require any reading down of the conflict of interest provisions of the CCA.

The presence of a conflict of interest may also suggest apparent bias, as was the case here. Following the Court's finding of a conflict of interest, and on the basis of existing case law, the Court held that the adjudicator was disqualified on the ground of apparent bias because "a fair-minded lay observer might reasonably apprehend that [the adjudicator] might not bring an impartial mind to the resolution of the question".

This case illustrates how important it is for adjudicators to ensure that their relationships with law firms do not create conflicts of interest in terms of disputes for which they are appointed adjudicator. Adjudicators will need to identify the solicitors acting for each party to ensure that the adjudicator does not have a relationship with those solicitors. If the adjudicator does have a working relationship with the solicitors of a party to the adjudication, the adjudicator will almost certainly have a conflict of interest and, consequently, may be assumed to have an apparent bias towards the party whose solicitors have a relationship with the adjudicator. The result is that the adjudicator's decision would likely be disqualified without needing to prove that the adjudicator favoured that party in their decision. Solicitors will also need to take care when recommending adjudicators to ensure that the adjudicator is not already acting for one of their clients. For parties to an adjudication, in appointing an adjudicator, it is important to consider whether a conflict may exist and request that the adjudicator confirm that he or she is not aware of any conflict of interest having considered the construction contract, the parties to the dispute and the solicitors acting for those parties.

Auckland

**188 Quay Street
Auckland 1010**

**PO Box 1433
Auckland 1140
New Zealand**

P: +64 9 358 2555

F: +64 9 358 2055

Wellington

**Aon Centre
1 Willis Street
Wellington 6011**

**PO Box 2694
Wellington 6140
New Zealand**

P: +64 4 499 4242

F: +64 4 499 4141

Christchurch

**83 Victoria Street
Christchurch 8013**

**PO Box 322
Christchurch 8140
New Zealand**

P: +64 3 379 1747

F: +64 3 379 5659