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AUCKLAND DISTRICT LAW SOCIETY LEGAL DEVELOPMENT

## Construction Contracts Act Update

Tuesday 9<sup>th</sup> September 2008  
Stamford Plaza  
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# Construction Contracts Act Update

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# Construction Contracts Act Update

by Eugene St John

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## INTRODUCTION

We<sup>1</sup> are now two years on from the last ADLS seminar<sup>2</sup> on the CCA. What has developed since 2006?

- AMINZ reports a significant increase in the number of adjudication applications
- Two further nominating authorities have been certified by the Minister
- The Court's approach to judicial review within the context of the CCA
- NSW Supreme Court moves to limit the scope of judicial review of determinations
- An Associate Judge declines to follow the judgment of the chief High Court Judge in *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd*
- The Courts get tough on the content of payment schedules
- A Judge here and in NSW hint at the possibility of contracting out of the Act

And what has not happened?

- The right to claim damages remains unresolved by the Courts
- The definition of "residential occupier" remains unresolved by the Courts
- The definition of "associated persons" has not been decided by the Courts

This seminar does not seek to go back to matters discussed by Stephen Price and Brendan Cash at the last ADLS seminar on this topic. This seminar provides an update of cases since Messrs Price and Cash delivered their paper and looks in more detail to some of the trends that have developed here and overseas.<sup>3</sup>

What's been happening overseas? We know that adjudication began in the UK but is now firmly established in NSW and Victoria. Western Australia and the Northern Territory have recently enacted similar legislation as did Singapore in 2004. Some jurisdictions are now confident enough to amend their legislation to expand its effectiveness. The latest edition of *"Keating on Construction Contracts"*<sup>4</sup> now devotes an entire chapter to the UK legislation noting the emerging case law. The first substantive text on construction adjudication in the UK has been published by a Judge of the TCC, HHJ Peter Colson QC<sup>5</sup>. After more than a decade in operation in the UK, the authors of these significant texts point to detailed statistics showing trends in adjudication and note some practical realities that are emerging.

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<sup>1</sup> The author gratefully acknowledges the assistance of Derek Firth in the preparation of this paper.

<sup>2</sup> 16 May 2006

<sup>3</sup> Those wanting to follow the emergence of case law since that last seminar should look at Michael Gold's paper delivered in March 2007 (LexisNexis) and Tomas Kennedy-Grant QC's paper in April of this year published in the NZ Lawyer – 4 April 2008.

<sup>4</sup> Stephen Furst and Vivian Ramsey, 8<sup>th</sup> edition, London, Sweet & Maxwell 2006

<sup>5</sup> "Construction Adjudication" Oxford University Press, 2007

No one now attempts to deny the system is heavily weighted in favour of the claimant. Statistics from the UK and NSW show the claimant to be successful roughly 70 % of the time.<sup>6</sup> Those statistics showed exponential growth at the introduction of the legislation, but by years 3 and 4, that growth appears to have leveled off. One of the more interesting statistics is as to who are the parties proceeding to adjudication. Like the UK and NSW, the CCA was driven by the perceived need to protect sub-contractors from contractors. In the UK the majority of adjudications are now between owner and contractor. Nor is adjudication necessarily considered the cheap alternative to litigation as the framers had envisaged. In the UK, it has been noted by the authors of *Keating*<sup>7</sup> that the magnitude of legal and expert costs that parties to adjudications are incurring appears to be significant; and adjudicators own fees and costs are not insignificant.<sup>8</sup> In the UK, adjudicators' costs were reported to average approximately 3 % of claims. NSW shows a slighter higher average of 3.8% of claims between \$40,000 to \$100,000.

*Keating* also notes particular tactics emerging. The filing of claims around holiday time increases in an obvious attempt to limit the ability of the responding party to respond.<sup>9</sup> Another is for subcontractors to collectively gang up and refer notices on a contractor at the same time to hinder the latter's ability to respond.<sup>10</sup> Fundamentally, the authors<sup>11</sup> recorded that parties are increasing treating adjudications as final decisions and the number of adjudication decisions revisited in arbitration or by the courts is small. In the UK, the majority of adjudications were carried out on a "documents only" basis with no conferences or site visits.

How many adjudications have there been under the CCA? What is the percentage of success? We don't know. AMINZ apparently has not kept statistics.<sup>12</sup>

Cases decided since the last ADLS paper show that our Courts want to enforce the aims of the CCA when it comes to payment claim schedules. Parties who do not follow the Act will receive no assistance from the Court. Justice Asher's decision in *Marsden Villas Limited v Wooding Construction Limited*<sup>13</sup> appears to be the most commonly cited decision under the Act with the Court of Appeal decision of *George Developments Ltd v Canam Construction Ltd*.<sup>14</sup> No attempts have been made to distinguish these cases; rather the dicta expressed in those judgments in support of the CCA has been wholly endorsed in subsequent cases.

We appear to have hit a roadblock in respect of enforcement. The High Court appears willing to step in and grant interim relief when determinations are the subject of proceedings for judicial review and in the context of bankruptcy and liquidation proceedings used to

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<sup>6</sup> Queensland statistics can be found at [www.bcipa.qld.gov.au/BCIPA](http://www.bcipa.qld.gov.au/BCIPA); UK statistics at [www.adjudication.gcal.ac.uk](http://www.adjudication.gcal.ac.uk); NSW statistics at [www.dpws.nsw.gov.au/Government+Procurement/Security+of+payment](http://www.dpws.nsw.gov.au/Government+Procurement/Security+of+payment). Unfortunately, AMINZ does not appear to have kept the same sort of statistics. It is unclear why AMINZ did not take steps to collate this material when it had the advantage of being the only nominating authority.

<sup>7</sup> At page 602

<sup>8</sup> See Report No.5 of the Adjudication Reporting Centre at [www.adjudication.gcal.ac.uk](http://www.adjudication.gcal.ac.uk) noted in Const.L.J. 269 at 279. In *Edmund Nuttall Limited v R.G. Carter Limited* [2002] B.L.R.312 "Although no doubt cheaper than litigation, as Mr Richard's fees in the present case indicated, adjudication is not necessarily cheap." See also *Willis Trust Company Ltd v Green* (infra), decision of 25/5/06 where the claimants legal fees for the adjudication were reported to be \$171,053.

<sup>9</sup> The Glasgow Caledonian University Adjudication Reporting Centre has been monitoring monthly trends for this purpose and suggests there is evidence of a rise in claims around holiday time to "ambush" the respondent.

<sup>10</sup> Keating at page 602 suggests that adjudicators need to be alert to such tactics so that within the limits of the procedure they can conduct the adjudication keeping a balance between the parties (although does not suggest how this might be done.)

<sup>11</sup> At page 602.

<sup>12</sup> Now that there are two further nominating authorities, AMINZ further suggest the information might now be commercially sensitive.

<sup>13</sup> [2007] 1 NZLR 807

<sup>14</sup> [2006] 1 NZLR 177

enforce “debts due” the issue appears destined for the Court of Appeal as Judges of the High Court appear unable to agree on the aims of the Act when it comes to enforcement.

The High Court has not yet been asked to address the issue of “residential occupiers” and there emerges two very differing views of how the definition of “residential occupier” is to be applied. Nor has the High Court had to deal with ss 48(1) and (2) and determine if damages can be claimed outside a payment claim. Again, two quite different views have emerged. Nor has the Court been asked to address the definition of “associate.” The Court of Appeal will shortly address whether a judgment entered under s 73 is a “final” judgment for the purposes of the Insolvency Act 2006.

In going through all the Court’s decisions issued under the CCA,<sup>15</sup> there is scant use of the enormous case law built up in the UK and NSW. The UK has a specialist Court and NSW has a specialist construction division of the Supreme Court. These Courts offer enormous assistance as we continue to develop our own jurisprudence. Although the legislation around the various jurisdictions differ and care must be taken,<sup>16</sup> nonetheless, it is surprising that there is not more use of these valuable authorities as cases continue before our Courts. The two issues of judicial review and enforcement are two problems that have been dealt with extensively in these jurisdictions. Both jurisdictions have at appellate level restricted grounds for judicial review in this context. Decisions from these jurisdictions in this area are easily and freely searchable and obtainable over the internet.

## PAYMENT CLAIMS

Despite the Court of Appeal decision in *George Developments* and Asher J’s decision in *Marsden* we have seen further arguments about the validity of payment claims. *Welsh v Gunac South Auckland Limited*<sup>17</sup> held that a payment claim which does not express itself to be a payment claim under the Act will not be valid.<sup>18</sup> The Court held that failure to comply with mandatory requirements set out in the Act is not a “technical quibble” as described by the Court of Appeal in *Canam*. However, a single payment claim which omits reference to the Act but appears in the middle of a series of complying documents might lead the Court to hold that the document ought to be read along with all previous payment claims in the series.<sup>19</sup> However, the document itself does not need to contain the words ‘payment claim’. In *Winslow Properties Limited v Wooding Construction Limited*<sup>20</sup>, Cooper J held that a written claim that failed to describe itself as a payment claim for the purposes of the Act was valid because it was accompanied by a covering letter, the first paragraph of which referred to the attached claim as “progress claim number 18, which is a payment claim under the Construction Contracts Act 2002.”

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<sup>15</sup> Unfortunately, there remains scant reporting on both the Brookers and LexisNexis sites of unreported District Court decisions.

<sup>16</sup> Several NSW cases have indicated that references to English authorities are of limited value in this statutory context because of significant differences between the “scheme and text” of NSW and UK legislation: *Musico v Davenport* [2003] NSWSC 977; *Australian Remediation Services v Earth Tech Engineering Pty* [2005] NSWSC 362.

<sup>17</sup> (unreported) HC Auckland, Civ 2006 – 404 – 7877, 11 February 2008

<sup>18</sup> citing with approval the decision of Judge Joyce QC in *Civil Construction Limited v Dhuez Limited* (unreported) DC Auckland CIV 2006 – 004 – 102, 19 May 2006

<sup>19</sup> See para [22] in *Welsh*

<sup>20</sup> (unreported) HC Auckland, CIV 2006 – 404 – 4969, 14 December 2006. See also the decision of Venning J (4 April 2007) declining leave to appeal.

## THE DUE DATE FOR PAYMENT

In *Marsden*, Asher J held the contract could dictate the date a payment schedule was due over the default provisions of the CCA. The contract was a version of NZS 3910 that referred to the issue of payment certificates within 10 working days. The contractor argued that the default provisions of the Act must apply because the contract did not refer to payment schedules. That was rejected by the Court. Although the contract had been drafted prior to the Act, it had been entered into after the Act's introduction and the parties were taken to have meant that only one payment regime would apply. The wording in the contract was therefore taken to have abridged the statutory time for the issue of a payment schedule from 20 days down to 10 days. However, in *Suanui v Hi-qual Builders Limited*<sup>21</sup> the payment claim stated the due date for payment was five days after the payment claim was delivered to the owners, but the contract did not include that as a term of the contract. The actual term of the contract referring to when a payment schedule should be issued was described as "nonsense" by the Judge. The judgment is authority for the point that if no date is specified in the contract then in the absence of some course of dealings or other method of implying a term then the contractor cannot unilaterally impose a term as to when a payment schedule will be issued by merely inserting a date on the payment claim. In the absence of an express term as to when a payment schedule will be issued, s22(b) will apply giving 20 working days after the payment claim is served. Any other analysis, would allow the contractor to unilaterally alter the contractor to the term of the contract. However, the fact that the contract provided a "nonsense" regime for the issue of a payment schedule and the payment claim itself provided for a date contrary to the Act did not invalidate the payment claim.<sup>22</sup> In *Winslow Properties Limited v Wooding Construction Limited*<sup>23</sup> it was held that it is not necessary when making a payment claim to specify a precise date to comply with s20(2)(d) of the Act if there were sufficient words by which this could be ascertained.

## SERVICE

In *Winslow* the payment claim was served on the owner's engineer who under the contract was able to accept notices. The owner argued that 20 (1) was mandatory and service had to be on the owner. The Court held if the parties to a written contract provided a service provision then that should be enforced over the requirements of the CCA adopting the reasoning in *Canam* and *Marsden*. In *West City Construction Limited v Edney*<sup>24</sup> and *Willis Trust Co Ltd v Green*<sup>25</sup> the Court held that the provisions of s80 are neither mandatory nor exclusionary. If the document is served on a party by another means and the evidence satisfies the Court that the document has come to the attention of that party then that will be sufficient proof of service.

## PAYMENT SCHEDULES

Section 21(2) contains three mandatory requirements for a payment schedule; that the schedule be in writing, identify the payment claim to which it responds and indicates a scheduled amount. The term "indicates" anticipates a payment schedule will not carry with it any formality subject only to 21(3) which mandates that the payer must "indicate" the manner in which the scheduled amount is calculated and the reason(s) for the difference between the scheduled amount and the amount claimed.

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<sup>21</sup> (unreported) HC Auckland, CIV 2008 – 404 – 1576

<sup>22</sup> See also *Stainless Steel & Fabrications Ltd* (infra) where an incorrect date did not invalidate the claim. The statutory provisions were then held to apply.

<sup>23</sup> (unreported) HC Auckland, CIV 2006 – 404 – 4969

<sup>24</sup> (2005) PRNZ 947

<sup>25</sup> (unreported) HC Auckland, Civ 2006-404-809, 1 March 2006

In *Marsden Villas Limited v Wooding Construction Limited* Asher J noted:<sup>26</sup>

“The Act therefore has a focus on a payment procedure, the results that arise from the observance or non-observance of those procedures, in quick resolutions of dispute. The processes that it sets up are designed to sidestep immediate engagement on the substantive issues such as set-off for poor workmanship which in the past were so often used as tools for unscrupulous principals and head contractors to delay payments. As far as the principle is set up, the regime is ‘sudden death.’ Should the principal not follow the correct procedure, it can be obliged to pay in the interim what it has claimed, whatever the merits. In that way, if the principal does not act in accordance with the quick procedures of the Act, that principal, rather than the contractor and subcontractors, will have to bear the consequences of delay, in terms of cash flow.”

The contract provided that claims could not be made for works carried out over less than a month. The contractor had sent payment claims, however, before the end of the month for administrative reasons. Asher J held that if the payment claims were sent out not in accordance with the contract this did not invalidate them. The place to confront that error, if it was one, was in the payment schedule.<sup>27</sup> A miscalculation in the claim would also not matter.

In *Westnorth Labour Hire Limited v SB Properties Limited*<sup>28</sup> in response to a payment claim the employer issued a detailed letter, complaining about various issues, cost overruns and a suspicion that work had been improperly charged for. The letter concluded:

“I must advise that we do not agree with your charges for the reasons noted above and until you provide the breakdown requested and until we have had suitable time to consider the information you provide, no further payments will be made...”

Rodney Hansen J held on appeal that the letter was a valid payment schedule. He held that letter indicated that the scheduled amount was “nil” and that the payer had adequately explained why. He held:<sup>29</sup>

“Although the letter does not adopt the terminology of the Act, is not stated to be a payment schedule and does not specify that the scheduled amount is nil, the essential message is clear and unequivocal. Mr Mullane explains why he now doubts the accuracy of Westnorth timesheets and hence the sums he has been charged. He identifies a charge for materials that have been returned and instances of faulty workmanship which would entitle SB Properties to counterclaim. He says he will not pay the two invoices until Westnorth provides him with full particulars of what the contracted labour has done.”

*Westnorth* is difficult to reconcile with *Metalcraft Industries Limited v Christie*<sup>30</sup> where after a dispute a roofing contract was cancelled and the contractor issued a payment claim. There had already been some acrimonious correspondence between the parties but in response to the payment claim the owner’s solicitors wrote:

“In any event our client disputes liability for payment, and advises that she is unable to specify if any payment is to be made to your client, until she receives invoices for the remedial work undertaken by her replacement contractors. This, and our earlier

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<sup>26</sup> at [17]

<sup>27</sup> In NSW the Supreme Court in *Britannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238 decided that a contractor does not have to even have a bona fide belief in its payment claim. If a claim is inflated then that is a matter to be dealt with in the payment schedule.

<sup>28</sup> (unreported), HC Auckland, CIV 2006 – 404 – 001858, 19 December 2006

<sup>29</sup> at paragraph [28]

<sup>30</sup> (unreported) HC Whangarei, CIV 2006 – 488 – 645, 15 February 2007

correspondence, is to be regarded as our client's reason for withholding payments. The cost of the remedial work is expected to exceed your client's invoice.

Any summary judgment proceedings on the basis of your claim that the sum is a debt due, or otherwise, will be defended and costs will be sought.”<sup>31</sup>

In the District Court, the Judge found that the “only sensible interpretation” available from the solicitor's letter was that it indicated a payment schedule of “nil”. The Judge also found that the content of the letter indicated a method of calculation. That approach was rejected by Harrison J on appeal. He said:<sup>32</sup>

“With respect, I disagree. In my judgment the letter, even when read in conjunction with earlier correspondence, does not approach satisfaction of the statutory requirements. It cannot be construed as indicating a scheduled amount of nil. To the contrary, Pegg Ayton specifically stated that Miss Christie was not then in a position ‘to specify if any payment is to be made.’ It was not an unequivocal denial of liability for all of the payment claim, but was instead noted that Miss Christie would review her position at a later date. The strict provisions of part 2 were enacted to preempt this very mischief.

....The statement of Miss Christie ‘is unable to specify if any payment is to be made....until she receives invoices for remedial work’ could not justify a failure within that period to quantify the scheduled amount.

.... She was asserting that nothing was owing despite the common ground that some work was carried out pursuant to the contract. Adoption of this position was extreme. That is why in September 2005 Miss Christie was under a strict onus to explain with some precision the basis for calculating that Metalcraft was not then entitled to any payments.”

Harrison J then added in relation to the level of detail required to a payment schedule:<sup>33</sup>

“..... An assertion that remedial work is required at a cost which would exceed the payment claim could never constitute a valid reason either for the difference between the scheduled amount and the amount claimed or for withholding payment. General and unspecified allegations of defective workmanship are insufficient unless quantified within a reduction for the claimed cost of remedial work. Similarly a claim that excess materials were supplied is not enough; Ms Christie would have to identify them and their value to justify a further reduction in the scheduled amount. Delays in completing the work and consequential damage caused by leaking and water damage may give rise to a counterclaim for special damages, but even if quantified they could not be taken into account in the scheduled amount: s 79. None of the reasons given in Pegg Ayton's correspondence justified withholding payment of any part of Metalcraft's claim.”

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<sup>31</sup> In *Multiplex Constructions Pty Limited v Luikens* [2003] NSWSC 1140 it was held that the history of dealings and communications between parties are relevant to what constitutes a valid payment schedule. On that basis, the reference by the solicitors to earlier correspondence as forming part of the payment schedule would seem reasonable.

<sup>32</sup> paragraph [18]

<sup>33</sup> At paragraph [23]

That decision is obviously difficult to reconcile with *Westnorth*.<sup>34</sup> Harrison J considered *Westnorth* but dealt with it<sup>35</sup> on this basis:

“Each case in this area largely depends upon the contents of the documentation under consideration.

As Rodney Hansen J found, the principal’s letter provided all the information necessary for the contractor to understand its position and make the appropriate consequential decision. And as Mr Hazelton points out, the principal’s correspondence in *Westnorth* contained a number of arithmetical calculations, beginning with the amount of the invoices, their relationship to projected budgets and total previous payments and figures for materials returned – in substance a calculation indicating why no money was considered to be then payable.”

It appears that the Courts prefer the approach in *Metalcraft* over the approach in *Westnorth* although the distinction is often difficult to locate.<sup>36</sup>

One academic in New Zealand<sup>37</sup> writes that these cases throw up more than the usual uncertainty from the seemingly contradictory results that arise from cases decided on a fact and situation basis.<sup>38</sup> He criticizes the reasoning of Harrison J as ignoring the realities of domestic contracts. He noted:

“The *Metalcraft* case, in which the Court adopted the full particulars standard and required quantification, exemplifies a not uncommon situation where a payer attempting to quantify the reasons in the payment schedule will be faced with legal, factual or other difficulties. If a payment schedule gives the payee’s breaches of contract as the reasons for paying less than the claimed amount, to estimate and quantify the amount of damages payable for the breaches can be a difficult task. It is not a precise science even for lawyers.

..... When the payer found water leaking from the roof, she might not know the exact cause and extent of the problem. Should she hire a tradesman to investigate? Should she get one quote or several quotes from potential replacement contractors only for the purpose of arriving at a reasonable figure of remedial cost to be put in the payment schedule?

....In theory, those difficulties can be overcome and quantification achieved if the payer has a team of lawyers, accountants, surveyors, engineers, architects and so on. However, it is unrealistic and unfair to expect a payer to incur such expenses at the payment claim and schedule stage of the CCA scheme. This is because, as has

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<sup>34</sup> Reference to Australian decisions in this area is problematic because the equivalent Australian legislation places far more emphasis on the payment schedule in the context of adjudication. The NSW Act specifically provides the respondent cannot include in an adjudication response any reasons for withholding payment unless the reasons have already been set out in the payment schedule. See *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258. The Victorian Act does not have an equivalent expressed provision but does provide that the adjudicator is to consider certain matters only and one is the payment schedule to which the application relates.

<sup>35</sup> at paragraph [25]

<sup>36</sup> See *Stainless Fittings & Fabrications Ltd v Stan Ash Builders Ltd* (unreported) DC Papakura, CIV 2007 – 055 – 61, 25 July 2008 where the Court rejected a payment schedule notwithstanding that the owner had employed quantity surveyors to calculate the sums owing. See also *Mules Construction Ltd v Wedding Earthmovers Ltd* (unreported) HC Auckland, CIV-2007-404-4570, 20 December 2006 and *Silverpoint International Ltd v Wedding Earthmovers Ltd* (unreported) HC Auckland, CIV-2007-404-104 to 107 at para [41] and the discussion by Ren (infra) of the merits of those two cases at 5.2.

<sup>37</sup> John Ren, “What it takes to be a valid payment schedule under the Construction Contracts Act 2002” (2008) 14 NZBLQ 78

<sup>38</sup> Other cases in which payment schedules have been found to be invalid are *10 Gilmore Limited v Tracer Interiors and Construction Limited* (unreported), HC Wellington, CIV 2005 – 485 – 2009, 6 December 2005 where the schedule specified a scheduled amount but gave no reason why it was less than the payment claimed; *West City Construction Limited v Edney* (2005) 17 PRNZ 947 where the schedule did not specify an amount but only a formula. See also *Mules Construction* (infra).

been discussed, the proper role of this stage is to determine whether the payer is genuinely disputing the claimed amount with the payee.”

The author concludes by arguing the standard should be:

“...that the reasons for paying less than the claimed amount must be of such a nature and detail that a reasonable person would believe the reasons to be credible and to justify paying less than the claimed amount. This is based on the basic role of a payment schedule (the role being inferred particularly from the CCA’s requirement that a valid payment schedule indicate reasons for paying less than the claimed amount) – to distinguish a specious dispute from a genuine dispute.”

In *Suanui v Hi-qual Builders Limited*<sup>39</sup>, Wylie J dismissed an appeal from the District Court, in which the contractor obtained judgment on the basis of a payment claim. The right to issue the claim in question was triggered on issue of a code compliance certificate. That CCC was later withdrawn by the Council<sup>40</sup> on the basis that remedial works needed to be undertaken. The Court found that this did not invalidate the payment claim. At the time the payment claim issued, the CCC had been issued. The right to issue the payment claim had arisen. It did not matter that the contractual basis for claiming the final 10 per cent was later extinguished by Council. In the District Court, Judge Mather<sup>41</sup> rejected a “5 page” letter of dissatisfaction holding it did not amount to a payment schedule notwithstanding reference to a lengthy list of remedial items. Although the letter properly set out a list of complaints it failed to specify an amount the payee was willing to pay.<sup>42</sup>

*Metalcraft* was further applied in *Charles Beckhan T/A C Beckhan Builders v Betty*<sup>43</sup>. The owners’ solicitors wrote in response to a payment claim that the owners had already paid more for the value of the work to date and the materials delivered to site and further went on to claim that the invoices did not correspond with the time spent or the materials provided to the site. The Judge rejected that this was a payment schedule because there was no calculation at all as to how and by how much the owners claimed they had overpaid. It was significant the Judge said that the letter made clear that the owners had not analyzed the invoices provided and had only a “suspicion” that they did not correspond with the time spent or materials provided.

In the context of payment schedules, Simon France J in the *Horizon*<sup>44</sup> case made an interesting obiter statement about the application of the *Canam* decision when deciding whether a document was an appropriate payment schedule; noting:<sup>45</sup>

“I am not to be taken as endorsing the proposition that as long as the material can be found somewhere in the paperwork, the Act’s requirements are met. I consider that the bench in *Canam* would be surprised to see its decision used for that broad a proposition.”

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<sup>39</sup> (unreported) HC Auckland, CIV 2008 – 404 – 1576, 26 June 2008

<sup>40</sup> Wylie J doubted the Council had the power to retrospectively withdraw a code compliance certificate although he was not asked to decide that issue.

<sup>41</sup> (unreported) DC Waitakere, see CIV 2007 – 090 – 002424, 21 February 2008

<sup>42</sup> The High Court did not have to deal with whether this was a payment schedule because, curiously, this issue was expressly abandoned by the owner on appeal.

<sup>43</sup> (unreported) DC Whangarei, CIV 2007 – 008 – 000939, 17 June 2008

<sup>44</sup> (infra)

<sup>45</sup> at [52]

## RESIDENTIAL OCCUPIERS

What of the contract where the owner is named as a company although it is clearly for a residential property in which a director of the company is to live? What of the situation where the owner is named as a trust or assert themselves to be the trustees of a trust? Bayley and Tomas Kennedy-Grant QC<sup>46</sup> state:

“In the case of a trust which contracts for the construction of a dwelling house for occupation by one or more of the beneficiaries of the trust, the contract will not be a residential construction contract because the trust will not qualify as a ‘residential occupier’. This is so even where the trustees and beneficiaries of the trust are the same persons, because they will contract in one capacity and occupy in another.”

That statement has not been followed by some adjudicators. Some take a strict approach and hold the sole issue is whether the party to the contract could physically be a residential occupier. On that basis, companies and trust arrangements will be excluded. Other adjudicators prefer to look to the “realities” of the contract. Consider this decision by one Auckland adjudicator asked to adjudicate on a claim of more than \$300,000.00. The contract was for the construction of a large residential property but the party to the contract was named as a trust. It was apparent to all that the party who represented the trust intended to live in the property but the builder had no idea of the trust arrangements. The adjudicator said:

“It is a question of fact for me to determine whether the respondent intended to occupy the premises as a dwelling house. The Bayley/Kennedy Grant text on the Act expresses the view that where a trust contracts for the construction of a dwelling house for occupation by a beneficiary that the contract will not be a residential construction contract because the trust will not be a residential occupier. The authors take the view that even where the trustees and the beneficiaries are the same persons that this will not constitute a residential contract. No authorities are cited in support of this proposition. I can see that in some circumstances the existence of a trust could have this effect. I have been unable to find any authority which assists me as to whether a trust situation automatically excludes a respondent from the consumer protection afforded by the Act to residential occupiers.<sup>47</sup> I have formed the view that it is important to consider the whole context of the matter prior to determining whether or not in this particular situation there was a residential construction contract within the meaning of the Act.”<sup>48</sup>

This approach causes obvious difficulties for the contractor. It undermines the certainty that the CCA should bring to the resolution of construction disputes. A contractor is unlikely to know what trust arrangements exist and unlikely to have a copy of the trust deed. It is unlikely to have any idea whether the party it has contracted is a trustee and/or a beneficiary, yet is expected to make a decision at an early stage whether to import those forms necessary for a residential contract into the payment claims or the adjudication claim. Failure to do so can have serious consequences.

In the UK, a strict line is adopted. In *Samuel Thomas Construction v Anon*<sup>49</sup> the contract concerned the refurbishment of a number of farm buildings one of which the owner intended to live. The other barn was to be sold. It was held that where the construction contract was for two dwellings, one of which was to be occupied by one of the parties and one of which was not, the contract in question could not be said principally to relate to operations on a

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<sup>46</sup> “A guide to the Construction Contracts Act” Rawlinsons Media Limited, 2003, at page 43.

<sup>47</sup> The author has been unable to find any authority on that point in the UK or Australia.

<sup>48</sup> For further discussion of the issues that arise when an owner tries to claim that he contracted as a trustee for the trust, see *Arnold Jensen 2005 Limited v Bills*, (unreported) DC, Christchurch, CIV 2008 – 009 – 54, 5 June 2008.

<sup>49</sup> (unreported), 28 January 2000, TCC noted in “Construction Adjudication” at 2.42.

dwelling which one of the parties to the contract intended to occupy. On this basis work done to common property of a residential building will not be caught by the exception because the contract did not relate principally to the area occupied by the employer. The situation becomes more confused when work is done to both a residential area and common property under the same contract. What of the client who assigns or sells the contract to a third party? The Act defines a party who *is or intends* but makes no mention of “has occupied.”

*Dempsey & Woods Civil Contractors Ltd v Ajay Investment Consultants Ltd*<sup>50</sup> is an example of a Judge looking at what he called the “realities” of the situation rather than who were the parties to the contract. The client was a company; but invoices had been sent to a family trust at the request of the client. When sued, the company claimed that payment claims were not valid because the necessary information for a residential occupier was not attached. The Judge said<sup>51</sup>:

“It is argued that Mr Bakshi is a “residential occupier” as defined in s5. Clearly, the building is a dwelling house. Mr Bakshi deposes in his affidavit, “essentially the first defendant employed the plaintiff to build our family home..... that seems to me to be a sufficient indication to occupy the building as required to meet the s5 definition. The remaining issue is as to whether or not Mr Bakshi is “one of the parties” to the contract as required by the statutory definition.”

And at paragraph [12]:

“There was some argument on this issue of an essentially semantic nature. For the plaintiff it was argued that Mr Bakshi personally is not a party. He appears on the face of the contract document as a guarantor only and it is argued that he is not a party to the construction contract as such but to a separate contract of guarantee of the obligations of the first defendant which is the only other legal entity mentioned (the members of the trust referred to not having been identified). It is argued that the Construction Contracts Act makes no provision for third parties and hence a guarantor should not be construed as being a party within the meaning of the Act.”

And at paragraph [14]:

“In practical terms these arguments rather fly in the face of reality. It is clear that Mr Bakshi was the person with whom the plaintiff was at all times dealing. The invoices upon which the plaintiff relies were issued not to the first defendant which it now sues, but to Raj Bakshi Trust, and the plaintiff’s dealings with Mr Bakshi throughout are only consistent really with acknowledging him as a representative of that trust. In such circumstances as trustee (if so he be) dealing on behalf of undisclosed principals is personally liable to those with whom he contracts.”

The approach above<sup>52</sup> is quite at odds with the UK position. In *Edenbooth Ltd v Cre8 Developments Ltd*<sup>53</sup> Justice Coulson QC noted:

“First, the defendant is a company. It is difficult to imagine how a company could ever be a *residential* occupier; a company might occupy premises for commercial purposes, but the use of the word “residential” seems to me to convey a requirement that, for the exemption to bite, a real person must be living in – residing in – the

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<sup>50</sup> (unreported) DC Auckland, CIV 2006 – 004 – 2083, 20 February 2007.

<sup>51</sup> At para [10]

<sup>52</sup> For further discussion about whether a guarantor is a “party” to a contract, see the comments of Harrison J in *Willis* (infra), 25 May 2006, paras [78] to [79]

<sup>53</sup> [2008] EWHC 570

house or flat in question. In those circumstances I simply do not see how the defendant company could be a residential occupier.

As to that, Mr Mencer might well have been in a better position if he had been the party contracting with the claimant. However, when the claimant originally started the adjudication, it named Mr Mencer in person as the respondent. He was quick to point out that at no time had he contracted with the claimant directly. He said that the contract was between the claimant and the defendant company. On the documents that I have seen, he was right to do so. As a result, the first adjudication was abandoned and the second adjudication was started in the right company name. Therefore it seems to me that Mr Mencer cannot now argue that his (possible) status as a residential occupier should or could affect the dispute resolution provisions of the contract to which he was not a party, and in respect of which he had no formal status or role. If the defendant company was a party to the contract, then he was not, so his possible status as a residential occupier is irrelevant.”

## CONTRACTING OUT

In *Construction Service Co (Wellington) Ltd (in receivership) v Wellington Waterfront Ltd*<sup>54</sup> Gendall AJ held that a contractual provision deferring the contractor’s right of payment on resumption of possession by the principal was part of the payment mechanism and not contracting out of the Act. This topic has also drawn recent attention in NSW following the NSW Court of Appeal decision in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales*<sup>55</sup> which held that in the right circumstances a Superintendent to the contract can issue a further interim or final certificate which effectively deducts the original adjudicator’s decision without offending the no contracting out provision. Commentators have already noted the uneasy balance that the Act attempts to straddle between promoting a statutory framework of payments on the one hand while showing suitable deference to the principles on contractual freedom on the other.<sup>56</sup>

In *John Holland*, the contractor provided a security bond “for the purposes of insuring the due and proper performance of the Contract and of satisfying the obligations of the Contactor under the Contract.” During the works, John Holland disagreed with three of the superintendent’s certificates in relation to payment claims and brought three separate claims under the Act. In each case an adjudicator found largely in John Holland’s favour. The RTA paid the amounts determined and the disputes arose involving the RTA seeking to recover the amounts paid. The amounts sought to be recovered were greater than the security held. However, on practical completion, the RTA declined to release half the security relying on a contractual provision in the document which provided it could do so if in its sole opinion it was “just an equitable” to do so.

Importantly, the final certificate procedures in the contract provided (as final certificate procedures typically do) for the superintendent to make a final assessment of monies owing under the contract. The contract went on to provide that the employer could recover from the contractor’s security bond. The employer then effectively deducted the amount of the adjudications from that bond pending a final determination of the “substantial existing disputes” – just as the contract entitled it to do because – again as the contract allowed – it was “just an equitable” to do so. The contractor argued this offended the Act’s no contracting out provision because it undermined the effect of the adjudications. However, McDougall J held that nothing in the clauses dealing with security and final certificate

<sup>54</sup> (unreported) HC Wellington, CIV 2006-485-1117, 13 September 2006

<sup>55</sup> [2007] NSWCA 140

<sup>56</sup> O’Brien, “Contractual Mechanisms to overcome security of payment determinations” Presentations for the continuing Professional Education Department of the College of Law, 17 July 2007, page 85 and McDougall J, “Prohibition on contracting out of the Building and Construction Industry Security of payment Act 1999” (NSW) (2006) 22(4) BCL 246

excluded, modified or restricted the operation of the Act. While the final reconciliation of amounts owing by one party to another under the contract may reach a conclusion inconsistent with that reached by an adjudicator, it did not follow that the operation of the act was thereby excluded, modified or restricted. He held<sup>57</sup>:

“There is no reason why a final determination by the superintendent could not ‘undo’ the effect of a prior determination by an adjudicator, in just the same way as a final determination by a court or arbitral or other tribunal might do so.”

And later: <sup>58</sup>

“I do not think that there is anything in this scheme which puts it outside the superintendent’s power to reassess the value of work that has been valued by an adjudicator, even though the adjudicator’s value may differ from that assigned by the superintendent in the latter’s payment schedule....”

The judge noted that the Act recognised that a final determination by a Court or tribunal of competent jurisdiction may undo the effect of a prior determination. He held there was no reason why a final determination by a superintendent could not also operate as a final determination by a Court or other tribunal. He noted that there are benefits to be gained by allowing the superintendent to correct any error in valuation by an adjudicator:

“There is much utility...in permitting the superintendent to attempt this task. For example, the commonsense and correctness of the superintendent’s determination may be so clear that the party adversely affected by it will not trouble to take the next step.”

In dismissing the contractor’s appeal, the NSW Court of Appeal agreed with earlier descriptions of the Act as a “pay now, argue later” scheme and as a scheme to ensure “prompt interim progress payments on account, pending final determination.” The issue, however, was final determination. Importantly, the Court held because an adjudicator’s decision was interim it was “subject to a different position being established in relation to payment for the relevant work or related goods and services, either *contractually* or in proceedings.” This judgment from an appellant Court would appear to indicate that it is possible to claw back the consequences of an adverse adjudication by the appropriate contractual mechanism.

## JUDICIAL REVIEW

Other than issue of substantive proceedings by Court process or by arbitration, judicial review is the only effective means of challenge to a determination other than the very limited statutory grounds created in the Act. Parties appear to have been slow to appreciate this fertile ground of challenge. Judicial review is likely to become the most controversial aspect of the CCA and the approach by the Courts will significantly reduce or improve the effectiveness of the Act’s aims. In NSW, the Courts initial enthusiasm for judicial review of determinations caused considerable disquiet and caused the NSW Court of Appeal to take steps to restrict the availability of judicial review of determinations. The UK Court of Appeal has done likewise. New Zealand is now at the stage where the Court must determine the scope of availability of this remedy. Will judicial review become the common attack on determinations or will the Court impose restrictions on a party’s right to attack a determination? How will the Courts deal with interim measures pending judicial review? It is

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<sup>57</sup> at [52]

<sup>58</sup> at [56]

helpful before looking at the recent New Zealand cases to examine how the UK and NSW has approached the task.<sup>59</sup>

## THE UK APPROACH TO JUDICIAL REVIEW

In the UK it was debated for some time if judicial review was even available against an adjudicator's decision.<sup>60</sup> The English Court of Appeal has since confirmed it is in *Carillion Construction Limited v Davenport Royal Dockyard Limited*<sup>61</sup> but in a narrow compass.<sup>62</sup> In *Edenbooth Ltd v Cre8 Developments Ltd*<sup>63</sup> the approach of the Courts to challenges to determinations<sup>64</sup> was described by HHJ Coulson QC this way:

"The proper procedure for the court to adopt in these circumstances, as in all applications to enforce an Adjudicator's decision, is first to look at any points that have been taken as to the Adjudicator's jurisdiction. If the Adjudicator did not have the necessary jurisdiction then the decision is a nullity. If, on the other hand, the Adjudicator did have the necessary jurisdiction, then the court should go on to consider – if it is raised any suggestion that the Adjudicator acted unfairly. If the court concludes that the Adjudicator did have jurisdiction and had not acted unfairly then the court is obliged to enforce the decision of the Adjudicator: see for example, *Bouygues (UK) Ltd. v. Dahl-Jensen (UK) Ltd* [2000] BLR 522 and, more recently, *Carillion Construction Limited v. Devonport Royal Dockyard Limited*"

The *Carillion* case is now the highest authority from the UK on judicial review of adjudications. It is an interesting case for many reasons. In *Carillion* the case referred to adjudication was in excess of £100 million. The adjudicator was furnished with 29 lever arch files of materials including hundreds of pages of legal argument. The respondent argued that it was a breach of natural justice to have to meet the claim. However, an important quote is that of Chadwick LJ.<sup>65</sup>

"The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed, aptly be described as "simply scabbling around to find some argument, however tenuous, to resist payment.

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<sup>59</sup> Several NSW cases have indicated that references to English authorities are of limited value in this statutory context because of significant differences between the "scheme and text" of NSW and UK legislation: *Musico v Davenport* [2003] NSWSC 977; *Australian Remediation Services v Earth Tech Engineering Pty* [2005] NSWSC 362. See also *Davenport* (supra) at page 258: "It is very rare for cases on adjudication in the United Kingdom to be cited to the NSW Supreme Court."

<sup>60</sup> In *Diamond v PGW Enterprises Limited* [2003] ScotCS 343 the Court unanimously held that judicial review is not available and the adjudicator is not a statutory decision maker. Lord MacFayden said at [47]: "I was wrong in *Homer Burgess Limited v Shirex (Annan) Limited* 2000 SLT 277 at 284K to choose an adjudicator as being in substantially the same position as a statutory decision maker. The circumstances in the present case make it clear that it is important to distinguish the position of an adjudicator from that of a statutory decision maker."

<sup>61</sup> [2005] EWCA 1358.

<sup>62</sup> See Rasheda Rana, "Adjudications and Judicial Review: An update on the position in England and Australia" [2006] The International Construction Law Review 503.

<sup>63</sup> [2008] EWHC 570

<sup>64</sup> In this context, the challenge is to the entry of the determination by summary judgment which is the common procedure adopted in the UK in the specialist Construction and Technology Court.

<sup>65</sup> At para 85.

It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.

In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly.”

In the UK, one Judge <sup>66</sup> in the context of natural justice put the matter this way:

“if (adjudicators) behave, in reaching their decisions, in a manner which, on an objective basis, involves a disregard of fair play, the consequence of which appears to have had a substantial and material effect on the adjudicator’s decision, then the Court should be prepared to intervene.”

In the UK, the Court has held that an adjudicator who applies his or her own experience in place of or to supplement submissions from the parties then that will be a denial of the natural justice. In *Belfour Beatty Construction Limited v Borough of Lambeth* <sup>67</sup> Lloyd QC held that the decision of an adjudicator was held void because the adjudicator had taken the initiative and applied his own knowledge and experience and produced his own critical path analysis. One writer<sup>68</sup> argues the result would have been the same in New Zealand on account of breach by the adjudicator of the statutory limitation on what the adjudicator could take into account in reaching a determination.

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<sup>66</sup> *Ardmore Construction Limited v Taylor Woodrow Construction Ltd* [2006] CSOH 3 (a decision of the Court of Sessions, the supreme civil court of Scotland.)

<sup>67</sup> [2002] EWHC 597

<sup>68</sup> Davenport “Adjudication in the building industry” (2<sup>nd</sup> Ed.) Federation Press 2004 at page 160.

## NEW SOUTH WALES AND JUDICIAL REVIEW

One Australian author<sup>69</sup> noted that by 2004 when the NSW Supreme Court began actively reviewing adjudicator's decisions<sup>70</sup> serious problems emerged. As the author noted:<sup>71</sup>

"Since *Musico*, in every adjudication in which the author has determined that the respondent is liable to pay a substantial amount, the respondent has applied to the Supreme Court for an order quashing the adjudicator's determination and injunction to stop the claimant from applying for or filing an adjudication certificate or enforcing judgment. The Court has been very ready to grant an interim injunction ex parte pending in determination. The Supreme Court has even granted injunctions where the adjudicated amount is as little as \$30,000.00."

The author goes on to highlight the difficulties facing a successful claimant which is then met with an application for judicial review:<sup>72</sup>

"Claimants are concerned that even though they are successful before an adjudicator they will end up in the Supreme Court and, if the adjudicator has made what the Court finds to be a jurisdictional error of law, the claimant will be ordered to pay the respondent's costs in the Supreme Court. Of course, a claimant is not bound to defend an adjudicator's determination. The claimant who does not want to run the risk of liability for costs in the Supreme Court can file a consenting appearance just as the adjudicator does."

## THE NEW SOUTH WALES COURT IN APPEAL IN *BRODYN*

The New South Wales decision in *Brodyn Pty Limited v Davenport*<sup>73</sup> significantly restricted the ability of parties to seek judicial review of an adjudicator's determination under the NSW Act. From what was described as a doctrinal shift the Court of Appeal held that an adjudicator's determination is only reviewable for jurisdictional error where it was not a determination within the meaning of the Act, because it does not satisfy a precondition which the Act makes essential for the existence of such determinations. The Court held that an adjudicator's determination could only be challenged if:

- (a) The basis and essential requirements of a determination are not satisfied; such as existence of a construction contract, the service of a payment claim. Such essential pre-conditions were to be distinguished from mere 'detailed requirements', such as the time constraints set out in the Act.
- (b) The purported determination is not a bona fide attempt to exercise the power granted under the Act; this phrase is taken not to connote something relating to honesty<sup>74</sup> but rather demanded "an effort to understand and deal with the issues and discharge of the statutory function." These included that the adjudicator must consider the prescribed matters set out in the Act. If the adjudicator failed to do this then the determination was void.<sup>75</sup>

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<sup>69</sup> Davenport (above)

<sup>70</sup> See as examples *Musico & Ors v Phillip Davenport & Anor* [2003] NSWSC 977 and *Transgrid v Walter Constructions Group* [2004] NSWSC 21

<sup>71</sup> See page 255

<sup>72</sup> At page 258:

<sup>73</sup> (2004) 61 NSWLR 421

<sup>74</sup> See McDougall J in *Timwin Constructions Pty Limited v Facade Innovations Pty Limited & others* [2005] NSWSC 548

<sup>75</sup> See the NSW Court of Appeal in *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32, upholding a decision to quash a determination where the adjudicator failed to have regard to the matters specified in the Act.

- (c) There is a substantial denial of a substantial measure of natural justice required under the Act. Thus a failure to consider submissions would be a breach although entirely misinterpreting them would not. So too would be the failure to comply with the timing and services requirements of the Act.<sup>76</sup> In *50 Properties Investments v O'Mara*<sup>77</sup> Brerton J noted the denial of natural justice would only invalidate an adjudication "if the procedure falls short of that measure of natural justice to which a party is entitled under the scheme of the Act." Thus in *Richard Shorten & another v David Hurst Constructions Pty Limited*<sup>78</sup> Einstein held that the concept of materiality<sup>79</sup> was "an extricable limit" to the natural justice that the Act requires parties to be given in a particular case.

The effect of this decision and in cases subsequent has been to restrict the Court's involvement in adjudicator's decisions. The Court of Appeal has confirmed that the process under the NSW Act to secure the objectives of firstly to receive a progress payment and secondly a quick form of measure to adjudicate a dispute over that payment, means that the Court "contemplates a minimum opportunity for Court involvement".<sup>80</sup> Quick, cost effective determinations which are binding only on an interim basis and are subject to a final reckoning, with quality justice displaced in favour of speedy dispute management. The NSW Court of Appeal has twice refused<sup>81</sup> to reconsider *Brodyn* and these limitations will remain unless overturned by the High Court of Australia.

As one commentator noted<sup>82</sup> the decision in *Brodyn* is a "license for the adjudicator to get things wrong."<sup>83</sup> That is, provided that the adjudication determination satisfies the preconditions which the Court of Appeal has said that the Act makes essential for the existence of a valid determination. The same Court has twice looked at *Brodyn* and on both occasions reaffirmed the need for tight control of judicial review of determinations. In *Minister for Commerce v Contrax Plumbing (NSW) Pty Limited*<sup>84</sup> the Court held:<sup>85</sup>

"an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operable terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act. Section 22 (2) does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of s22(2) as to what is to be considered, an error on these matters does not render the determination invalid."

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<sup>76</sup> Approving the earlier Supreme Court decision in *Emag Constructions Pty Ltd v High Rise Concrete* [2003] NSWSC 903.

<sup>77</sup> [2006] NSWSC 428 at [45]

<sup>78</sup> [2008] NSWSC 546

<sup>79</sup> Also citing McDougall J in *John Goss Projects Pty Limited v Leighton Contractors Pty Limited* (2006) NSWLR 707

<sup>80</sup> *Transgrid v Siemens* [2004] NSWCA 395

<sup>81</sup> *Coordinated Construction Co Pty Ltd v J M Hargreaves Pty Ltd* (2005) 63 NSWLR 385 and *Downer Construction (Australia)* [2007]; per Giles J A at [99]: "I favour maintaining *Brodyn Pty Ltd v Davenport* until the High Court says otherwise."

<sup>82</sup> See Bill Likovski, "Challenges to adjudications after Brodyn: a review of recent case law." Seminar contained in presentations for the continuing professional education of the College of Law, Wednesday 17 August 2005. For a detailed analysis, see Julia Murray "The application of administrative law standards to the Security of Payment Act" (2006) 22 BCL 162.

<sup>83</sup> In *Brodyn*, Einstein J in the NSW Supreme Court [2007] NSWSC 1019 remarked that the haste with which the adjudication process must be conducted under the Act will "necessarily give rise to many adjudication determinations which will simply be incorrect."

<sup>84</sup> [2005], NSWCA 142

<sup>85</sup> at paragraph [49]

In the UK and NSW, errors of law and errors of fact without something more do not give rise to review of determinations.<sup>86</sup> The Court will not interfere with mistakes – even the worst of mistakes – that being the necessary price for the advantages of the scheme of the Act. As an example, in the context of an error of fact, one of the most fundamental errors an adjudicator can make is a determination against a responding party who is in not, in fact, a party to the contract. However, successive cases have held that if the mistake was made in the context of the determination then it was a determination within the adjudicator's jurisdiction to decide.<sup>87</sup> In *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited*<sup>88</sup> the adjudicator had calculated a sum in favor of the claimant of about £200,000.00. However, he made a serious mistake in his calculations by reference to retentions which if corrected would have resulted in a decision going the other way of about £140,000.00. Both the Court of first instance and the Court of Appeal held that although everyone (including the adjudicator) agreed an error had been made it was an error made within the adjudicator's jurisdiction. Accordingly, the adjudication remained binding.<sup>89</sup> Breaches of natural justice will invalidate adjudication only where the breach is material enough to warrant intervention.

## NEW ZEALAND AND JUDICIAL REVIEW <sup>90</sup>

In *Willis Trust Company Co Ltd v Green* <sup>91</sup> the owner issued judicial review proceedings seeking to quash a determination. It was put to the Court by the contractor seeking to uphold the determination that overseas authorities meant the Court should take a restrictive approach to judicial review of determinations under the CCA. Harrison J was not so sure:<sup>92</sup>

“Mr Williams accepted that an adjudicator is exercising a statutory power of decision when performing his or her functions under the Act. The adjudicator's decisions are thus subject to judicial review. However, by reference to English and Australian authorities he submitted that the High Court's power on review is strictly circumscribed. In summary, he said, the trend of authority is that errors of law, fact or procedure by an arbitrator in making a decision are insufficient to set aside the determination, for the reason that the procedure is designed to be prompt and efficient without finally determining a party's rights (*Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWHC 778, Jackson J at para 80); the only errors amenable to judicial review are those going to jurisdiction.

I question but do not need to decide whether Mr Williams' restrictive submission is correct. As noted, the adjudicator was exercising a statutory power of decision (s 3 Judicature Amendment Act 1972). The jurisdiction to interfere on review relates to the adjudicator's exercise of that power (s 4) and normally includes what is traditionally understood to constitute a question of law in the nature of statutory misconstruction (Joseph: *Constitutional and Administrative Law* (2nd Ed, 2001) at para 21.4.2).

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<sup>86</sup> Coulson QC in “Construction Adjudication” at 6.22 suggests that the difference between the UK and NSW approaches are of “narrow compass.”

<sup>87</sup> See *AJ Brenton T/A Manton Electrical Components v Jack Palmer* (TCC), 19 January 2001 and *Nolan Davis Limited v Stephen Catton* (unreported), 2000, (TCC number 5 90).

<sup>88</sup> First instance: [2000] BLR 49; Court of Appeal: [2000] BLR 522.

<sup>89</sup> See *Willis Trust Company Ltd v Green* (infra) where Harrison J without comment corrected an error in the adjudicator's determination relating to GST and interest.

<sup>90</sup> See John Ren “Judicial Review of construction contract adjudicators” NZLJ December 2005

<sup>91</sup> (unreported) HC Auckland, CIV 2006 – 404 – 809, 1 March 2006. The enforcement of the judgment entered under the CCA in that case is dealt with in *Holmes Construction Wellington Ltd v Lees* (unreported), HC Auckland, CIV 2006 – 404 – 4219, 9 February 2007.

<sup>92</sup> Paras [21] to [23]

Mr Williams' pragmatic submission that a right to interfere for pure error of law (that is, statutory misconstruction) would place this Court in an appellate position, slowing down and frustrating the whole purpose of the Act, may be inconsistent with its express recognition of the right to review without effecting the adjudication process (s 60). There may be an issue of whether or not a decision is amenable to review for error of law by reference to particular or general factors (see *Peters v Davison* [1999] 2 NZLR 164 (CA) at 184-185). In the absence of developed arguments from counsel I intend to proceed on the assumption, without deciding the point, that this Court has a right to review for error of law."

In *Taylor v Lahatte*<sup>93</sup> Stevens J quashed an adjudicator's decisions and awarded costs against the successful party in the adjudication who sought to support the determination. The parties entered into a building contract to construct a farm shed. The owners refused to pay the accounts of the construction company noting various defects. The owners sought to cancel the contract and the dispute ended up before an adjudicator under the CCA who found the owners liable to pay the contractors \$34,536.46 which appears to be the majority of that claimed by the contractor.

The determination was issued on 3 August 2007. In September 2007 the contractor filed its application in the District Court to enter the determination as a judgment. In early November 2007 the owner filed its application for judicial review and with it an ex parte application for interim orders pursuant to s8 of the JAA 1972 restraining the contractor from taking steps to enforce the determination. It appears that the High Court granted the interim order on an ex parte basis on the same day. The case did not come on to be heard until 10 months after the adjudicator had issued his decision. In the context of "pay now – argue later" and the Court being willing to grant stays on an ex parte basis there is an obvious problem. In discussing the Courts approach, Stevens J noted:<sup>94</sup>

"However, as there are no appeal rights under the Act, the High Court will need to be cautious to ensure that such applications do not become vehicles for an attempted appeal on the facts."

And at [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 and fairness, procedural errors, or other errors usually associated with administrative review."

The thrust of the adjudicator's mistake appears to lie in his wish to inspect the construction but only after indicating that no questions would be asked of the parties. He then proceeded to issue a determination based not only on his inspection but on discussions with the parties at the scene and moreover appears to have incorrectly recorded the respondent's response. Although both parties were recorded as wanting the appointment of an expert to determine the value of the work (presumably the cost of remedial items) the adjudicator went on to determine the necessary adjustment. It seems that the contractor later resiled from its willingness to appoint an expert but the adjudicator then refused to allow the owner the opportunity to obtain and pay for an engineer's report to substantiate their estimate repairs. A formal request appears to have been made but the adjudicator apparently responded by saying he saw no point in obtaining an expert report. The adjudicator then advised that he

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<sup>93</sup> (unreported), HC Auckland, CIV 2007-404-6843 24 June 2008.

<sup>94</sup> At para [18].

would give what weight he thought was necessary to the respective parties' submissions. Unfortunately, the adjudicator made a rod for his own back by stating at the commencement of his decision:

"I cannot hold myself out as an expert on construction or quality issues. However, my inspection of the shed was of considerable assistance. The maintenance issues required to complete the shed are of a minor nature."

This led to the Judge holding at [44]:

"In terms of resolving this wide difference in the evidence, I consider that it would have been eminently suitable to instruct an expert, as is contemplated in s 45(e) of the Act. Rather, the adjudicator chose not to pursue this course, and seems rather to have followed his own instincts, by allowing an adjustment of \$8,000.00, notwithstanding the fact that he stated that he did not hold himself out as an expert on construction or quality issues."

Stevens J after referring to expert evidence produced as part of the judicial review proceeding by the owner that the works would cost considerably more than \$8,000.00 to repair went on to add at [46]:

"This evidence demonstrates the importance of obtaining an expert report in the circumstances which presented themselves to the adjudicator."

And again at [48]:

"With respect to the evidence, the key area of the nature and extent of the defects and the costs to repair them, ought, in my view, to have lead the adjudicator to instruct, or at least to direct the parties to instruct, a joint expert report on those matters. Indeed, as already noted, this is precisely what both parties had initially suggested. Yet for reasons best known to himself, and which are not explained in the determination, the adjudicator did not seek expert guidance on this issue.

Rather, the adjudicator seems to have used his own lay assessment, again drawn from the site visit, to conclude that the sum of \$8,000.00 would be sufficient to allow the defects to be repaired and the building completed. I am satisfied that the process involved breaches of natural justice to the applicants and led the adjudicator into procedural and other errors."

For adjudicators, this decision at first blush might cause problems. Adjudicators with legal backgrounds are commonly appointed yet presumably do not claim technical expertise on construction issues. Are those adjudicators expected to appoint experts as the Judge suggests? Are those adjudicators obliged to allow a respondent to instruct an expert if it requests? Both questions pose problems. Firstly, it is for the parties to produce whatever evidence they consider relevant. It is not clear from the judgment but it would seem that the respondent (the owner) sought to instruct an expert after the time in which it had to respond to the claim made by the claimant. The draconian time limits are by design and are to recognise that speed is more important than substance. It is part of an adjudicator's role to reject evidence given outside time limits. Merely because an adjudicator is not an "expert" on the particular construction issue again does not appear to warrant the appointment of an expert. Again, the adjudicator must rely on the evidence that he/she is given.

Davenport<sup>95</sup> notes that in Australia despite the fact that the adjudicator is usually valuing work or services, the adjudicator does not have to be a quantity surveyor or to have any particular expertise in valuing work. The only strict criterion is that the adjudicator must decide the value on the basis of the submissions of the parties, not the adjudicator's own experience.<sup>96</sup>

What of the Court's willingness to intervene on an amount involving \$ 34,536.46? Materiality is an important aspect of judicial review. The Court can legitimately decline to intervene, notwithstanding reviewable error, where the issues involved are not sufficient to warrant the Court's attention. Indeed, one High Court decision made clear that the Court will punish parties for bringing judicial review cases where the sums involved appear trivial in the context of High Court proceedings.<sup>97</sup> Yet the contractor in this case proceeds to adjudication presumably impressed by the speed and efficiency of the process to find that the High Court on an ex parte basis grants a stay against the adjudication and ten months later quashes the adjudication with an award of costs on a 2b basis.

In *Horizon Investments Limited v Parker Construction Management (NZ) Limited*<sup>98</sup> the decision of an adjudicator was challenged for lack of jurisdiction, breach of natural justice and of irrationality. The sum involved was \$1.1 million. The contractor initiated adjudication for the amount of unpaid payment claims. Horizon responded by initiating its own adjudication counterclaiming for \$400,000.00 against the contractor for liquidated damages for unjustified delay in finishing the project. The competing claims were consolidated.

The contractor succeeded essentially because the adjudicator concluded that payment schedules provided by Horizon did not meet the CCA's requirements and so were invalid. In terms of the Act, Horizon had to pay the claim in full. Because she determined that the "form" of the schedules was inadequate, the adjudicator did not determine any of the disputes advanced by the parties for determination. The judgment records that the adjudicator stated that she had "insufficient material" to decide these subsequent issues and that the format of the adjudication was inappropriate for those disputes.

The immediate difficulty was that both parties had expressly accepted that Horizon had provided valid payment schedules. Their form was never put before her to argue. Nor did she give any prior indication of what she had concluded to allow submissions on the point. Unfortunately, the adjudicator then went on to further award a sum that was not the sum claimed and, as the Judge recorded, neither party could actually explain.

Simon France J quashed the decision. He noted that there had been no dispute as to the form of the payment schedules taken by Parker. Indeed both parties continually referred in their evidence and submissions to the payment schedules. After noting s41 of the Act which obliges an adjudicator to comply with principles of natural justice his Honour held:<sup>99</sup>

"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 the opportunity to make submissions, adequate notice must be given and an appropriate opportunity afforded to do those things."

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<sup>95</sup> "Adjudication in the Building Industry" (2<sup>nd</sup>. Edition) the Federation Press

<sup>96</sup> *Transgrid v Walter Construction Group* [2004] NSWCS 21.

<sup>97</sup> *Cruickshank v Disputes Tribunal and another* (unreported), HC Auckland, CIV 2006-404-003966, 9 August 2007, a 50 % uplift on scale costs.

<sup>98</sup> (unreported) HC Wellington, CIV 2007 – 485 – 332 per France J.

<sup>99</sup> at [28]

The Judge asked if the adjudicator was permitted to consider the validity of the schedules when neither party had put the point at issue. He found:<sup>100</sup>

“In one sense the answer depends upon the level of specificity with which one describes the dispute. At its broadest, the approach urged by Mr Cleary, 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.

“[41] It is true that the Act does not allow contracting out, but that does not mean the parties must put in issue the form of the Payment Schedule if they prefer not to.....

“[42] I consider, it was not open to the adjudicator on the dispute that was referred to her to consider the validity of the form of the Schedules.”

The Judge declined to consider the scope of the adjudicator’s function and her ability to decline to rule on matters specifically put forward as part of the adjudication. That, he said, should await an occasion where it was decisive in a case. That issue has, however, received considerable attention in the UK and NSW.

The decision in *Horizon* is entirely consistent with NSW authority. For instance, in *Musico v Davenport*<sup>101</sup>, McDougall J found that the adjudicator had denied to the claimant natural justice in deciding that a party was not entitled to liquidated damages for delay, the adjudicator had relied upon a basis not contended by either party. The adjudicator found the liquidated damages clause was a penalty clause; an argument not raised by the respondent. The judge found:<sup>102</sup>

“It follows, in my opinion, that where an adjudicator determines an adjudication application on a basis that neither party has notified to the other or contended for, and the adjudicator has not notified to the parties, there is a fundamental breach of the requirements of natural justice that a party to a dispute have ‘reasonable opportunity’ of learning what is alleged against him and of putting forward his own case in answer to it.”

The essence of these authorities is that the adjudicator must be careful to consider only those matters which have been put before him. That does not mean that the parties control the process – that is in the hands of the adjudicator. So for instance, a failure or refusal to carry out an inspection is not a denial of natural justice<sup>103</sup>.

In *Concrete Structures (NZ) Limited v Palmer*<sup>104</sup> Baragwanath J was concerned with the continuation of judicial review proceedings where the points at issue were then the subject of District Court proceedings. The contractor had been paid two amounts awarded in an adjudication determination. It appears from the judgment that the parties were then resolving on a substantive basis the issues in the District Court where presumably the owner sought to recover back some or all of the amounts it had paid under the determination. The Court noted:<sup>105</sup>

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<sup>100</sup> at [40]

<sup>101</sup> [2003] NSWSC 977

<sup>102</sup> at [108]. In the UK see *Balfour Beatty Construction Limited v Borough of Lambeth* (supra)

<sup>103</sup> *Multiplex Constructions Limited v Luikens* [2003] NSWSC 1140 at [88]

<sup>104</sup> (unreported) HC Rotorua, CIV 2004 – 463 – 825, 6 April 2006

<sup>105</sup> At paragraph [15]

“The jurisdiction of this Court in judicial review is discretionary. It is not exercised to interfere with the conventional procedures of the District Court or of statutory tribunals in relation to which there are statutory appeal processes permitting access to this Court on appeal. This Court exercise (sic) its judicial review jurisdiction unless there is some residual risk of uncorrected illegality that cannot conveniently be dealt with by the District Court or tribunal.”

## INTERIM RELIEF PENDING JUDICIAL REVIEW

Section 8 of the Judicature Amendment Act 1972 provides that:

“... at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:”

The Hon R Smellie QC in “Progress payments and adjudication”<sup>106</sup> suggested that:

“The granting of relief upon an application for judicial review is always discretionary, which means that the Court could take the view that since the determination is only a temporary decision the appropriate course would be to leave it to the payer to make its challenge either in an action or by arbitration at a later stage. That kind of approach may well be taken where the challenge is based upon errors of law or absence of evidence. Clear cases of bias or significant breaches of natural justice, however, are more likely to attract immediate intervention. It is, however, doubtful whether the Courts would be prepared to make interim orders pursuant to s8 of the amendment once a determination has issued, because short of final orders, the determination is, by s60, declared to continue, to be a full force and effect.”

That sound prediction has not been followed. In *Willis Trust Company Limited and Concrete Structures (NZ) Limited v Palmer*<sup>107</sup> Harrison J granted interim relief under s8 JAA where it was said that the owner would be “prejudiced” if forced to meet the determination. Harrison J noted that the exercise involved a balancing of each parties rights but there was scant discussion of the role of the CCA. The relief was granted on the condition that the amount of the determination was paid to a stakeholder. An interim order was also granted in *Taylor* on an ex parte basis on the day the proceedings were filed.<sup>108</sup>

In *Concrete Structures (NZ) Limited v Palmer*<sup>109</sup> Courtney J held that interim relief under s8 of the Judicature Amendment Act 1972 was available to prevent enforcement of a determination. She held:<sup>110</sup>

“It is obvious that, in the normal course, the CCA intends there to be only the most limited means in which an adjudicator’s determination can be challenged. However, the Act stops short of precluding proceedings for judicial review; it was therefore envisaged that an adjudicator’s determination might ultimately be overturned for breaches of natural justice. Not only does the Act envisage that a party might apply for judicial review, it is silent as to the right to apply for interim relief in the context of judicial review proceedings by s8 JAA:

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<sup>106</sup> At page 84.

<sup>107</sup> (unreported) HC Auckland, 2006-404-809, 1 March 2006.

<sup>108</sup> See para [9] of the judgement.

<sup>109</sup> 2006 NZAR 513

<sup>110</sup> At [16]

It cannot have escaped Parliament's notice that one party's position might be irretrievably prejudiced by the time a judicial review application had been determined. It is unlikely that it intended to preclude interim relief where one party faced this danger. In the balancing exercise between the rights of the party with a favorable adjudication to be paid immediately and the rights of the party claiming a breach of natural justice the factor must surely be the impact if the strict rights under the CCA prevailed. If the effect would be to permanently prejudice the other party so as to render its application for judicial review worthless, regardless of the outcome, then I cannot think it was the intention. I do not consider that, as a matter of statutory interpretation, the CAA has the effect of ousting s8 JAA."

The Judge concluded that the only point she had to consider was whether there was a risk that if payment was made the contractor would be unable to pay it back. That was a question of evidence. The Judge appeared to accept the test was analogous to a stay pending appeal so as not to render appeal rights nugatory which is consistent with the UK approach. Courtney J did not use the word "insolvent" but rather the term "financially at risk"<sup>111</sup> and held:<sup>112</sup>

"It is for the plaintiff to show the necessity for interim relief to preserve its position. To do so, it would need to show, at the least real risk that if it pays over the outstanding sum the second defendant will be unable to repay it if the plaintiff succeeds in the judicial review proceedings."

As Messrs Price and Cash pointed out in their paper, the risk of miscarriage of justice and the issue as to solvency had been canvassed widely in English cases where it is said the answer is far from straight forward.<sup>113</sup>

In the UK, Coulson writes<sup>114</sup> that if the Courts are to embark on this "balancing exercise" then the starting point is the decision of Denning J in *Lindsay Parkinson & Co v Triplin Limited*<sup>115</sup> which in the context of applications for security of costs the Court should ask whether the financial circumstances of the party had been brought about by the defendant, such as delays in making payment. That general approach was followed by the TCC Judge in the context of adjudication in *Wimbledon Construction Company 2000 Limited v Derick Vago*<sup>116</sup>. In the UK, evidence of financial difficulties has not necessarily led to the Court's intervening to prevent enforcement of determinations. For instance, in *Herschel Engineering Limited v Breen Property Limited (No 2)*<sup>117</sup> the Court held that there was no substantial difference between the financial position of the claimant company at the time it entered into the contract, and the time of the application. At the time of the contract the claimant company was an unknown entity in financial terms; since that was the company with which the defendant has decided to contract and had entrusted with the work, it would now be wrong for the defendant to take advantage of that position to seek a stay of execution. He concluded:

"In my view, on an application for a stay where a party has enters (sic) into a contract with a company whose financial status is or may be uncertain and finds itself liable to pay money to that company under an adjudicator's decision, the question may properly be posed: is this not an inevitable consequence of the commercial activities of the applicant that it finds itself in the position that it is in? It has, as it were, contracted for the result...."

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<sup>111</sup> See para [27]

<sup>112</sup> at para [28]

<sup>113</sup> See Coulson QC, "Construction Adjudication", at page 399.

<sup>114</sup> "Construction Adjudication" at 15.10 and 15.13.

<sup>115</sup> [1973] QB 609

<sup>116</sup> [2005] EWHC 1086

<sup>117</sup> The decision of HHJ Lloyd QC, unreported, 28 July 2000, TCC.

It is very easy (and prudent and relatively inexpensive) to carry out a search or to obtain credit references against a company whose financial status and standing is unknown. Not to do so, inevitably places a person in a significant disadvantage. It has only itself to blame if the company selected by it proves not to have been substantial (as opposed to a material deterioration in its finances since the date of contract).”

A similar result was reached in *Michael Jones Construction v Golledge and others*<sup>118</sup> where the TCC Judge concluded from the evidence that the claimant contractor was not in a significantly worse financial position than it had been at the time the contract was made. Thus the defendant’s employers “got the result they contracted for and cannot now use the claimant’s financial ill health to avoid judgment.” As we have seen, the New Zealand Courts on interim applications appear to accept as reasonable that the monies which are the subject of the claim be paid into Court. That approach has been criticised in the UK as defeating the purposes of the Act. For instance in *Total M&E Services Limited v ABB Building Technologies Limited*<sup>119</sup> HHJ Wilcox noted that to allow a stay might affect sub-contractors which, by dint of an owner’s application, are practically forced back to the “pay when paid regime”: He added:

“were the whole of it paid into Court and the claimants deprived of its benefit the claimant’s sub-contractor would be in exactly the same position he would have been in had the Housing Grants Regeneration Act never been enacted.”

In *AWG Construction Services Limited v Rockingham Motor Speedway Limited*<sup>120</sup> HHJ Toulmin noted the Court should not protect parties seeking a stay unless consistent with the overriding objectives of the Act and the justice of the case demanded it. He noted that:

“In general, a Court must balance (a) the intention of the legislation that adjudication should be enforced summarily; (b) the right of the successful party not to be prejudiced by being kept out of its money, and (c) in cases where there is a serious risk that a party will not be able to recover the money, that the defendant is not being seriously prejudiced in a way not contemplated by the Act which is silent as to the position where a defendant runs more than a nominal risk of being unable to recover money after trial or arbitration award.”

A recent decision of Miller J in the High Court at Wellington<sup>121</sup> demonstrated a firmer stance to interim applications. The plaintiff applied for judicial review of a determination and an interim order because the defendant was in financial difficulties. Miller J appeared unimpressed when the plaintiff sought security for the money it was to pay saying:<sup>122</sup>

“I have indicated to counsel today that I am not prepared to enter into arguments about the quality of the security offered. The policy of the Construction Contracts Act is that the party against whom a determination has been made must pay before exercising such rights of appeal as the Act affords. Although this takes the form of an application for judicial review, it is my judgment an appeal in substance.

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<sup>118</sup> [2006] EWHC 71 (TCC)

<sup>119</sup> [2002] EWHC 248

<sup>120</sup> [2004] EWHC 888 (TCC)

<sup>121</sup> *Spark It Up Ltd v Dimac Contractors Ltd* (unreported) HC Wellington, CIV 2008 – 485 – 1706, 15 August 2008.

<sup>122</sup> Paras [4] and [5].

It is accepted by the parties that it is reasonable for the plaintiff to seek security for the payment that it has to make under the award because there is evidence that Dimac is in financial difficulties. However, I am not prepared as I have indicated to impose security on the parties. There are two options available to the plaintiff: to pay the money into the Court, as it has indicated it is able to do, or to provide security in a form that is acceptable to Dimac in its discretion.”

## PROCEEDINGS TO RESTRAIN THE ADJUDICATOR

In *Bluemover One Limited v The Breen Construction Company Limited*<sup>123</sup> the plaintiff filed proceedings in the Dunedin High Court for an order declaring invalid, or setting aside, the adjudicator’s appointment and the notice nominating an adjudicator. At the same time, it applied ex parte for an injunction restraining the third defendant from adjudicating. In that case, the plaintiff argued that there was no construction contract. There appears no criticism in that case that it is normally a matter for the adjudicator to decide his or her own jurisdiction. Rather Christiansen AJ noted:<sup>124</sup>

“The question of whether or not a construction contract subsists is inevitably a legal question. I cannot accept that where there is a real issue, as here, about the existence of same, that question cannot be tested at an early opportunity through the Court process.”

The Court noted that because of the timing of the initiation of the adjudication process (just before Christmas) the plaintiff had little option but to act pre-emptively and apply to the High Court. This contrasts with NSW where the Courts have not looked favorably at interim applications pending judicial review. The Court has doubted whether matters will irretrievably be lost unless and until some action is taken to enforce the payment claim or the determination. Interim relief before or during an adjudication is expressly frowned upon. McDougall J in *Australian Remediation Services P/L v Earthtech Engineering P/L*<sup>125</sup> when considering an application to restrain a claimant from proceeding with an adjudication application noted that it is adjudicators under the Act who are the primary organs for the resolution of disputes whereas the power of the Courts operate at a later stage. Accordingly, the Court ought to “think hard and long before interfering in the implementation, in a particular case, of that statutory scheme.”

## ARE SOME CASES TOO COMPLEX FOR THE CCA?

In *Horizon*, the Court noted that the adjudicator had declined to deal with aspects of the claim because she thought them too large and complex in an adjudication claim. In the UK the Courts have confronted but rejected this as an argument to challenge an adjudication. In *Carillion*, Chadwick LJ questioned whether adjudication of complex cases was Parliament’s intention but noted nonetheless<sup>126</sup> that the “right” answer is subordinated to the need to have an answer quickly. In Australia, one Judge of the Supreme Court has suggested that the size of payment claims ought to be capped.<sup>127</sup> So what should the adjudicator have done in the *Horizon* case when she thought the matter too complex for adjudication? That issue

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<sup>123</sup> (unreported), HC Dunedin, CIV 2006 – 410 – 001022, 3 July 2007

<sup>124</sup> at paragraph [15]

<sup>125</sup> [2005] NSWSC 362 followed in *Lifestyle Retirement Projects No.2 P/L v Parisi Homes P/L* [2005] NSWSC 411 at [4] “The existence of a fact necessary for the validity of an adjudication is a matter within the competency of the adjudicator to determine.”

<sup>126</sup> paragraphs 85 to 86

<sup>127</sup> See McDougall J, “The Court View of Security of Payment legislation and operation.” Available from the NSW Supreme Court website: [www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/11\\_sc.nsf/pages/sco\\_mcdougall310805](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/11_sc.nsf/pages/sco_mcdougall310805)

was dealt with squarely by Judge Lloyd QC in *Balfour Beatty v London Borough of Lambeth*:<sup>128</sup>

“An adjudicator, acting impartially and in the accordance with the principles of natural justice, ought in such circumstances to inform the parties that a decision could not properly, reasonably and fairly be arrived at within the time and invite the parties to agree further time. If the parties are not able to agree more time then an adjudicator ought not make a decision at all and should resign.”

In NSW, the answer under the *Brodyn* authority would have been that the adjudicator had not made a bona fide attempt to exercise the power contained within the Act.

In *CIB Properties Limited v Birse Construction Limited* <sup>129</sup>the claim that was referred to adjudication consisted of about 50 lever arch files but after further disclosure and submissions there were 150 lever arch files relevant to the adjudication. The adjudicator's time was by consent extended for the reaching of a decision. The claim was for approximately £16 million. One of the grounds for the challenge to the final decision was that the size and complexity of the dispute made it impossible for it to be resolved fairly by adjudication. The Court held that the test was not whether the dispute was too complicated to refer to adjudication, but whether the adjudicator was able to reach a fair decision within the time limits allowed by the parties. Because the parties had consented to successive extensions it followed that the adjudicator by the fact that he issued a decision was able to reach a decision notwithstanding the complexity of the case.

## OTHER ATTACKS ON DETERMINATIONS

In *Britannia Pty Ltd v Parkline Constructions Pty Ltd*<sup>130</sup>, the New South Wales Court of Appeal held that a judgment founded on a determination under the NSW Act could be attacked if service of the payment claim involved misleading or deceptive conduct in breach of s52 of the Trade Practices Act<sup>131</sup>.

In *Katherine Pty Ltd v CCD Group Pty Ltd* <sup>132</sup> McDougall J was confronted with an application to stay a judgment entered in the lower court following a determination. The plaintiff argued it would be unconscionable to allow enforcement of the judgement which would include enforcement of a penalty rate of interest – 9 % a month or 180 % per annum.<sup>133</sup> Accordingly, the court was asked to exercise its equitable jurisdiction to stay the judgment. The Court agreed:<sup>134</sup>

“On that finding, the defendant is guilty of unconscionable conduct under the unwritten law. Section 51AA of the Trade Practices Act is therefore enlivened.”

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<sup>128</sup> [2002] BLR288 at paragraph [36]

<sup>129</sup> [2005] 1 WLR 2252

<sup>130</sup> (2006) 67 NSWLR 9

<sup>131</sup> The legislation on which the Fair Trading Act 1993 is based.

<sup>132</sup> (2008) NSWSC 131

<sup>133</sup> That is the calculation in the judgement; see para 20.

<sup>134</sup> See para [42]

In addressing how relief would be formulated:<sup>135</sup>

“Again, to the extent that Mr Murphy relied on the underlying policy of the NSW Act or its interstate equivalents - prompt payment of progress claims with a postponement of ultimate disputes – that can be reflected in the moulding of relief. Nor is there anything that I can discern in the underlying policy of those Acts that entitles those who perform construction work or supply related goods and services to use the mechanisms provided by those Acts to recover a penalty.”

## **BANKRUPTCY AND THE CCA**

In *Insite Design and Development Limited v Saddler*<sup>136</sup> judgment had been entered against the debtor after the Court found that his various complaints had not amounted to a payment schedule. Judge Everitt subsequently refused to grant a stay of execution of the judgment holding that to do so would undermine the purposes of the CCA. A bankruptcy notice was subsequently issued which the debtor applied to set aside. The Court was confronted with the issue as to whether there was a triable claim that could not have been set up prior to the entry of judgment. If there was then the debtor could not meet the statutory test set out in s19(1)(d) of the Insolvency Act 1967.<sup>137</sup> By the time of this hearing, the debtor had sufficient evidence to convince Sargisson AJ that the debtor had a genuine claim that exceeded the judgment debt but the issue was whether this could have been “set up” at the time that a payment schedule should have been issued. She said:<sup>138</sup>

“The underlying principle is that s19(1)(d) does not aid those that who sleep on their rights, but rather aids those who were unable to assert their rights due to factors beyond their control. It cannot be the correct position that the phrase “could not set up in the action in which judgment was obtained” aids a debtor who could readily have provided a payment schedule to dispute a payment claim, but failed without good reason to do so. I am led therefore to the conclusion that if the legal inability relied on is s79, then the debtor must establish cogent reasons which show that it is reasonable to rely on s79 and that the legal inability relied upon has not occurred because of the debtor’s own inexcusable failure to take advantage of the payment schedule procedure under the Construction Contracts Act.”

She distinguished *Re Capon*<sup>139</sup> and noted that Gendall ACJ in that case was concerned with circumstances in which the debtor was caught out by the relevant newness of the Construction Contracts Act and through excusable inadvertence to follow the strict procedures in the Act. Gendall ACJ had said in that case:

“I do not accept that a judgment debtor with a genuine counterclaim should be subjected to the serious consequences of bankruptcy adjudication without the opportunity to raise this claim simply through inadvertence or omission to follow the strict procedures in the Construction Contracts Act.”

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<sup>135</sup> See para [48]

<sup>136</sup> (unreported), HC Auckland, CIV 2006 – 404 – 4528, 27 April 2007

<sup>137</sup> Now section 17 of the Insolvency Act 2006.

<sup>138</sup> at [30]

<sup>139</sup> (2004) 18 PRNZ 105

In contrast, Sargisson AJ found that the judgment debtor knew about the payment schedule procedure; and indeed through his lawyer had advised he intended to invoke the procedure but failed to do so. She concluded:

“For these reasons, I do not accept that s19(1)(d) is intended to allow debtors a second chance, where they themselves created, without good cause or justification, the legal inability in which they rely.”

The difficulty with that reasoning is it leaves the door open for the unsophisticated owner to claim the sort of protection granted in *Re Capon*. Curiously, what does not appear to have been fully argued was the issue about whether the Court should have entertained the issue about whether there was a “triable issue” at all. Section 79 is clear; that the Court should not give “effect” to any counterclaim; set-off or cross demand.”

In *Holmes Construction (Wellington) Limited v Rees*,<sup>140</sup> the debtor argued that the judgment was not a “final judgment” for the purposes of the Insolvency Act 1967. This was on the basis of Asher J’s decision in the same case<sup>141</sup> which held that the enforcement process is not intended to transform an adjudicator’s determination into a final judgment. Faire AJ agreed that issue should be heard by the Court of Appeal with other issues in the same cases.<sup>142</sup>

## **WHY ARE PARTIES LEAVING IT TO THE ENFORCEMENT STAGE TO RAISE THESE ARGUMENTS?**

What seems to have eluded all the parties who found themselves owing a judgment because of the failure to provide a valid payment schedule is that rather than await enforcement and seek the Court’s assistance they could have just as easily invoked their own adjudication to determine the scope of remedial works or other damages. The CCA in New Zealand does not only protect the contractor. The owner is just as entitled to seek a determination. For instance, in *Insite Design*, judgment was entered on 7 April 2006. Mr Sadler’s hearing to set aside the bankruptcy notice was held on 30 January 2007 and judgment delivered by 27 April 2007. Sargisson AJ found there was evidence to support his counterclaim. Although constant attention is drawn to those judicial statements suggesting the final position should then be determined by arbitration or proceedings, Mr Sadler could have just as easily sought his own determination as to his various complaints. Had he been awarded a money sum then that could have been entered as a judgment to which the Court would have had to take account.

## **THE NOTICE OF ADJUDICATION**

As the right to challenge a determination is so limited, overseas jurisdictions have placed important emphasis on the notice of adjudication. Indeed, it has been described as the most important document in the process because it defines the limits of the adjudicator’s jurisdiction. As you have seen, going beyond that notice or failing to consider the matters referred to in the notice will provide fertile grounds to challenge a determination. As we mentioned before, overseas statistics show the claims procedure to be heavily weighted in favour of the claimant. One reason for this imbalance is said to be that the claimant is unilaterally able to define the scope of what will be adjudicated. The New Zealand evidence is that lawyers presenting claims tend to produce documents akin to legal proceedings with a

<sup>140</sup> (unreported) HC Auckland, CIV 2006 – 404 – 004129 and 4220, 3 March 2008

<sup>141</sup> See the obtaining of judgment under s 73 below.

<sup>142</sup> That will be heard by the Court of Appeal on 2 October 2008. In Queensland, the Federal Magistrates Court ruled this year that a judgment based on an adjudicator’s determination is a “final” judgment for the purposes of the Commonwealth Bankruptcy Act. See *Cavanah & Anor v Advance Earthmoving & Haulage Pty Ltd* [2008] FMCA 427 and in NSW, *Falgat Constructions v Masterform* [2005] NSWSC 525

separate document defining the claim in the nature of a statement of claim. However, that claim cannot widen the dispute that has been defined in the notice of adjudication.

## **ADJUDICATORS FEES**

In New Zealand, it is common for adjudicators to protect themselves by insisting that they have not accepted jurisdiction until payment of their fees is placed into trust. Adjudicators derive the ability to do this, presumably, from s35(1) of the CCA which requires only that the adjudicator “indicate” whether he or she is willing to act in that capacity. The common approach that emerges is that adjudicators will “indicate” their willingness to act, but on the condition that the appointment takes effect from the time that the fees are placed in trust. For the claimant, this means that if it wishes to proceed at speed it place all the adjudicator’s fees in trust immediately upon receiving the notice from the adjudicator hoping, at least, to receive the respondent’s share as part of the determination.

The adjudicator’s fee, however, is not payable if he or she fails to determine the dispute within the time allowed by s46(2). Two points are worth noting. An adjudicator can require payment of his or her fees before communicating the determination to the parties. It follows that there is a difference between a completion of the determination and communicating the determination to the parties. If an adjudicator advises the parties that it has been completed within the statutory period then he or she has complied notwithstanding that the contents of the determination have not been delivered. Section 46 as to the timing of the adjudicator’s decision is mandatory. In the UK, considerable case law has built up over whether a late decision is a nullity.

## **DAMAGES**

A matter yet to be ruled on by the High Court is where a party proceeds to adjudication claiming damages. In New South Wales, the only matter that can be adjudicated is the payment claim. That jurisdiction has had to consider whether claims for damages properly arise in the context of a payment schedule (however framed). The CCA does not create such bar. Either party may bring an adjudication claim. The issue that has yet to be confronted by the Court is the relevance of ss48(1) and (2) of the CCA which state:

- “(1) If an amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine –
- (a) whether or not any of the parties to the adjudication are liable, or will be liable if certain conditions are met, to make a payment under that contract; and
  - (b) any questions in dispute about the rights and obligations of the parties under that contract.
- (2) If no amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine any questions in dispute about the rights and obligations of the parties.”

Is it the case that if a party seeks damages under a contract (for whatever reason) it can employ s48(1) but if that party asks for a preliminary determination (as an example) that the contractor had breached the contract by failing to complete (but without naming any consequential damages) that the party must then face the hurdle of s61, which provides at ss(2) that the Court must have regard to, but is not bound by, the adjudicator’s determination? Thus far there is no decision which directly discusses these sections in detail. That seems to be on the basis that parties have not sought adjudication on the parties “rights and obligations” but rather for a money sum. However, the obvious issue is that by a party seeking damages must necessarily involve a discussion of the “rights and obligations”

of the parties. Coulson QC in his text notes that this aspect of the CCA is unique among all the jurisdictions.<sup>143</sup>

“In New Zealand, a determination on the matter of a payment is enforceable and may be recovered as a debt due in any court. On the other hand, a determination about the ‘rights and obligations’ of the parties is not enforceable, which means that if a party fails to comply with it, the other party may bring proceedings to enforce it, but the court need only have regard to, and not be bound by, the adjudicator’s determination. It is thought that this might create potential difficulties: although it will often be simple to differentiate between a determination requiring payment and a determination of the parties’ rights and obligations, there will be other occasions when they might well amount to precisely the same thing. A claim for a specific sum may turn on whether or not the contractor is responsible under the contract for a particular element of the work or whether it is work that he is required to do by way of a variation. In those circumstances it may be difficult to say that the determination of the amount is enforceable (because it might be said that it was a determination of rights and liabilities), even though it appears reasonably clear that that was the intention of the legislature.”

In *Jian Hua Property Limited v Freemont Design and Construction (no 2)*<sup>144</sup> the client was alleged to have unlawfully terminated the contract. An invoice and payment claim was subsequently issued for various items under the contract and a further item for “\$95,701.05 (plus GST) for loss of profit for when the client instigated termination of the contract.” The owner did not respond and the contractor filed a statutory demand which came before the Court on an application to set aside. After reviewing ss16 and 17 of the CCA the Court held:<sup>145</sup>

“Here, the ‘loss of profit claim’, is not something the respondent is entitled to under the contract. Nor is the claim for downtime. These claims are not debts owed under the contract. They are the respondent’s estimates of the loss it has suffered because it is no longer possible to carry out the work under the contract.

It may be that the payee can claim for the loss of expected profits and greater than expected expenditure incurred under the contract by way of damages or relief under s9 of the Contractual Remedies Act 1979. But in my view the payer cannot invoke the payments regime under the Act to recover what are effectively claims for damages or compensation.”

As Michael Gold pointed out<sup>146</sup> the mere fact the payer has failed to provide a payment schedule is not an “automatic win in the lottery for the payee.” When the payee goes to enforce their ‘debt due’ the Court hearing the enforcement proceedings is able to look behind the claimed amount to ascertain whether the amounts claimed are made up of qualifying amounts.<sup>147</sup> A party cannot sneak into a payment claim a claim for damages and then receive a “windfall” by the failure to issue payment schedules. But that case turned on what could legitimately be put into a payment claim. The issue that has divided practitioners and adjudicators but has not yet been ruled upon by the Courts is the simple proposition whether a party can refer to adjudication a damages claim quite separate from a payment claim. New Zealand departs from NSW in this respect. The NSW Act allows only adjudication on payment claims. The UK Act does allow such claims. However, the UK does not have the restriction of s48 of the CCA. The short point is this: some adjudicators are happily deciding damages claims on the basis that they are brought under s48(1). An

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<sup>143</sup> See page 208

<sup>144</sup> (unreported) HC Auckland, CIV 2005 – 404 – 5526, 16 February 2006

<sup>145</sup> at [48]

<sup>146</sup> (supra)

<sup>147</sup> For a table as to qualifying and non-qualifying claims see the table produced at page 8 of Michael Gold’s paper (supra).

example is as follows from one Auckland adjudicator delivering a determination under the CCA in which damages were sought for the alleged unlawful repudiation of a tender. The respondent argued that *Jian Hua* precluded an award of damages because what the claimant was really seeking was a determination as to the rights and obligations of the parties: The adjudicator rejected that argument:

“The respondent asserts that damages are not “an amount of money under the relevant construction contract” within the meaning of s48(1). Nor can damages be “a payment under that contract” within the meaning of s48(1)(a).

I would have thought that damages for breach are payable under a contract. However, if the respondent is correct in its assertion then I would have thought it is clear that damages must be included within the meaning of the words ‘any questions in dispute about the rights and obligations of the parties under that contract’ in s48(1)(b).

There is a plethora of cases in English law dealing with breaches of contract (for example, charter party claims, construction dispute claims, damages for breach of sale and purchase agreements and so on) and it has certainly never occurred to me that these claims are not claims under the contracts in question. Indeed, in every such case the contracts in question have provided the foundation for claims for damages for breach.

It is clear under s25 that any ‘dispute’ may be referred to adjudication and s48(1) applies to any “dispute” where an amount of money is claimed.”

The matter obviously goes to one of jurisdiction. It is fertile ground for judicial review and we can expect the High Court will be called upon shortly to decide the point.

## **ENFORCEMENT AND THE STATUTORY DEMAND – SECTION 79 OF THE CCA VS SECTION 290 OF THE COMPANIES ACT 1993**

In *Volcanic Investments Limited v Dempsey and Wood Civil Contractors Limited*<sup>148</sup> the contractor obtained a determination which it then sought to enforce by the issue of a statutory demand. The respondent applied to set it aside under s290 of the Companies Act 1993. Section 290(4) provides:

“(4) The Court may grant an application to set aside a statutory demand if it is satisfied that:  
(a) there is a substantial dispute whether or not the debt is owing or it is due;  
(b) the company appears to have a counterclaim, set off, or cross demand and the amount specified in the demand less the amount of the counterclaim, set off, or cross demand is less than the prescribed amount; or  
(c) the demand ought to be set aside on other grounds.”

Volcanic claimed a set off for losses claimed to have been incurred as a consequence of delay by the contractor and had issued District Court proceedings for recovery. The issue was the apparent clash between s290(4) and s79 of the CCA. Section 79 provides:

“79 Proceedings for recovery of debt not affected by counterclaim, or set off, or cross demand. In any proceeding for the recovery of a debt under ss23, 24 or 59, the Court must not give effect to a 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

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<sup>148</sup> (2005) 18 PRNZ 97

(b) There is not in fact any dispute between the parties in relation to that claim for that amount.”

Randerson J held:

- (a) that the issue of a statutory demand was a “proceeding” contemplated by s79 for recovery of a debt.
- (b) the Court was precluded from giving effect to the set off claimed by *Volcanic* by virtue of s79 unless s290(4) overrode it.
- (c) Section 79 prevailed over s290(4) of the Companies Act 1993.
- (d) Section 79 only affects the operation of s290(4)(b). It did not effect s290(4)(c) in terms of which a statutory demand may be set aside “on other grounds.”

Because *Volcanic* failed to establish that it was solvent as an “other ground” the application to set aside a statutory demand was dismissed. *Volcanic* was immediately followed in *10 Gilmer Limited v Tracer Interiors Construction Limited*<sup>149</sup>, which allowed a statutory demand to proceed based on payment claims which had not been met by a payment schedule.<sup>150</sup> In an earlier case before *Volcanic*, Associate Judge Gendall in *Brooklyn Holdings Limited v Able Handyman Services Limited*,<sup>151</sup> set aside a statutory demand based upon a CCA debt (but because the debtor company proved solvency). In an obiter statement, the Judge also considered the debtor’s argument that the statutory demand in liquidation proceedings were not “proceedings for the recovery of a debt”. He added:<sup>152</sup>

“Although I need not decide this issue here, as I see it, there is little in this argument. The issue of a statutory demand, in part at least, must always involve an element of debt collection, given that the debts in question are required to be outstanding.”

*Volcanic* has been followed in *Freemont Design and Construction Limited v Natures View Joinery Limited*<sup>153</sup>; *Kizer Builders Ltd*<sup>154</sup> v *OEC Construction Ltd* and *Sci Development & Construction Ltd v NZ Build Ltd*.<sup>155</sup> In *Freemont* the debtor also argued *Volcanic* was wrong because a statutory demand was not a proceeding for the purposes of s79 of the Construction Contracts Act 2002. Faire J distinguished *Volcanic* on the basis that it was not the issue of the statutory demand itself which was the proceeding but rather the application to set aside the statutory demand. In *Freemont*<sup>156</sup>, the Court also decided the case on solvency as an “other ground” under s290. However as to solvency, in *Spencer v Jed Rice Building Contractors Limited*<sup>157</sup>, Associate Judge Abbott held:<sup>158</sup>

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<sup>149</sup> (unreported) HC Wellington, CIV 2005 – 485 – 6 December 2005

<sup>150</sup> Again, solvency was an issue. The Judge cited authority that if the recipient of a statutory demand satisfies the Court that it is arguably solvent, the demand must be set aside pursuant to section 290(4)(c) – *Rocklands Park Limited v Logan Samuel Limited* (2004) 9 NZCLC at 263, 535 and *Medisys Limited v Getting and Castle Limited* (unreported) HC Auckland, M1426/00, 9 February 2001, Master Kennedy-Grant

<sup>151</sup> (unreported) HC Wellington, CIV 2005 – 485 – 1362, 13 September 2005

<sup>152</sup> at [32]

<sup>153</sup> (unreported) HC Auckland, CIV 2005-404-4807, 20 April 2006

<sup>154</sup> (unreported) HC Wellington, CIV 2006 – 485 – 2287, 16 November 2006

<sup>155</sup> (unreported) HC Auckland, CIV 2005 – 404 – 3656, 23 November 2005

<sup>156</sup> *Freemont* also held that if all matters such as set off, counterclaims or cross claims were dealt with in the adjudication then a judgment entered under s 73 creates a res judicata. The same result has been held in NSW in the Supreme Court decision of *Falgat Constructions v Masterform* [2005] NSWSC 525 where it was held that the adjudicator was akin to a judicial tribunal and until set aside the adjudication and any subsequent judgement was a final decision on the merits creating a res judicata. In Queensland, the Federal Magistrates Court in *Cavanah & Anor v Advance Earthmoving & Haulage Pty Ltd* [2008] FMCA 427 also held a judgment arising out of a determination was a “final” judgement for the purposes of the Commonwealth Bankruptcy Act.

<sup>157</sup> (unreported) HC Auckland, CIV 2007 – 404 – 7539, 21 February 2008

<sup>158</sup> at [14]

“One commentator has suggested that solvency should not be accepted as a ground for setting aside a statutory demand on its own, arguing to accept that proposition would allow a solvent debtor company to refuse to pay a demand purely capricious reasons. *Andrew Beck, “Solvency and statutory demands”* (2006) NZLJ100. I agree that something more than solvency alone should be required where there is an undisputed debt.”<sup>159</sup>

*Volcanic* was criticised by John Ren.<sup>160</sup> He argued that the application to set aside a statutory demand bore no resemblance to a proceeding for a payee to recover a debt. If anything, the opposite. An application for liquidation was obviously a legal proceeding but was not a debt recovery proceeding. We know that the Associate Judges have railed against what is described as a misunderstanding of the use of statutory demands as a debt collection procedure instead insisting that the procedure is only there to test the solvency of a company. We wonder if that approach in this context is now too restrictive. The decision of Wild J in *Apple Fields Limited v Trustee Executors and Agency Co of New Zealand Limited*<sup>161</sup> is perhaps more helpful where he held the legitimate purpose of a statutory demand was to force payment of a due debt. He held:

“Masters of the High Court who usually deal with these provisions, have viewed the use of the statutory demand procedure for other or ulterior purposes as an abuse of the process of the Court. Other purposes, that is, than genuinely demanding payment of a debt due, with a view to putting the company into liquidation if it is not paid.

.....unsurprisingly, there is nothing in the Act prescribing the making of a statutory demand without an intention at the time to take the further step of applying to put the debtor company into liquidation if the demand is not complied with. After all, the maker of a statutory demand will generally expect, or at least hope, the demand will be met. An analogy can be drawn with the legal proceedings. It has never been suggested that it is unlawful or improper for a plaintiff to commence legal proceedings if it does not have the intention (or even the financial ability) to follow the proceeding through to its conclusion, ie. to trial or whatever. The lawfulness and propriety in both legal proceedings and statutory demands will surely depend on whether proper grounds exist for commencing the proceeding or making the demand. In other words, in the case of the demand, on whether there is an undisputed due debt yet subject to a counterclaim set off or/ cross demand.”<sup>162</sup>

This brings us to *Silverpoint International Limited v Wedding Earthmovers Ltd*<sup>163</sup>. Doogue AJ refused to follow *Volcanic* and as one commentator noted this matter now needs to be decided by the Court of Appeal.<sup>164</sup> Doogue J disagreed with the decision in *Freemont* and held the only possible “proceeding” could be the statutory demand. An application to set aside a statutory demand, he held, was not a proceeding to recover a debt.<sup>165</sup> Nor, he held, was a statutory demand a proceeding for a recovery of a debt, rather a preliminary step that frequently accompanies liquidation proceeding. Indeed, nor would he accept that liquidation proceedings are in themselves proceedings for recovery of a debt. They were only the beginning of a process, which quite indirectly, might lead to in part or entire satisfaction of a debt. The Court was also concerned with s310 of the Companies Act 1993 in which the liquidator has the right to bring into account claims against the creditor. The Court held that

<sup>159</sup> See also *Walter Larsen & Sons Limited v the Department of Corrections* (2006) 18 PRNZ 55.

<sup>160</sup> “Enforcing payment obligations under the Construction Contracts Act 2002”, NZ BLQ 336

<sup>161</sup> 13 PRNZ 387

<sup>162</sup> That statement of Wild J was endorsed in Guan (supra) by Gendall AJ.

<sup>163</sup> (unreported) High Court Auckland, CIV 2007 – 404 – 104, 30 May 2007

<sup>164</sup> Tomas Kennedy-Grant QC “Construction Contracts Act – Five years on.” *New Zealand Lawyer*, 4 April 2008

<sup>165</sup> In *Cavanah* (supra) the Court held that an adjudication was a “proceeding” within the statutory framework which may have costs implications for parties seeking to enforce a payment claim through the adjudication procedure.

the application of 310 could not be barred by s79 of the CCA. It was inconsistent. The inconsistency, the Judge said, could be avoided by determining s79 does not apply to liquidation proceedings. Once that step was taken, he said, the logical consistency was that it would not apply to statutory demand proceedings that are ancillary to liquidation proceedings. He said:<sup>166</sup>

“In my view, the wording of s79 when considered in its statutory context means that the restriction contained in s79 cannot sensibly be read as extending to liquidation proceedings. It might be possible to argue that there are strong policy considerations that would justify a wider interpretation than given to the provisions of s79. However, I am not convinced that there is any reason to do so. I have no doubt that the objectives of the CCA are important for those who come within the scope of the Act.....,

[89] On the other hand, liquidation proceedings also have significant consequences to those who have interests in companies. They include shareholders, investors and creditors. Liquidation proceedings have the practical result of the extinction of those companies. It is difficult to see how such proceedings can be fair if the Court is required to ignore substantial set-offs, counterclaims and cross demands – which would be the effect of extending the operation of s79 to liquidation proceedings. It is not self-evident that the policy considerations require that creditors who have claims within the purview of the Construction Contracts Act 2002 should be able to insist on satisfying their claims without allowance for counterclaims etc, even at the cost of potential injustice to companies and those associated with them.”

Doogue AJ distinguished Randerson J's analysis in *Volcanic* that the CCA prevailed over the Companies Act 1993 on the basis that the Judge had wrongly assumed that both enactments were concerned with proceedings for recovery of debts.

The decision in *Silverpoint* seems to turn on two quite separate points; (a) whether a statutory demand or an application to set aside a statutory demand or proceedings to liquidate a company are proceedings for recovery of a debt<sup>167</sup> and (b) quite separately, whether the framers of the Act contemplated that a company could be placed in liquidation before an opportunity to advance a set-off, cross claim or counterclaim. It is a matter the Court of Appeal will have to resolve. This approach is at odds with overseas authority<sup>168</sup> although different statutory criteria apply. We suspect that the authors of the CCA did not envisage this problem arising. Indeed, Smellie QC noted in his text published as the legislation came into force<sup>169</sup> that thanks to ss73, 74 and 79 of the CCA such “fabian”<sup>170</sup> tactics were not possible at the enforcement stage in New Zealand. The question obviously is whether it is unfair to enforce judgment and ignore what genuine claims the debtor might have against the creditor. In the context of the CCA, we suggest the answer is that is what

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<sup>166</sup> at [88]

<sup>167</sup> The rules committee obviously regard the statutory demand as a “step in the proceeding.” It is a specific item listed in the costs schedule.

<sup>168</sup> In *George Parke v The Fenton Gretton Partnership* (2002) CILL 1712 it was held that a determination creates a debt which may form the basis of a statutory demand. In *Ozy Homewares Pty Limited v Wes Gordon Pty Limited*, [2007] NSWSC 982, the contractor obtained judgment after the owner failed to issue a payment schedule in response to a payment claim. A statutory demand was then issued. An application to set aside the statutory demand was made under the equivalent of section 290 of the Companies Act 1993. The Court set aside the statutory demand on the basis that the inability to bring a cross claim against a judgment was for the purposes of the Act “some other reason why the demand should be set aside.” In Queensland, see *Peekhurst Pty Ltd v Glenzeil Pty Ltd* [2007] QSC 159 where the Queensland Supreme Court held that it was appropriate to use the statutory demand procedure to enforce a debt under the Act. In NSW, see *Falgat Constructions v Masterform* [2005] NSWSC 525 for a similar result. In *Cavanah & Anor v Advance Earthmoving & Haulage Pty Ltd* (infra) it was held that although an adjudication may not determine the rights outside the Act it certainly determined the right to statutory payment. Accordingly, the Court held that if adjudicator's decisions were not treated as final judgments than it would ‘render any successful adjudication outcome nugatory.’

<sup>169</sup> Page 101

<sup>170</sup> The reference is to the creditor raising set-off, counterclaims or cross demands.

the creditor signed up for when it entered into the construction contract. It expressly signed up for the regime that debts due under the Act must be paid irrespective of what that might bring. The matter will have to be resolved by the Court of Appeal but the issue is of obvious concern to the Associate Judges.<sup>171</sup> However, the harsh consequences of “pay now argue later” are illustrated by *Harlow & Milner Ltd v Linda Teasdale*.<sup>172</sup> There was an adjudication and judgment subsequently entered in favour of the contractor against Mrs Teasdale. The contractor obtained an interim charging order and on the application to make it final, Mrs Teasdale’s solicitors argued there was an on-going arbitration and enforcement should await the outcome. The Judge described the argument as “quite hopeless” and held:<sup>173</sup>

“The defendant is not entitled to ignore the judgment of this court and to delay her payment to the claimant in the hope that ‘something may turn up’. Her solicitor’s suggestion that the Charging Order should in some way be suspended, until the result of the arbitration is known, would wholly undermine the adjudication process. If it were right, it would mean that any party who was on the receiving end of an adjudicator’s decision could, if they wanted to avoid the result, commence arbitration proceedings against the successful party, and then argue that the adjudicator’s decision should abide the eventual outcome of that arbitration. It was precisely to avoid such delaying tactics that the statutory adjudication process was created in the first place.”

Later, when the contractor moved to sell the property by writ of sale Mrs Teasdale again argued this should await the outcome of the arbitration. The Judge held:<sup>174</sup>

“Standing back from the authorities for a moment, it is worth considering what the effect would be if I acceded to the defendant’s request not to make the order for sale because of the on-going arbitration. It would mean that any unsuccessful party in adjudication would know that, if they refused to pay up for long enough, and started their own arbitration, they could effectively render the adjudicator’s decision of no effect. It would be condoning, in clear terms, a judgment debtor’s persistent default, and its complete refusal to comply with the earlier judgments of the court. For those reasons, it is a position which I am simply unable to adopt.”

## COSTS AND INTEREST

The *Suanu* case also held that parties seeking to enforce by way of summary judgment a payment claim are entitled to “actual and reasonable costs” in accordance with the Act. In that case, the Judge had awarded costs on a 2b basis but that was overturned in the High Court by District Court way of a cross appeal. Furthermore, although the contract provided for a penalty rate of interest that would continue only until the date of judgment and thereafter the statutory rate of interest would apply. However, actual and reasonable only applies to enforcement. It does not apply to those cases where the successful party is resisting a challenge to the claim.<sup>175</sup> The Court of Appeal has indicated<sup>176</sup> that although s23(2)(a)(ii) does not apply to that Court “the spirit of the provision may find expression through the breadth of the Court’s discretion as to costs”.

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<sup>171</sup> See the comments of Faire AJ in *Laywood and Rees* granting leave to the Court of Appeal on the issue of the status of a “final” judgment referred to above; at [13]: “That certainly has considerable attraction because it will ensure that the Court of Appeal is apprised of all aspects relating to the orders which District Courts make pursuant to s 74(4) of the Construction Contracts Act 2002, including the use of such judgments in both personal and corporate insolvency cases.”

<sup>172</sup> (No 1) is reported at [2006] EWHC 54 (TCC); (No 2) is reported at [2006] EWHC 535 (TCC); and (No 3) is reported at [2006] EWHC 1708 (TCC); [2006] BLR 359.

<sup>173</sup> [2006] EWHC 535

<sup>174</sup> [2006] EWHC 1708 (TCC); [2006] BLR 359.

<sup>175</sup> See *Westnorth* (supra) at paragraph [32]

<sup>176</sup> *Salem Ltd v Top End Homes Ltd* (unreported), CA 169/05, 4 April 2006

## THE OBTAINING OF JUDGMENT UNDER SECTION 73

Section 73 requires that a determination be entered as a judgment by application to the District Court. That section should be plain enough, but *Page and Macrae Ltd v Real Cool Ltd*<sup>177</sup> is an example where the claimant's lawyers wrongly assumed that they had to file in the High Court if the determination exceeded \$200,000. Asher J in *Laywood and Rees v Holmes Construction Wellington Ltd*<sup>178</sup> had earlier held that the District Court had exclusive jurisdiction to enter judgment irrespective of whether it exceeded \$200,000. In that case, the District Court Judge dealt with the application to enter judgment on the papers in chambers without a hearing notwithstanding the defendant had filed a notice of opposition. Asher J held that there was no requirement in the CCA to hold a hearing on the claimant's application to enter a determination as a judgment. He has granted leave to appeal to the Court of Appeal on both points.<sup>179</sup> That appeal will also deal with whether a judgment based on a determination is a "final judgment" for the purposes of the Insolvency Act 2006.

## NEW NOMINATING AUTHORITIES

Since the introduction of the CCA, AMINZ has been since June this year the only nominating authority with the pluses and minuses that a monopoly creates. One of the problems is the wide divergence of the fees charged by different adjudicators. Nor did there appear to have been much coherence in the way adjudicators were allocated to cases. Nor does there appear to have been any coherent allocation of adjudications to parties on a "which shoe might fit" basis when the parties cannot agree on an adjudicator. We know that there is a wide range of fees charged by adjudicators; but parties appear to be "stuck" with the adjudicator appointed who is able to dictate their own fees.

Earlier this year Building Disputes Tribunal (NZ) Limited<sup>180</sup> was certified as a nominating authority. This authority proposes to offer as one of its services a maximum adjudicator's fee for adjudication claims involving smaller amounts (currently said to be \$40,000.00).

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<sup>177</sup> (unreported) HC Tauranga, CIV-2007-404-5774, Heath J

<sup>178</sup> [2008] 2 NZLR 493

<sup>179</sup> The hearing date is set down for 2 October 2008

<sup>180</sup> In June 2008, the Adjudicators Association of New Zealand was also appointed a nominating authority.

# Construction Contracts Act Update

## SOME PRACTICAL POINTERS

by Derek Firth

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## **INTRODUCTION**

My comments are intended to supplement the erudite paper presented by Eugene St John.

In Footnote No 2 on page 3 of his paper, you will see a reference to earlier papers by Michael Gold (March 2007) and Tomas Kennedy-Grant QC (April 2008).

Those papers, together with this dissertation by Eugene St John, provide virtually a complete compendium on all of the decided cases of any note.

If you combine with that material the legislation, the previous ADLS Seminar in May 2006 presented by Stephen Price and Brendan Cash and the two texts on the Act (A Guide to the Construction Contracts Act by Geoff Bayley and Tomas Kennedy-Grant QC, Rawlinsons; and Progress Payments and Adjudication by Hon Robert Smellie CNZM QC, LexisNexis) then you have virtually all the material there is!

I propose to address the topic from a completely different angle which is from the perspective of an adjudicator in the hope of providing some practical advice for bringing or defending claims under the Construction Contracts Act 2002.

## **GETTING THE PROCESS UNDERWAY**

### **Scope of the Act**

It is important to remember that the dispute or payment claim must arise under a construction contract entered into after 1 April 2003 (now a matter of diminishing practical importance).

It must relate to construction work as defined in s6.

### **The importance of understanding the two broad types of Claim which can be made**

There are really two completely separate opportunities under the Act to address two completely different types of claims.

The first is the equivalent of a default judgement procedure based on the claimant having issued a valid Payment Claim (s20) to which there has not been a timely and compliant Payment Schedule (s21). If a Payment Claim is made which meets the requirements of s20 and it is not responded to either in time or with a compliant Payment Schedule then the claimant is entitled to be paid irrespective of the merits of the Payment Claim and it is then up to the respondent to make payment and challenge the merits through arbitration (or the Courts if there is no arbitration clause).

A claimant in this fortunate situation appears to have the option of applying directly to the Court for summary judgement or bringing an adjudication under the Act. An application direct to the Court is a safe alternative only if the claimant is in such a strong position that it almost certainly cannot lose. If there is any doubt about the claimant's entitlement, then it will be wiser to make the claim in an adjudication and, in the alternative, seek the same or similar relief "on the merits".

The statutory provisions in this regard (ss19 to 24 inclusive) are discrete. That is how you should think about them.

The second and quite independent and different opportunity is to refer a “dispute” to adjudication under s25. The meaning of dispute is driven by a dictionary definition and is therefore very wide.

The procedure and other provisions covered in s28 onwards apply to both categories of claim.

Most claims are for the payment of money (by a builder) or for the recovery of remedial costs (by an owner), but the Act is wide enough to cover virtually anything.

### **The importance of the Notice of Adjudication**

While any claim brought must be within the terms of the Act, it is even more important to remember that the jurisdiction of an adjudicator is constrained by the scope of the claim described in the Notice of Adjudication which is the very first step taken by a claimant to kick off the statutory procedure.

### **The desirability of preparing the Adjudication Claim first, even before issuing a Notice of Adjudication**

A wise claimant will therefore virtually prepare in full its Adjudication Claim (ie the material which is delivered after an adjudicator is appointed) before finalising the Notice of Adjudication because that is the only way to ensure something will not be overlooked. For example, if the Notice of Adjudication is simply a claim for money then no other claim can be introduced a week or two later when the Adjudication Claim is presented after the adjudicator has been appointed. For example, it is too late to add other money claims and it is too late to claim anything else, for example an extension of time claim or a claim for a Charging Order. It is even arguable that it is too late to claim costs and interest if they are not claimed in the Notice of Adjudication.

There is another good reason to do this, in addition to the need to get the Notice of Adjudication right.

That is, that when the adjudicator is appointed, the Adjudication Claim must be delivered within 5 working days and that is a statutory period which cannot be extended (except by consent which is usually not forthcoming!) (See s36.)

### **Charging Orders**

An adjudicator cannot issue a Charging Order. An adjudicator can only give approval for the issue of a Charging Order (s49). The Charging Order itself must be issued by the District Court (s76).

You will need to look carefully at the provisions dealing with the liability of an owner who is not the respondent but who is an “associate” of the owner (as defined obtusely in s7).

## **THE CONTENTS OF THE CLAIMS AND RESPONSES**

### **A legal right to one shot and no legal right to a hearing**

The claim must be delivered within 5 working days of the adjudicator being appointed. The response must be delivered within a further 5 working days, but there is a statutory discretion to extend that time.

That might be it.

Certainly, s42(1) permits an adjudicator to require (inter alia) further written submission and to call a conference of the parties. But those things might not happen.

Accordingly, when presenting a claim or a response, you must assume you may never be allowed to say another word.

Each document must say everything you want to say about the claim or your defence and everything else, including such matters as interest and costs.

Certainly, adjudicators are obliged to observe the rules of natural justice (an express statutory provision in New Zealand and imported by the common law in the UK), but it is quite clear that what might otherwise be natural justice has to be tempered in order that statutory time limits are observed.

You would be wise to completely put out of your minds normal court procedures; or what you might get away with in court by doing replies to replies to replies ...

Of course, replies will be permitted if natural justice requires it, but very tight time limits will be imposed (usually of only two to four days).

### **Challenges to jurisdiction**

If there is to be a challenge to jurisdiction that should be raised immediately and the adjudicator may address it as a preliminary issue (still leaving time to meet the statutory deadlines if jurisdiction is sustained) or, if the factual and legal issues relevant to jurisdiction are significantly interwoven with the facts and legal issues relating to the merits, then an adjudicator is likely to reserve the question of jurisdiction and decide it at the same time as issuing the main Determination.

### **Contents of claims and responses generally**

For the above reasons the claims and responses should be presented like dossiers (as in all of the Civil Law jurisdictions) comprising a narrative of what the party is on about (which may or may not be in the form of a pleading), statements of evidence, documents relied upon, legal submissions, and anything else to be referred.

### **Defences, counterclaims and set-offs**

A true counterclaim cannot be brought. The correct procedure is for the respondent to issue its own Notice of Adjudication so that the counterclaim is dealt with in parallel.

A set-off can be considered because of the very brief provisions of s25(2) which, I believe, are most important. It provides:

- (2) An example of a dispute is a disagreement between the parties to a construction contract about whether or not an amount is payable under the contract (for example, a progress payment) *or the reasons given for non-payment of that amount.* (Emphasis added).

## **CONFERENCE**

The conference, if one is held, is not a hearing. It is not an opportunity to produce further evidence (as of right) and it is not an opportunity to cross-question each side.

I understand that the practice of adjudicators differs considerably and that some permit cross-examination.

My practice is to make it clear at the outset (when accepting appointment) that whether or not there is a conference will be decided in consultation with the parties after the response is delivered and that if there is a conference I will come to it having read all of the material and the purpose of the conference will be to enable me to ask questions of those present for the purpose of enabling me to better understand the written material already produced. That is what happens, and it works very well.

## **OTHER DISCRETIONARY PROCEDURES PERMITTED BY SECTION 42**

The list is long, but many powers are rarely used (other than setting deadlines for further submissions and convening a conference).

## **THE DETERMINATION**

It seems to be fairly clear from the Act that only one Determination can be issued. Not an Interim Determination nor a Partial Determination or anything else.

I think, to be conservative, one must assume that (ironically) the adjudicator gets only one shot at it!

For this reason, if it looks as if it is going to be desirable to call for subsequent submissions on interest and costs, an adjudicator probably has to get the consent of all parties to do so before the Determination is issued. Otherwise he or she must do the best that can be done on the material available.

## **QUICK AND DIRTY OR, HOPEFULLY, FINAL?**

Some commentators take the view that adjudication is not intended to be anything more than a quick and dirty approach to preserve cash flow, where that is justified, and for the real merits to be sorted out subsequently in the formal dispute procedures under the contract. There may be occasions when that approach is justified, but I take the view that if an adjudicator focuses conscientiously on all of the issues and does his or her best to anticipate what an arbitrator might do then the Determination is more likely to be treated by the parties as final. Also, there is the very important point that the amounts involved in some disputes may not justify a subsequent formal round and that is another good reason why I believe an adjudicator should try and get it right.

## **RECALCITRANT RESPONDENTS**

While most respondents cooperate fully and appreciate that they may have to live with the Determination (either because the amount is small or the adjudicator probably got it right) there are a minority who will try “every trick in the book” to put off the dreadful day.

Fortunately, the Act shuts the door on most avenues which might otherwise be available and firmness on the part of the adjudicator will close the rest.

Obviously, there can be occasions when the most obstinate respondent also appears to be in the right, but respondents in that position seldom do themselves good service by acting like a defendant on a criminal charge (some of whom are also sometimes in the right!)