

## **Judicial Review of Adjudications Under the Construction Contracts Act**

*by Mark Colthart*

### **District Court v High Court**

- There are two types of review available:
  - Review by the District Court of a determination affecting an owner who was not a respondent (ss 52-55);
  - Judicial Review by the High Court under the Judicature Amendment Act.
- As far as I am aware there are no cases concerning the District Court's review powers under ss 52-55.
- This presentation therefore concerns Judicial Review in High Court.

### **Availability of Review – A Balancing Act**

- There are many indications in the Act that the Adjudication process was not intended by Parliament to be perfect, and that Adjudicators should not be held to the same exacting standards of procedure and rigorous evaluation of the law and facts expected of Judges and members of other permanent tribunals.
- The purpose of the Act includes to facilitate cashflow, and "to provide for the speedy resolution of disputes".
- Adjudication determinations are not intended to be final in the sense that they are not intended to determine ultimate liability.
- There are very tight timeframes involved. An Adjudicator cannot be expected to come to grips with the whole range of potential arguments, whether legal or factual, within the tight timeframes provided for in the Act.<sup>1</sup>
- Adjudicators' powers are wide ranging and extensive. The powers are set out in s 42. An Adjudicator may:

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<sup>1</sup> *Willis Trust Co Ltd v Green* (High Court, Auckland, CIV 2006-404-809, 25 May 2006 at paragraph [20])

- conduct the adjudication in any manner that he or she thinks fit; and
  - request further written submissions from the parties to the adjudication, but must give the relevant parties an opportunity to comment on those submissions; and
  - request the parties to the adjudication to provide copies of any documents that he or she may reasonably require; and
  - set deadlines for further submissions and comments by the parties; and
  - appoint an expert adviser to report on specific issues (as long as the parties are notified before the appointment is made); and
  - call a conference of the parties; and
  - carry out an inspection of any construction work or any other thing to which the dispute relates (as long as the consent of the owner or occupier is obtained before entry to any land or premises is made and, if the owner or occupier is a party to the adjudication, that party's consent must not be unreasonably withheld); and
  - request the parties to do any other thing during the course of an adjudication that he or she considers may reasonably be required to enable the effective and complete determination of the questions that have arisen in the adjudication; and
  - issue any other reasonable directions that relate to the conduct of the adjudication.
- Under s 43 an Adjudicator's powers are not affected by the failure of the respondent to serve a response to the claim, or by the failure of any party to provide information or submissions requested by the Adjudicator.
  - In such circumstances the Adjudicator is entitled to draw any inferences from such failure as he or she sees fit, determine the dispute based on the information available to him or her, and give any weight he or she thinks fit to any late information.

- But, counterbalanced against those factors, there are certain minimum standards set out in the Act. The duties of an Adjudicator are set out in s 41. An Adjudicator must:
  - act independently, impartially, and in a timely manner;
  - avoid incurring unnecessary expense;
  - comply with the principles of natural justice;
  - disclose any conflict of interest (and resign unless parties agree otherwise).
- The Act also prescribes:
  - matters the Adjudicator must consider (the Act, construction contract, claim and response, expert reports, and site inspections (although the matters include “any other matters the Adjudicator reasonably considers to be relevant”));
  - the form and substance of the determination, including an obligation to provide reasons.
- UK and Australian cases have held that not every error of fact, law or procedure will constitute a reviewable error. In order for an error to be a ground for judicial review it must go to the Adjudicator’s jurisdiction; that is, because of the error, the Adjudicator acted without or in excess of his or her jurisdiction.<sup>2</sup>
- It has been held that non-jurisdictional errors in interpreting and applying the law and the contract, in assessing evidence and finding facts or in conducting the adjudication are not grounds for judicial review.
- Issue of whether a particular error goes to jurisdiction depends on:
  - Whether the error is contrary to or consistent with the provisions of the Act, in particular its purpose and scheme;
  - Whether the error is inherently unfair to one party;

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<sup>2</sup> See John Ren’s article “Judicial review of construction contract adjudicators” [2005] NZLJ 461.

- Whether the Act itself has a mechanism for rectifying the error.

### **Grounds for Review – What will constitute grounds?**

- Three NZ cases, two of which were successful.
- *Horizon Investments v Parker Construction Management* (High Court, Wellington, CIV 2007-485-332, 4 April 2007, per Simon France J).
  - Involved a contract for the construction of 5 apartments and 2 townhouses overlooking Oriental Bay, Wellington. The dispute was over \$1.1 million claimed but not paid. The Adjudicator found in favour of Parker Construction, and Horizon applied for review.
  - The Adjudicator found in favour of Parker on basis that a complying payment schedule had not been served by Horizon. Therefore Horizon had to pay claim in full. In light of that conclusion the Adjudicator did not determine any of the disputes advanced by Horizon or other issues such as time extensions claimed by Parker and Liquidated Damages claimed by Horizon.
  - The problem was that neither party had raised the issue as to provision of complying payment schedules. Both had accepted that they were valid schedules. The Adjudicator had decided the issue of her own motion.
  - The issue facing the High Court was whether or not the Adjudicator could decide the matter on the basis of an issue not advanced by either party, and if so whether adequate notice of her intention to do so was given and an opportunity to make submissions provided.
  - The High Court held that the determination must be set aside as:
    - The validity of the payment schedules was not put in issue by either party.
    - As a bare minimum principles of natural justice required the Adjudicator to give adequate notice and an opportunity to provide evidence and make submissions if she intended to decide the adjudication on the basis of an issue not submitted by either party.

- Adequate notice was not given. The Court referred to a memorandum issued by the Adjudicator to the parties asking whether both agreed that the relevant certificates were payment schedules in form and substance. Both responded that they were (at least in relation to form). The Judge held that if the memorandum was intended to put in issue whether schedules complied with the Act “it palpably failed”.
  - In any event it was not open to the Adjudicator to consider the validity of the schedules – that was not an issue the parties asked the Adjudicator to determine. The Adjudicator’s jurisdiction was defined in terms of the dispute which had been referred by the parties.
  - Overall the Judge noted that a matter the parties did not want decided had been. At same time matters which were submitted were left unresolved.
- *Taylor v La Hatte* (High Court, Auckland CIV 2007-404-6843, 24 June 2008 per Stevens J).
    - Involved a contract between Northspan and Mr & Mrs Taylor for construction of a farm shed.
    - A dispute arose regarding various alleged defects in the building work raised by the Taylers.
    - The Adjudicator awarded Northspan \$34,000 plus GST and interest, being 3 out of 4 invoices issued to the Taylers.
    - Stevens J found a number of reviewable errors (see paras [47] – [50] of the Judgment):
      - The Adjudicator conducted a site visit after informing the parties that he merely wanted to look at the building and would ask no questions. He did in fact ask questions, and then relied on responses in determination;
      - The Adjudicator acknowledged that he was not an expert on construction or quality issues, but proceeded to determine the dispute

based on his own evaluation of engineering issues, without reference to an expert. The Judge held that instead of instructing an expert (as he was entitled to do under s 45(e)) the Adjudicator “followed his own instincts” and allowed an adjustment of \$8000 for remedial costs (described as an “unexplained” figure). Actual remedial costs were later shown to be \$44,000.

- *Willis Trust Co Ltd v Green* (High Court, Auckland, CIV 2006-404-809, 25 May 2006 per Harrison J,).
  - Harrison J rejected valiant arguments advanced on behalf of the principals that the determination contained errors of law:
    - First argument was that there was no dispute. The Judge accepted that would amount to a reviewable error. But not accepted on the facts.
    - Second argument was that the Adjudicator was wrong to determine that the Engineer’s letter and progress payment certificate was not a payment schedule under the Act. Again rejected on the facts. Doubtful whether that would amount to a reviewable error.
    - Third argument was that the Adjudicator erred in finding that time had expired for provision of a payment schedule. Again rejected on the facts. Doubtful whether that would amount to a reviewable error.
    - Fourth argument was that the Adjudicator erred in treating the directors’ guarantee as a “construction contract”. Held on the facts that the document was a construction contract, not merely a guarantee. No doubt that, if established, that would have been a reviewable error.

### **Other Grounds<sup>3</sup>**

- Notice of Adjudication not valid or not validly served: This would amount to a reviewable error. The notice is the first formal notice of dispute. It initiates the

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<sup>3</sup> Ibid.

dispute and provides the basis for the Adjudicator's jurisdiction. Without it the adjudication would be a surprise attack on the respondent.

- Selection of Adjudicator out of time: Although not prejudicial in every case, this should be a reviewable ground. Allowing a delay at this point is contrary to the purpose of the Act to determine disputes in a speedy manner. It also leaves the respondent in state of uncertainty as to the claimant's intention. Does the claimant intend to abandon or proceed with claim?
- Failure to serve the adjudication claim in time: There are arguments either way as to whether a decision to proceed with an adjudication in the face of late service of an adjudication claim amounts to a reviewable error.
  - Arguments against this being a reviewable error include that if the process has to be stopped as a result of failure to serve a claim that would enable claimant to unilaterally terminate the adjudication process (which is not permitted by the Act), and that prejudice will be to the claimant not the respondent.
  - Arguments for this being a reviewable error include that prompt service of a claim is fundamental to the speedy resolution of a dispute. But, at that point the Adjudicator is seized of jurisdiction, and can proceed to determine the dispute promptly and take measures to minimise the effect of any delay.
  - There is at least one UK case (*William Verry Ltd v North West London Communal Mikvah* [2004] EWHC 1300 which has held that a decision to proceed despite late service of a claim was not a reviewable error. However, in that case the claim was served on the date set by the Adjudicator but in fact one day after the date allowed by the UK legislation.
  - The better approach would be to require the claimant to re-initiate the process and re-serve its claim on time. That avoids the prospect of a challenge to the determination on this ground much later down the track.
- Failure to consider an adjudication response served in time: This situation has arisen where Adjudicators have incorrectly determined that a response was not served in time. Gives rise to a clear breach of natural justice, depriving adjudicator of jurisdiction.

- The more problematic (and I suspect common) situation is where an Adjudicator is asked to consider a response not served in time. To do so may give rise to a reviewable error in light of s 46(1) which provides that an adjudicator *must not* have regard to a late adjudication response. This problem can be avoided by extending time for receipt of the response.
- Failure to ensure that all evidence, submissions and other material is provided to all parties: Yes, this will amount to a reviewable error.
- Ex Parte communications: Yes, this will amount to a reviewable error, particularly where substantive as well as administrative matters are discussed.
- Consideration of irrelevant materials or failure to consider relevant materials: This will always be an issue of fact and degree. UK cases indicate that if an Adjudicator declines to consider evidence which on his or her analysis of the facts and law is irrelevant it would not be a jurisdictional error. An Adjudicator's obligation is to make a good faith attempt to consider the material to decide (rightly or wrongly) whether it is relevant or irrelevant. If they do that, no there is reviewable error. If they don't consider the material at all, then there is a reviewable error.
- Determination out of time: weight of authority is against this being a reviewable error. UK and Australian cases have held that a determination made out of time was still valid. The purpose of the Act is not served by forcing a claimant to start again.

### **Interim Relief**

- Availability of interim relief:
  - Section 60 provides that an Adjudicator's determination is binding and continues to be of full effect even though a party has applied for Judicial Review.
  - But in *Concrete Structures NZ v Palmer* (High Court, Auckland CIV 2004-404-825, 17 February 2005, per Courtney J) and *Willis Trust Co v Green* (High Court, Auckland, CIV 2006-404-809, 1 March 2006, per Harrison J) the High Court has held that interim relief is available.

- Courtney J held that it was unlikely that Parliament would have intended to preclude interim relief where permanent prejudice to one party would render an application for judicial review worthless.
- Interim relief also granted in the recent case of *Taylor v La Hatte* (Stevens J)
- Interim relief will be available where it can be demonstrated that the respondent is insolvent so that interim relief is necessary to preserve the applicant's position.
- Relief was refused in *Concrete Structures* but granted in *Willis Trust Co* subject to conditions including payment of relevant sum to a stakeholder.

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