

A REVIEW OF THE CASES ON THE CONSTRUCTION CONTRACTS ACT 2002

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by

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Introduction

- 1 It is impossible to tell how many times the provisions of the Construction Contracts Act 2002 (“CCA”) have been invoked since the Act came into force on 1 April 2003¹. It is also impossible to tell what proportion of the cases in which the Act has been invoked have resulted in judicial decisions. A search of the Ministry of Justice’s website² at <http://jdo.justice.govt.nz/jdo/Search.jsp> provides links to 86 superior court decisions on the Act including one Supreme Court decision and four Court of Appeal decisions. There have, in addition, been a number of District Court decisions; but these are not easily accessible.

- 2 I examine these decisions under the following heads:
 - a. Definitions – paragraphs 3-8;
 - b. The right to progress payments and the procedure for claiming and making them – paragraphs 9-41;
 - c. The consequences of a payer’s failure to comply with the provisions regarding payment schedules and the making of progress payments – paragraphs 42-43;

¹ The texts of the Act and of the Construction Contracts Regulations 2003 can be accessed on the New Zealand Government legislation website at www.legislation.govt.nz

² Carried out on 4 January 2010

- d. Adjudication – paragraphs 44-69;
- e. Recovery of unpaid claims and enforcement of adjudicator’s determinations – paragraphs 70-91;
- f. Service – paragraphs 92-99;
- g. The prohibition of contracting out – paragraphs 100-101;
- h. The High Court’s powers of judicial review – paragraphs 102-105.

Definitions

(a) “Construction contract”

3 In *O’Connor Holdings Ltd v Ace Builders Construction Ltd* [2005] DCR 193 the Court held that, while a contract for the direct hire of labour is not within the Act³, a contract for the supply of workers is.

(b) “Construction work”

4 The definition of “*construction work*” is found in s 6 of the Act. To the best of my knowledge there is only one New Zealand case in which that definition, or any part of it, has been considered.

5 The definition includes the following:

- (1) *In this Act, unless the context otherwise requires it, construction work means any of the following work:*
 - (a) *The construction ... of any building, erection, edifice, or structure forming, or to form, part of land ...*
 - (b) *The construction ... of any works forming, or to form, part of land; ...*
 - (c) *The installation in any building or structure of fittings forming, or to form, part of land; ...*
 - (d) *...*

³ See s 11(a) of the Act

- (e) *the external or internal cleaning of buildings and structures ...*
- (f) *...*
- (f) *the painting or decorating of the internal or external surface of any building or structure.*

6 In *Gulf Harbour Investments Ltd v Y Gulf Harbour Ltd* (High Court, Auckland, CIV 2006 - 404-386, 16/3/06 Christiansen A.J.), the Court held that a yacht is not a “*structure*” within the meaning of that term in the definition of “*construction work*” in s 6(1)(g) of the Act. The argument that was advanced was that the absence from s 6(1)(e) and 6(1)(g) of the words “*forming, or to form, part of land*” meant that, under those paragraphs of the subsection, construction work could include work in relation to chattels, including boats and aircraft. The Judge rejected this argument on the ground that it was clear from the definitions of “*construction contract*”, “*commercial construction contract*” and “*residential construction contract*” in s 5 of the Act that “*construction work*” is in every case on buildings or structures forming part of the land.

(c) “Dispute”

7 The term “*dispute*” is important because of its use in Part 3 of the Act, which provides for the adjudication of disputes. I consider it in paragraphs 46-52 below.

(d) “Residential occupier”

8 The term “*residential occupier*” is defined in s 5 of the Act to mean:

an individual who is occupying, or intends to occupy, the premises that are the subject of a construction contract wholly or mainly as a dwellinghouse.

I consider it in paragraph 78 below.

The right to progress payments and the procedure for claiming and making them

(a) Introduction

9 Part 2, subpart 3 (sections 19-24) of the Act provides for the making of, and responding to, payment claims (sections 20-21) and prescribes the consequences of failure by the payer to make payment (sections 22-24). Section 19 contains some necessary definitions.

10 Among the definitions in s 19 is the definition of “payee” as:

“the party to a construction contract who is entitled to a progress payment”⁴

In *Suanui v Hi-Qual Builders Ltd* (High Court, Auckland, CIV 2008-404-1576, 26/6/08, Wylie J) the Court held that the fact that a code compliance certificate, the existence of which was a condition of a claim for payment, was rescinded after the claim had been made but before the time for serving a payment schedule had expired (no payment schedule was served) was irrelevant: the claim was valid when made.⁵

(b) The courts’ general approach

11 The general approach of the courts to cases arising under Part 2 subpart 3 of the Act may be summed up by the following quotations:

- a. from *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA), (2005) 18 PRNZ 84, CA 244/04, 12/4/05

[41] We are satisfied that the necessary analysis must be undertaken with the purpose of the Act in mind. The purpose provision of the Act includes the fact that the Act was “to facilitate regular and timely payments between the parties to a construction contract”. The importance of such regular and timely payments is well recognised. Lord Denning (quoted in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1973] 3 All ER 195, 214 (HL) Lord Diplock) said:

“There must be a “cashflow” in the building trade. It is the very life blood of the

⁴ The term “progress payment” is defined in s 5 of the Act and includes “final payment under the contract”.

⁵ See, to similar effect in relation to the effect of a later payment certificate and schedule on an earlier one the basis of a claim, *Nash Properties Ltd v Harris Holdings Construction Ltd* (High Court, Auckland, CIV 2009-404-1013, 11/6/09, Faire AJ).

enterprise”.

- b. from *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807, High Court, Auckland, CIV 2008-404-2136, 25/5/06, Asher J.

[16] *The Act sets up a procedure whereby requests for payment are to be provided by contractors in a certain form. They must be responded to by the principal within a certain timeframe and in a certain form, failing which the amount claimed by the contractor will become due for payment and can be enforced in the Courts as a debt. At that point, if the principal has failed to provide the response within the necessary time frame, the payment claimed must be made. The substantive issues relating to the payment can still be argued at a later point and adjustments made later if it is shown that there was a set-off or other basis for reducing the contractor’s claim. When there is a failure to pay the Act gives the contractor the right to give notice of intention to suspend work, and then if no payment is made, to suspend work. There is also a procedure set up for the adjudication of disputes.*

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

(c) Requirements for payment claims

(i) Frequency

- 12 Section 20(1) provides that:

A payee may serve a payment claim on the payer for each progress payment,—

- (a) *if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or*
- (b) *if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).*

- 13 In *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 11(b) above) the Court held that, notwithstanding the inclusion in the contract of a clause

stating that payment claims “*shall be submitted in respect of work carried out during periods of not less than one Month* ” and the definition in the contract of “*Month*” as “*calendar month*”, a claim for a shorter period was not invalid. The Judge took the same approach, obiter, to the equivalent provision in the default payment regime (s 17(2)).

(ii) Service

14 Section 20(1) requires a payment claim to be served “*on the payer*”. In *Winslow Properties Ltd v Wooding Construction Ltd* (High Court, Auckland, CIV 2006-404-4969, 14/12/06, Cooper J)⁶ the Court held that, where the contract provides for service on the engineer for the principal, such service is valid. The argument that such a contractual provision amounted to contracting out of the Act was rejected (see further paragraph 101(d) below).

15 For the effect of s 80 see paragraphs 92-99 below.

(iii) Content: introduction

16 Section 20(2)-(4) provide:

- (2) *A payment claim must—*
 - (a) *be in writing; and*
 - (b) *contain sufficient details to identify the construction contract to which the progress payment relates; and*
 - (c) *identify the construction work and the relevant period to which the progress payment relates; and*
 - (d) *indicate a claimed amount and the due date for payment; and*
 - (e) *indicate the manner in which the payee calculated the claimed amount; and*
 - (f) *state that it is made under this Act.*
- (3) *If a payment claim is served on a residential occupier, it must be accompanied*

⁶ This decision is reported at [2007] DCR 408. It was followed in *Hawkins Construction Ltd v Ecosse Afrique Enterprises Ltd* (High Court, Wellington, CIV 2008-485-2327, 25/2/09, Gendall AJ)

- by—
- (a) an outline of the process for responding to that claim; and
 - (b) an explanation of the consequences of—
 - (i) not responding to a payment claim; and
 - (ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).
- (4) The matters referred to in subsection (3)(a) and (b) must—
- (a) be in writing; and
 - (b) be in the prescribed form (if any).

Form 1 in Schedule 1 to the Construction Contracts Regulations 2003 prescribes the information that must accompany a payment claim served on a residential occupier.

(iv) Content: permissible claims

17 In *George Developments Ltd v Canam Construction Ltd* [2006] (see paragraph 11(a) above) the Court of Appeal made the following fundamental statement regarding the scope of the Act at paragraphs [55]-[56] of the Judgment:

[55] ... Although the definition of construction work in s 6 of the Act refers to physical work, the force and thrust of the Act cannot be limited to claims for physical work actually done as opposed to costs which inevitably arise from carrying out the work. This might include: insurance costs, interest, costs of preparing a programme or an extension of time entitlement. As long as the construction contract provides for the payee to be paid the claimed amount in consideration for its performance of construction work (whether or not the entitlement is contingent on a factor such as an extension of time being granted), the payee is entitled to make a claim for payment in a payment claim. If the payer's stance is vindicated, the particular amount will not have to be paid, but that will not prejudice the entitlement of the payee to be paid the other amounts claimed in the payment claim or invalidate the payment claim as a whole. It is not necessary that every amount claimed in the payment claim can be directly linked to a physical task involved in the construction of the building or structure. The Act was specifically intended to be interpreted so as to achieve its object of speeding up payments.

[56] This approach was echoed by *Quasar*, where the Court distinguished between an amount claimed under a provision in the construction contract and a claim for damages for breach which is not referable to a provision in the contract. We too adopt the same reasoning. We reject the suggestion that the Act and its protective processes are to be interpreted in a restrictive and confining manner.

In that case the Court of Appeal upheld the lower Court's finding that a claim for extension of time costs could be included in a payment claim under the Act.

- 18 In *Redhill Development (NZ) Ltd v Green* (High Court, Auckland, CIV 2009-404-3784, 5/8/09, Lang J), a judicial review application, the Court said:

[33] I deal first with the submission that the phrase “under the contract” should be interpreted narrowly. I agree that the use of this phrase suggests that Parliament intended to restrict the range of disputes that adjudicators could determine under the Act. Disputes may arise out of, or in relation to, a construction contract in numerous ways. It would not be appropriate, however, for many of them to be determined by an adjudicator. Claims for misrepresentation and under the Fair Trading Act 1986 are good examples of this. Parliament clearly intended that those types of claims should remain solely within the jurisdiction of the courts notwithstanding the fact that they might arise out of, or be in relation to, a construction contract.

[34] I do not, however, accept that the words “under the contract” should necessarily be interpreted as narrowly as the plaintiffs suggest. They must be interpreted so as to give effect to the purposes and objects of the Act. If that requires them to be accorded a broad interpretation, then that is the approach that the Court must take.

The Court in that case was required to consider whether an adjudicator, having found that the parties to a construction contract had not agreed to an extension of time for the service of a payment schedule, had jurisdiction also to find that, in terms of s 23(2)(a), the amount of the claim was recoverable ‘*as a debt due to the payee*’. The applicant developer argued that that was a consequence of the statute and did not arise under the construction contract, so that the adjudicator had no jurisdiction to make the order in question. The Court took as its starting point the identification of the dispute that the adjudicator was required to determine. It held that the dispute was whether the amount of the claim was payable to the payee under the contract and that the adjudicator had jurisdiction to make the order challenged. Alternatively, the Court held that the challenged order was of “*a consequential or ancillary nature necessary to exercise or complete the exercise of the [admitted] jurisdiction*”, under s 38(1)(b) of the Act.

- 19 In *Jian Hua Property Ltd v Freemont Design & Construction Ltd* (High Court, Auckland, CIV 2005-404-5526, 16/2/06, Doogue AJ) the contractor contended that the principal’s payment schedule was defective because it did not deal with payment claims for “*down time and loss of profits*”. The contract had been terminated prematurely, by mutual consent, because of difficulties being experienced in obtaining the necessary planning consents. The Court held that the claims did not arise under the contract but were “*the respondent’s estimates of the*

loss it has suffered because it is no longer possible to carry out the work under the contract". The claims were therefore not properly the subject of a payment claim under the Act.

- 20 In *Invent Solutions Ltd v Chan Developments Trustee Ltd* (High Court, Wellington, CIV 2005-485-2834, 1/4/09, Gendall AJ) the Court held that claims made under an exit agreement providing for the termination of a construction contract were claims arising under the contract.

(v) Contents: "determined" claims

- 21 In *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 11(b) above) the progress claim included claims that had been considered and, it was contended, rejected by the adjudicator at an earlier adjudication. The Court held that the adjudicator had not in fact determined those claims, so that it was unnecessary for it to determine the effect on the payment claim if it had included determined claims. However, obiter, the Court drew a distinction between determinations that a party is liable to make a payment and determinations about the parties' rights and obligations under the construction contract and noted that it is only the former that are enforceable under s 58 of the Act.

(vi) Content: indication of claimed amount

- 22 In *George Developments Ltd v Canam Construction Ltd* (see paragraph 11(a) above) the Court of Appeal held that it was permissible to have regard to earlier claims in deciding whether a claim "*indicated*" the manner in which the claimed amount had been calculated.

(vii) Content: due date

- 23 In *Suanui v Hi-Qual Builders Ltd* (see paragraph 10 above) the Court held:
- (a) that, where the contractual term as to the due date for payment is unworkable, the default provision of s 22(b)(ii) applies; and
 - (b) that the fact that the payment claim stated that payment was due five days after receipt of the claim (which was not correct, given (a)) did not invalidate the claim.⁷
- 24 In *Jenkin v Hanna* (District Court, Blenheim, CIV 2008-006-101, 23/6/08, Zohrab DCJ) the Judge held that the deficiency was remedied by the fact that, by reference to the notice to residential occupier, “*the defendant would have been readily able to ascertain a due date*”. The Judge’s conclusion is, I suggest, questionable.⁸

(viii) Format

- 25 In *George Developments Ltd v Canam Construction Ltd* (see paragraph 11(a) above) the Court of Appeal also rejected the argument that the payment claim in that case was invalid because it was in the normal, cumulative, format. The Court took the view that:

... technical quibbles should not be allowed to vitiate a payment claim that substantively complies with the requirements of the Act

and went on to note that the contractor in that case had not complained about the comprehensibility of previous payment claims made in the same way. (This reliance on the course of conduct between the parties is reflected in a number of other cases, eg *Solidcrete Technology Ltd v First Pacific Investments Ltd* [2005])

⁷ This case was followed, in relation to the issue of the effect of misstatement of the due date, in *Invent Solutions Ltd v Chan Developments Ltd* (see paragraph 20 above)

⁸ I am indebted to Mr Martyn Wilson, of Wain & Naysmith of Blenheim, for advice of this case.

DCR 769 and *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 11(b) above)).

(ix) Identification as claim under the Act

26 Section 20(2)(f) of the Act provides that a payment claim:

must ... state that it is made under the Act.

27 The District Court, in *Civil Construction Group Limited v Dhuez Ltd* (District Court, Auckland, CIV 2006-4-102, 19/5/06, Joyce DCJ), and the High Court, in *Welsh v Gunac South Auckland Ltd* (High Court, Auckland, CIV 2006-404-7877, 11/2/08, Allan J) have held that failure to comply with this provision is fatal.

28 However:

a. In the latter case Allan J stated, obiter, that:

It may be that in a given case a Court might properly conclude that an omission to comply with s 20(2)(f) is not determinative. An example might be the case of a major construction project in which a single payment claim appearing in the middle of a series of similar documents happens to omit the necessary reference to the Act. In those circumstances, it could not properly be said that the principal had been misled, or is in doubt as to what is intended. A Court might well then hold that the document ought to be read along with all previous payment claims in the series. But I express no firm view as to that. It is a matter for another court at another time.

b. In *Winslow Properties Ltd v Wooding Construction Ltd* (see paragraph 14 above), Cooper J held that a claim that failed to state that it was a payment claim under the Act was nevertheless valid, because it was accompanied by a covering letter, the first paragraph of which referred to the claim as “*Progress Claim No 18 which is a payment claim under the Construction Contracts Act 2002*”.

c. In *Invent Solutions Ltd v Chan Developments Ltd* (see paragraph 20 above) the Court held that the misdescription of the Act as the Construction Contracts Act “2003” did not invalidate the claim.

(x) Content: information required to be given to residential occupier in terms of s 20(3) and (4)

29 Section 20(3) and (4) of the Act provide:

- (3) *If a payment claim is served on a residential occupier, it must be accompanied by—*
- (a) *an outline of the process for responding to that claim; and*
 - (b) *an explanation of the consequences of—*
 - (i) *not responding to a payment claim; and*
 - (ii) *not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).*
- (4) *The matters referred to in subsection (3)(a) and (b) must—*
- (a) *be in writing; and*
 - (b) *be in the prescribed form (if any).*

30 In *Bills v Arnold Jensen (2005) Ltd* (High Court, Christchurch, CIV 2008-409-1349, 10/10/08, Fogarty J) the contractor’s payment claims were initially served without the information required to be given to a residential occupier. The claims were subsequently reissued with the necessary information; and no issue was taken regarding this.

31 In *Foggo v RJ Merrifield Ltd* (High Court, Christchurch, CIV 2009-409-605, 21/9/09, French J) the prescribed form was used but contained errors capable of confusing the payer. The claims were held to be invalid.

(d) Requirements for payment schedules

(i) Content: introduction

32 Section 21 provides:

- (1) *A payer may respond to a payment claim by providing a payment schedule to the payee*
- (2) *A payment schedule must—*
 - (a) *be in writing; and*
 - (b) *identify the payment claim to which it relates; and*
 - (c) *indicate a scheduled amount.*
- (3) *If the scheduled amount is less than the claimed amount, the payment schedule must indicate—*
 - (a) *the manner in which the payer calculated the scheduled amount; and*
 - (b) *the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and*
 - (c) *in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.*

(ii) Content: nature of payment schedule

33 In *Jian Hua Property Ltd v Freemont Design & Construction Ltd* (see paragraph 19 above) the Court held that the provisional progress payment schedule issued by the engineer to the contract (in terms of a contractual scheme which required the payer to respond to the provisional progress schedule and the engineer then to issue a progress payment schedule) was not a payment schedule. The Court said:

The engineer's letter of 25 August 2005 does not clearly amount to a statement of the amount that the payer proposes to pay to the payee. That letter is a preliminary communication between the engineer and the payer. An objective reading of the document would not convey to the payee that this was the statement by the payer of the amount that it proposed to pay.

(iii) Content: meaning of the word “indicate”

34 The word “indicate” is used in both s 21(2)(c) and s 21(3). In *Solidcrete Technology Ltd v First Pacific Investments Ltd* (see paragraph 25 above) Judge

Roderick Joyce QC had this to say about the meaning of the word “*indicate*” in s 21(2)(c):

[61] *Did it indicate the payer’s reason or reasons for withholding payment on any basis? In other, related to the statute, words did it explain (in indicative terms) the difference?*

[62] *To “indicate” means “to point out, point to or make known – to show more or less distinctly”: see the **Shorter Oxford Dictionary on Historical Principal** [sic]. That dictionary offers as a variant “to express briefly, lightly or without development; to give an indication.*

[63] *So the statute’s choice of verb must be taken to demonstrate that something rather less than, for example, the full and explicit particulars requisite for many pleadings will suffice.*

...

[65] *After what appears immediately above had been written, my attention was drawn to **Multiplex Constructions Pty Ltd v Luikens** [2003] NSWSC 1140⁹.*

[66] *There, (under the equivalent New South Wales legislation) Palmer J had the following to say as to what a payment schedule should show:*

...

s 14(3) of the Act, in requiring a respondent to “indicate” its reasons for withholding payment, does not require the payment schedule give full particulars of those reasons. The use of the word “indicate” rather than “state”, “specify” or “set out”, conveys an impression that some want of precision and particularity is permissible as long as the essence of the “reason” for withholding the payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication

[67] *I take respectful comfort from the fact that this approach is one coinciding with that to which I had already been attracted.*

(iv) Content: whether requirements as to content satisfied

35 The following are some of the cases in which a payment schedule has been held to satisfy the requirements of the Act as to content:

- a. *Solidcrete Technology Ltd v First Pacific Investments Ltd* (see paragraph 34 above):

⁹ This decision has also been referred to with approval by the High Court, in the case of *Westnorth* (see paragraph 35(b) of this paper).

In this case the Court held that the plaintiff had sufficient information to enable it to decide whether to pursue the claim: the previous claims had been dealt with on the same basis of a valuation of completed work and the reason for the difference on this occasion (defective work) was already known to it.

- b. *Westnorth Labour Hire Ltd v SB Properties Ltd* (High Court, Auckland, CIV 2006-404-858, 19/12/06, Rodney Hansen J):

In this case the judge held that, although the respondent's letter did not adopt the terminology of the Act, was not stated to be a payment schedule and did 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's time sheets 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 [which were the last two in a series] until Westnorth provides him with full particulars of what the contracted labour has done.

- 36 The following are some of the cases in which the payer's response has been held not to satisfy the requirements of the Act as to the content of a payment schedule:

- a. *West City Construction Ltd v Edney* (2005) 17 PRNZ 947:

In this case the respondent did not specify a payment amount but, in the Judge's words, "*rather, at most, it specified a formula*".

- b. *10 Gilmer Ltd v Tracer Interiors and Construction Ltd* (High Court, Wellington. CIV 2005-485-2009, 6/12/05, Gendall A.J.):

In this case there were four payment claims. Two of the responses were held to be defective because, although they included a scheduled amount, they did not indicate the manner in which that amount was calculated nor the payer's reasons for the difference between the claimed amount and the scheduled amount nor the payer's reasons for withholding payment.

- c. *Mules Construction Ltd v Wedding Earthmovers Ltd* (High Court, Auckland, CIV 2006-404-4570, 20/12/06, Sargisson A.J.):

In this case (which is one of a number of cases in which the alleged payment schedule has taken the form of a letter rather than a formal document (other such cases are *Westnorth Labour Hire Ltd v SB Properties Ltd* referred to in paragraph 35(b) above and *Metalcraft Industries Ltd v Christie* (High Court, Whangarei, CIV 2006-488-645, 15/2/07, Harrison J)) the letter made it clear that the head contractor would “*dispute liability for the claims and that the invoices [would] be subject to counterclaims or counter charges for the cost of remedial works*” but did not specify “*the extent to which any charges may be set off against the claim*”.

d. *Metalcraft Industries Ltd v Christie* (see the last sub-paragraph):

This is another letter case. The payer asserted that remedial work was required at a cost which would exceed the payment claim. The Court held that:

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.¹⁰

e. *Greys Avenue Investments Ltd v Harbour Construction Ltd* (High Court, Auckland, CIV 2009-404-2026, 12/6/09, Wylie J).

The payer responded to two of the three claims by providing a document headed “*Claims Certificate Breakdown Summary*”. The Court held that this did not comply with the requirements of s 21(2)(b) and (c) or (3)(a) and (b).

f. *Foggo v RJ Merrifield Ltd* (see paragraph 31 above).

In this case the Court declined to apply the approach adopted in *George Developments Ltd v Canam Construction Ltd* (see paragraph 22 above) to oral discussions between the parties.

¹⁰ For a similar case see *Invent Solutions Ltd v Chan Developments Trustee Ltd* (see paragraph 20 above).

(v) Timing

37 In terms of s 22 of the Act:

Liability for paying claimed amount

A payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if—

- (a) *a payee serves a payment claim on a payer; and*
- (b) *the payer does not provide a payment schedule to the payee within—*
 - (i) *the time required by the relevant construction contract; or*
 - (ii) *if the contract does not provide for the matter, 20 working days after the payment claim is served.*

(emphasis added)

38 For a decision on when the default time frame established by s 22(b)(ii) applies see *Suaniu v Hi-Qual Builders Ltd* (see paragraph 10 above).

39 In each of *TGC Properties Ltd v Freemont Design and Construction Ltd* (High Court, Auckland, CIV 2005-404-7165, 10/4/06, Doogue AJ), *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 11(b) above) and *Winslow Properties Ltd v Wooding Construction Ltd* (see paragraph 14 above) there was a contractual payment regime which required the payment schedule to be served within a shorter period of time than the default statutory period of 20 working days. In all three cases the Court held that the shorter contractual period governed the position and ruled that the payment schedule in each case had been served late. This approach is consistent with s 22 of the Act¹¹.

40 *Westnorth Labour Hire Ltd v SB Properties Ltd* (see paragraph 35(b) above) was a case in which the Court held that the relevant construction contract did not stipulate a time by which the payment schedule was to be provided. In that case the Court held that the provision of the construction contract relied on by the

¹¹ In *Suaniu v Hi-Qual Builders Ltd* (see paragraph 10 of this paper) an argument that there was a shorter contractual period was rejected on the facts.

payee related only to the time of payment and did not relate to the time by which the payment schedule must be served.

- 41 In *Beeby Construction Ltd v Javah Corporation Ltd*, a District Court decision of which I am aware only as a result of criticism of it in one of Kensington Swan's newsletters, the Court held that a letter written by the contractor after failure to provide a payment schedule within the time prescribed by clause 12.2.4 of NZS 3910:2003 attracted the operation of clause 14.3.2 of NZS 3910 and extended the period within which the payment schedule had to be provided. I agree with Kensington Swan's criticism of the decision.

The consequences of a payer's failure to comply with the provisions of the Act regarding payment schedules and the making of progress payments

- 42 Sections 22-23 of the Act set out the consequences of failure to serve a proper payment schedule on the payee. Section 24 prescribes the consequences of failing to pay the scheduled amount indicated in a payment schedule.
- 43 I will return to this topic later in the paper under the heading of recovery and enforcement (see paragraphs 70-91 below).

Adjudication

(a) Introduction

- 44 Part 3 of the Act (ss 25-71) provides for the adjudication of disputes.

(b) Definition of “dispute”

45 The term “dispute” is defined, not very helpfully, in s5 of the Act to mean:

A dispute or difference that arises under a construction contract

46 An example of a dispute is given in s 25(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.

Again, this is not very helpful.

47 In *Willis Trust Co Ltd v Green* (High Court, Auckland, CIV 2006-404-809, 25/5/06, Harrison J) the Court held that “*whether or not a dispute exists is of an intensely factual nature*”. In that case the contractor had issued a final payment claim to the principal and the principal had failed to provide a payment schedule within the statutory period and to pay the whole or any part of the claimed amount before the due date. The contractor elected to follow the path of adjudication rather than applying directly to the Court for summary judgment. Counsel for the principal argued that there was no dispute because the engineer to the contract had issued a statement of reasons for his inability to issue or otherwise deal with a final payment schedule. It was clear from the evidence as a whole, however, that the principal had (or believed it had) a counterclaim and did not intend to pay the contractor’s claim. The Judge ruled that there was clearly a dispute.

48 In *Horizon Investments Ltd v Parker Construction Management (NZ) Ltd* (High Court, Wellington, CIV 2007-485-332, 4/4/07, Simon France J) the Court “*respect[ed] the capacity of the parties to identify what points of dispute they would like an answer on*”.

49 In *Spark It Up Ltd v Dimac Contractors Ltd* (High Court, Wellington, CIV 2008-485-1706, 12/6/09, Dobson J) the Judge followed the approach adopted in *Horizon*¹².

50 In *Redhill Development (NZ) Ltd v Green* (see paragraph 18 above) the Court held that the challenged order of the adjudicator was within his jurisdiction having regard to the nature of the dispute referred to him.

51 In *Plimmerton Courtyard Ltd v Huntingdon* (High Court, Wellington, CIV 2009-485-772, 14/7/09, Simon France J) Plimmerton, as contractor, had obtained a determination for the amount of unpaid progress claims 13, 14 and 15 against a Ms Franklin, as principal. She in turn had sought and obtained a determination in respect of unexecuted or defective work included in earlier progress claims which she had paid. Plimmerton effectively accepted the correctness of all of Ms Franklin's criticisms of its earlier work but refused to remedy them until the amount of progress claims 13-15 had been paid by Ms Franklin. It argued in the adjudication initiated by her, and in subsequent judicial review proceedings, that "*there was no dispute because it agreed with all her complaints*". The Court rejected the argument, saying:

"One cannot avoid the process by simply agreeing fault but refusing to fix it until other conditions are met. The adding of another condition – in this case payment of ... claims [13-15] – of itself creates a dispute. So does the refusal to work on site, and to fix the errors."

(c) The selection and appointment of the adjudicator

52 The procedure for the selection and appointment of an adjudicator is prescribed in ss 33 and 35 of the Act.

¹² See paragraph 57(c) for the facts of the case.

53 In terms of s 35(1) the appointee must have been requested to act (“*requested*” or “*selected*” in accordance with s 33). Subsection (1) of section 33 provides:

The claimant must, within the time required under subsection (2),—

- (a) *request the person (if any) chosen by agreement between the relevant parties to act as adjudicator; or*
- (b) *if the person referred to in paragraph (a) has already indicated that he or she is unwilling or unable to act, request any other person chosen by agreement between the relevant parties to act as adjudicator; or*
- (c) *if no person is agreed on, request a nominating body chosen by agreement between the relevant parties to select a person to act as adjudicator; or*
- (d) *if the persons referred to in paragraphs (a) and (b) are unwilling or unable to act, and paragraph (c) does not apply, request an authorised nominating authority chosen by the claimant to select a person to act as adjudicator.*

54 In *Stellar Projects Ltd v Nick Gjaja Plumbing Ltd* (High Court, Auckland, CIV 2005-404-6984, 10/4/06, Venning J) the contractor appealed against a decision of the District Court entering judgment against it under s 74 of the Act. The procedure for the appointment of an adjudicator prescribed by s 33 of the Act had not been followed. There was no agreement between the parties as to the adjudicator nor was there any agreement as to a nominating body. The respondent subcontractor had not sought an appointment by an authorised nominating authority but had appointed an adjudicator who proceeded, notwithstanding objection by the appellant contractor, to determine the matter. His determination was then entered as a judgment by the District Court, notwithstanding the appellant contractor’s reiteration of its objection to the appointment of the adjudicator. The High Court held that:

Given the defect in the appointment of the adjudicator and the fact that there was no adjudicator appointed for the purposes of the Act there was no basis for entry of judgment in the District Court.

The Judge held that the entry of judgment in the District Court had “*proceeded on the mistaken premise that the adjudicator had standing to make the award which led to the entry of judgment*”.

(d) The adjudicator’s duty to comply with the principles of natural justice

- 55 Section 41 of the Act states that an adjudicator must:
- (a) *act independently, impartially, and in a timely manner; and*
 - (b) *avoid incurring unnecessary expense; and*
 - (c) *comply with the principles of natural justice; and*
 - (d) *disclose any conflict of interest to the parties to an adjudication; and*
 - (e) *if paragraph (d) applies, resign from office unless those parties agree otherwise.*
- 56 The term “*natural justice*” normally includes both the duty to act independently and impartially and the duty of procedural fairness¹³. In the context of the Act, the requirement in s 41(c) that the adjudicator “*comply with the principles of natural justice*” is clearly directed to the procedural fairness limb of natural justice.
- 57 A breach or breaches of natural justice have been held to have occurred in the following cases:
- a. *Horizon Investments Ltd v Parker Construction Management (NZ) Ltd* (see paragraph 48 above).

In this case, the Court held that an adjudicator who had considered and determined the question of whether the payment schedules in the case complied with the statutory requirements as to content when neither party had questioned their validity and without giving the parties the opportunity to make submissions on the point had acted in breach of the rules of natural justice.
 - b. *Taylor v LaHatte* (High Court, Auckland, CIV 2007-404-6843, 24/6/08, Stevens J)

¹³ There is a detailed discussion of the two limbs of the concept of natural justice in my paper “*The New Zealand Experience of the UNCITRAL Model Law : a review of the position as at 31 December 2007*” which can be down-loaded from my website at www.kennedygrant.com. The paper has also been published, in a slightly different format, in (2008) 4 *Asian International Arbitration Journal* 1-63

In this case, in which the Court reviewed the law relating to judicial review in some detail¹⁴, the Court held that the adjudicator had been in breach of the rules of natural justice in assessing the cost of remedial work in reliance on his own judgment, notwithstanding his acknowledged lack of expertise and the view of both parties that expert evidence was required, and in conducting a site visit in a manner which differed from his prior indication of how he would conduct the site visit.

c. *Spark It Up Ltd v Dimac Contractors Ltd* (see paragraph 49 above)

In this case the dispute referred was whether invoices 1161 and 1162 had been paid, the dispute decided was whether invoices 1201 and 1206 had been paid. This happened because the claimant contractor realised at a late stage of the adjudication (30 June 2008) that the invoices on which it had claimed had been paid and sought to claim instead for later invoices which had not been paid. On 4 July 2008 the adjudicator requested the contractor to file “*a final corrected statement of claim and copies of all payment claims indicating those which had not been paid*”. The contractor did so the same day (which was a Friday). At 7.25am on the following Tuesday the adjudicator informed the parties that he had made his decision. The Court held that the opportunity given to the employer to respond to the amended pleading had not been “*a reasonably adequate one*”.

(e) Power to make orders under s 50 of the Act in respect of non-respondent owners

58 Section 30 of the Act provides that a claimant:

Claimant may seek determination of liability of owner who is not respondent

A claimant may, in the notice of adjudication, seek—

- (a) *a determination under section 50 that an owner who is not a respondent is jointly and severally liable with the respondent to make a payment to the claimant; and*

¹⁴ See also the decision in *Spark It Up Ltd v Dimac Contractors Ltd* (see paragraph 49 of this paper)

- (b) approval for the issue of a charging order in respect of the construction site.

59 Section 50 of the Act provides:

Determination of liability of owner who is not respondent and approval of charging order over construction site owned by that owner

- (1) This section applies if—
 - (a) a claimant has referred to adjudication a dispute about whether an amount is payable by a respondent under a construction contract; and
 - (b) the claimant has sought, in the notice of adjudication,—
 - (i) a determination of the owner's liability under section 30(a); and
 - (ii) approval for the issue of a charging order in respect of the construction site under section 30(b); and
 - (c) the adjudicator has determined that the respondent—
 - (i) is liable to pay (whether in whole or in part) the amount claimed in the adjudication; and
 - (ii) is an associate of the owner.
- (2) If this section applies, the adjudicator must—
 - (a) determine that the owner is jointly and severally liable, with the respondent, to pay (whether in whole or in part) the amount claimed in the adjudication; and
 - (b) record in his or her determination that the owner is so liable and the amount of the owner's liability; and
 - (c) approve the issue of a charging order in respect of the construction site, and record that approval in his or her determination accordingly; and
 - (d) include in his or her determination sufficient particulars to identify the construction site to which the approval for the issue of a charging order relates.
- (3) The liability of an owner under subsection (2)(a) must not exceed the reasonable value of all of the construction work carried out on the construction site by, or on behalf of, the respondent (including construction work carried out by another party for, or on behalf of, the respondent), less all amounts actually paid by the owner in respect of that work.
- (4) To avoid doubt, the owner's liability—
 - (a) is satisfied to the extent that the respondent has paid the amount determined by the adjudicator under subsection (1)(c); or
 - (b) is discharged if the respondent's liability is set aside or otherwise discharged.

60 The term “associate” is defined in s 7 of the Act.

61 In *Redhill Development (NZ) Ltd v Green* (see paragraph 18 above), the non-respondent owners against whom orders had been made by the adjudicator

contended, in judicial review proceedings, that there was no jurisdiction to make orders against them because of the definition of the term “owner” in s 5 of the Act;

owner means an owner of a construction site

arguing that the property on which the work had been carried out was no longer a construction site (as that term is defined in the Act), i.e.:

the land on which the claimant has been carrying out construction work under the relevant construction contract

when they became owners.

The Court rejected their argument that s 50 of the Act only applied if work is still continuing when someone becomes an owner.

(f) Costs

62 Two categories of costs are dealt with in the Act:

- a. The parties’ costs and expenses (s 56); and
- b. The adjudicator’s fees and expenses (s 57).

63 The Act provides a default position (ie the position which will apply if no order to the contrary is made by the adjudicator) in respect of each of these categories of costs. Under s 56(2) the default position is that the parties to the adjudication must meet their own costs and expenses. Under s 57(3) the default position is that the parties are each liable to contribute to the adjudicator’s fees and expenses in equal proportions.

64 Under each of these sections, the adjudicator is given power to depart from the default position.

65 In relation to the parties, s 56(1) provides:

An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by—

- (a) bad faith on the part of that party; or*
- (b) allegations or objections by that party that are without substantial merit.*

66 In terms of s 57(3)(b) and (4) an adjudicator may make a determination that the parties are liable to contribute to his or her fees and expenses otherwise than in equal proportions in the circumstances specified in sub-section (4), which reads as follows:

An adjudicator may make a determination under subsection (3)(b) if, in the adjudicator's view,—

- (a) the claimant's adjudication claim, or the respondent's response, was without substantial merit; or*
- (b) a party to the adjudication acted in a contemptuous or improper manner during the adjudication.*

67 There is a degree of overlap between the two provisions but they are not precisely the same.

68 In *Willis Trust Co Ltd v Green* (see paragraph 47 above) the adjudicator's order that the appellant principal should meet a substantial proportion of the respondent contractor's costs and expenses under s 56, on the ground that the principal had caused the contractor to incur costs and expenses unnecessarily by allegations or objections that were without substantial merit, was upheld by the High Court.

69 As far as I am aware, there has not been a decision on the provisions of s 57(3)(b) and (4).

Recovery of unpaid claims and enforcement of adjudicators' determinations

(a) Introduction

70 The consequences of failure to pay the claimed amount where no payment schedule has been provided are set out in ss 22-23 of the Act and the consequences of failure to pay the scheduled amount where a payment schedule has been provided are set out in s 24.

71 There is a parallel provision (s 59) in relation to the consequences of not complying with an adjudicator's determination that a party to the adjudication is liable, or will be liable if certain conditions are met, to make a payment under the contract.

72 In the case of ss 22-24 of the Act, the consequences (so far as relevant for this paper) are as follows (quoting from s 23(2)(a)):

The consequences are that the payee—

- (a) may recover from the payer, as a debt due to the payee, in any court,—*
 - (i) the unpaid portion of the claimed amount; and*
 - (ii) the actual and reasonable costs of recovery awarded against the payer by that court;*

73 In the case of s 59, the equivalent provision (s 59(2)(a)) permits the party in whose favour a money order has been made in an adjudication to:

recover from the party who is liable to make the payment (party B), as a debt due to party A, in any court,---

- (i) the unpaid portion of the amount; and*
- (ii) the actual and reasonable costs of recovery awarded against party B by that court:*

74 In addition to these parallel provisions, there is a special regime for the fast-track enforcement of an adjudicator's determination in ss 73-75 of the Act.

(b) Fast-track procedure for the enforcement of the adjudicator's determination

75 The fast-track procedure for the enforcement of an adjudicator's determination provided by ss 73-75 of the Act involves the following steps:

- a. An application to the District Court, by a party to an adjudication in whose favour an adjudicator has made an order for the payment of money and/or costs and expenses, for the adjudicator's determination to be enforced by entry as a judgment of the District Court (s 73);
- b. An application, by a defendant, for an order that entry of the adjudicator's determination as a judgment be refused (s 74);
- c. Entry of the adjudicator's determination as a judgment if the defendant takes no steps (s 75) or its application for an order that entry of the adjudicator's determination as a judgment be refused is unsuccessful (s 74(4)).

76 Section 74(2) limits the grounds on which a defendant may apply for an order refusing entry of an adjudicator's determination as a judgment of the District Court. It provides:

The application for an order referred to in subsection (1) may be made only on the following grounds:

- (a) *that the amount payable under the adjudicator's determination has been paid to the plaintiff by the defendant;*
- (b) *that the contract to which the adjudicator's determination relates is not a construction contract to which this Act applies;*
- (c) *that a condition imposed by the adjudicator in his or her determination has not been met.*

77 In *Laywood v Holmes Construction (Wellington) Ltd* [2008] 2 NZLR 493 (High Court, Auckland, CIV 2006-404-4152, 13/12/07, Asher J) the Court held:

- a. That the procedure under ss 73-75 of the Act was available to a successful party in an adjudication notwithstanding that the amount of the adjudicator's determination exceeded the normal jurisdiction of the District Court;
- b. That, even if the defendant opposed the entry of the adjudicator's determination as a judgment, an oral hearing was not necessary;
- c. That the defence under s 74 that the amount payable under the adjudicator's determination has been paid to the plaintiff by the defendant

is limited to proof of the payment of the amount of the determination after the determination has been made, and the question of whether or not payment had previously been made cannot be raised.

On appeal ([2009] NZCA 35, CA 83/2008, 25/2/09) the Court of Appeal:

- (i) upheld the Judge on the first and third points (see sub-paragraphs (a) and (c) above);
- (ii) agreed with the Judge that no oral hearing was required in the particular case but held (paragraph 34 of the judgment) “*that there may be cases where an oral hearing will be required*”, eg (paragraph 45) “*where there is a dispute as to whether payment has been made since the determination which cannot be resolved on the affidavits*”.¹⁵

78 Section 10(d) of the Act provides that the fast-track procedure established in ss 73-75 does not apply to a “*residential construction contract*”, ie:

*a contract for carrying out construction work in which one of the parties is the residential occupier of the premises that are the subject of the contract*¹⁶

The issue has been raised in two District Court cases as to whether the fact that the construction contract is entered into by the intending occupiers as trustees rather than as individuals makes the contract a commercial construction contract. In *Grant Hamilton Construction Ltd v Trustees of the Japek Trust* (District Court, Hamilton, CIV 2008-019-1630, 25/3/09, Everitt DCJ) the Court held it did. In the later decision of *IQ Homes Ltd v Trustees of the Fisher Family Home Trust* (District Court, Christchurch, CIV 2009-009-1314, 31/7/09, Macaskill DCJ) the Court held it did not.

79 On the authority of *Stellar Projects Ltd v Nick Gjaja Plumbing Ltd* (see paragraphs 54 above and 80 below) and *Patel v Pearson Group Ltd* (see

¹⁵ Leave to appeal from this decision was refused by the Supreme Court, which stated that it found “*the judgment below compelling*” [2009] NZSC 44, (SC 23/2009, 15/5/09).

¹⁶ s 5 of the Act. The term “*residential occupier*” is defined in the same section as meaning: “*an individual who is occupying or intends to occupy, the premises ... wholly or mainly as a dwellinghouse*”.

paragraph 81 below), I suggest that, notwithstanding the wording of s 74(2) of the Act, entry of an adjudicator's determination as a judgment will be refused if the determination is a nullity.

80 In *Stellar Projects Ltd v Nick Gjaja Plumbing Ltd* (see paragraph 54 above for the facts), the Court held that the purported award of the adjudicator could have “*no effect in law or in equity*” and that the appeal against the entry of judgment in the District Court must succeed. It is, I think, implicit in this decision that, if the point were to arise again in a court, it would have to be considered by the court and, if upheld, entry of the adjudicator's determination as a judgment refused, notwithstanding the terms of s 74(2) (for which see paragraph 76 above).

81 In *Patel v Pearson Group Ltd* (High Court, Wellington, CIV 2008-485-2571, 24/4/09, Miller J) the Court held that the validity of an adjudicator's determination depends upon there being a contract between the parties to the adjudication. If, on the facts, the only contract is between individuals, a claim by a company subsequently incorporated by the contractor cannot be brought under the Act and a determination in favour of the company is invalid and cannot be enforced. In that particular case, the employer had accepted that the company was the contracting party, so conferring extended jurisdiction under s 38(2) of the Act.

(c) Section 79 of the Act

82 Section 79 of the Act provides:

In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if---

- (a) judgment has been entered for that amount; or*
- (b) there is not in fact any dispute between the parties in relation to the claim for that amount.*

83 There has never been any question as to whether the section applies where a party seeks to recover by ordinary court proceedings (usually an application for summary judgment) an amount owing on a payment claim or ordered to be paid by an adjudicator's determination. Examples are *Metalcraft Industries Ltd v Christie* (see paragraph 36(c) above) and *Halls Earthworks Ltd (In Liquidation) v Donovan Drainage and Earthmoving Ltd* (High Court, Whangarei, CIV 2007-488-144, 18/7/07, Faire AJ).

84 In *Construction Service Co (Wellington) Ltd (in receivership) v Wellington Waterfront Ltd* (High Court, Wellington, CIV 2006-485-1117, 13/9/06, Gendall AJ) the Court held that s 79 did not apply because it was not a case of a counterclaim, set-off or cross-demand but, rather, of there being no debt.

85 Until recently there was an issue as to whether the section applies where a bankruptcy notice under the Insolvency Act 2006 or a statutory demand under the Companies Act 1993 has been served on a debtor or debtor company.

86 In the case of a bankruptcy notice, the debtor may avoid committing an act of bankruptcy by satisfying the Court that he or she has a cross-claim against the creditor¹⁷. In the case of a statutory demand, the debtor company may apply to have the statutory demand set aside on the ground (so far as material in the context of this paper) that:

(a) *There is a substantial dispute whether or not the debt is owing or is due;*

or

(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.*

(s 290(4) of the Companies Act 1993)

¹⁷ Insolvency Act 2006, s 17(1)(d)(ii). The term “*cross-claim*” is defined in s 17(7) of the Act. The equivalent provision in the Insolvency Act 1967 was s 19(1)(d).

- 87 That issue has now been resolved by the decision of the Court of Appeal in *Laywood v Holmes Construction (Wellington) Ltd* (see paragraph 77 above), which held that it does apply in those circumstances, while leaving open the question of whether it applies at the later stage of “*adjudication of bankruptcy or order to wind up a company*”¹⁸.
- 88 In *Gill Construction Co Ltd v Butler* (High Court, Wellington, CIV 2009-485-203, 2/11/09, Mallon J) the Court held that s 79 also applies at the stage of an application for an order staying the subsequent liquidation proceeding.
- 89 In *Grey’s Avenue Investments Ltd v Harbour Construction Ltd* (High Court, Auckland, CIV 2009-404-2026, 12/6/09. Wylie J) the Court rightly rejected the argument that the decision in *Laywood* (see paragraph 87 above) only applies to the enforcement of an adjudicator’s determination under s73 of the Act and does not apply where a payee issues a statutory demand in reliance on s23 of the Act (see paragraph 72 above).

(d) Costs

- 90 As noted in paragraphs 72-73 above ss 23(2)(a), 24(2)((a) and 59(2)(a) of the Act all provide for a party who has not been paid in terms of the progress payment provisions of the Act or in terms of an adjudicator’s determination to recover “*the actual and reasonable costs of recovery*” awarded by the Court against the debtor.

¹⁸ Leave to appeal from the decision was refused by the Supreme Court [2009] NZSC 44 (SC 23/2009, 15/5/09). Reference was made to this aspect of the Court of Appeal decision in *Plimmerton Courtyard Ltd v Franklin* (High Court, Wellington, CIV 2008-485-2613, 2/7/09, Gendall AJ); but it was unnecessary to decide the point.

91 In *Auckland Waterproofing Ltd v TPS Consulting Ltd* (2007) 18 PRNZ 797 (High Court, Auckland, CIV 2007-404-5890, 11/12/07, Duffy J) the Court held that the words “*actual and reasonable costs of recovery*” should be given their ordinary meaning and decisions on costs thus be based on the plaintiff’s actual costs, so long as they are reasonable, rather than be determined in accordance with the ordinary rules relating to costs. In coming to this decision, the Court was influenced by the consideration that, if the Act were not interpreted in this way, its purpose of providing a speedy method of recovery by contractors and subcontractors would be defeated (see paragraphs [52]-[54] of the judgment).¹⁹

Service

(a) The statutory provisions

92 Section 80 reads as follows:

Any notice or any other document required to be served on, or given to, any person under this Act, or any regulation made under this Act, is sufficiently served if—

- (a) *the notice or document is delivered to that person; or*
- (b) *the notice or document is left at that person's usual or last known place of residence or business in New Zealand; or*
- (c) *the notice or document is posted in a letter addressed to the person at that person's place of residence or business in New Zealand; or*
- (d) *the notice or document is sent in the prescribed manner (if any).*

93 Regulations 9 and 10 read as follows:

9 Additional modes of service

(1) *In addition to the modes of service specified in section 80 of the Act, any notice or any other document required to be served on, or given to, any person under the Act or these regulations is sufficiently served if—*

- (a) *it is sent by fax; or*
- (b) *it is sent by email or other means of electronic communication and the requirements of regulation 10 are met.*

(2) *A notice or document sent by fax under subclause (1)(a) is, in the absence of proof to the contrary, served or given if the fax machine generated a record of the transmission of the notice or document to the fax machine of the recipient,*

¹⁹ This decision was followed in *Suanui v Hi-Qual Builders Ltd* (see paragraph 10 of this paper), and in *Solution Textures Ltd v Coleman* (High Court, Auckland, CIV 2009-404-1052, 23/4/09 and 1/7/09, Potter J.

and the date of the record is taken to be the date of receipt of that notice or document.²⁰

- (3) A notice or document sent by email or other means of electronic communication under subclause (1)(b) is, in the absence of proof to the contrary, regarded as having been served or given,—
- (a) in the case of an addressee who has designated an information system for the purpose of receiving emails or other electronic communications, at the time the email or communication enters that information system; or
 - (b) in any other case, at the time the email or communication comes to the attention of the addressee.
- (4) For the purposes of subclause (3), **information system** means a system for producing, sending, receiving, storing, displaying, or otherwise processing emails or other electronic communications.

10 Requirements for service by email or other means of electronic communication

- (1) A notice or document may be sent by email or other means of electronic communication under regulation 9(1)(b) only if—
- (a) the information in the notice or document is readily accessible so as to be usable for subsequent reference; and
 - (b) the person to whom the information is required to be served or given consents to the information being given in electronic form and by means of an electronic communication, if applicable.
- (2) For the purposes of subclause (1),-
- (a) a person may consent to use, provide, or accept information in an electronic form subject to conditions regarding the form of the information or the means by which the information is produced, sent, received, processed, stored, or displayed:
 - (b) consent may be inferred from a person's conduct.

(b) The cases

(i) Introduction

94 A number of questions have arisen in relation to these provisions:

- (a) Are they mandatory, so that service may not be effected in any other way?

²⁰ For an example of the application of this subsection see *Halls Earthworks Ltd (In Liquidation) v Donovan Drainage and Engineering Ltd* (see paragraph 83 of this paper).

- (b) Is service by posting to a person's post office box service "*at that person's usual or last known place of residence or business in New Zealand*", in terms of s 80(b) (see paragraph 92 above)?
 - (c) Is s 80(d) (see paragraph 92 above) limited to methods of service prescribed by statute or does it extend to methods prescribed by agreement or even unilaterally?
 - (d) If the answer to (c) is, No, can a contractually agreed method of service displace the methods set out in s 80?
- (ii) Are the methods set out in s 80 mandatory?

95 In *West City Construction Ltd v Edney* (see paragraph 37(a) above) the Court held:

... the provisions of s 80 are not mandatory. As Mr Wilson accepted during the course of submission, s 80 provides a means by which a party may satisfy the Court on an evidentiary basis that proceedings have been served. If a party complies with s 80 then there can be no dispute that the notice has been properly served. However, the provisions are not mandatory nor exclusionary. If a 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 is sufficient proof of service.

The Court took the same view of the section in *Willis Trust Co Ltd v Green* (see paragraph 47 above).

- (iii) Is service by posting to a post office box good service in terms of s 80(b)?

96 In *Bills v Arnold Jensen (2005) Ltd* (see paragraph 30 above) the Court held, following *Hieber & Ors v Commissioner of Inland Revenue* (2002) 20 NZTC 17, 774, that the post office box address used in the previous dealings of the parties in relation to the contract qualified as a place of service under s 80(b) (for which see paragraph 92 above)

(iv) Does s 80(d) only apply to statutory prescription or does it extend to contractual prescription?

97 Such authority as there is on the point - see *Bills v Arnold Jensen (2005) Ltd* (see paragraph 96 above) and *Hawkins Construction Ltd v Ecosse Afrique Enterprises Ltd* (see footnote 6 to paragraph 14 of this paper) – holds that s 80(d) is not limited to prescription by statute but includes contractually agreed methods of service. *Bills* goes so far as to include unilaterally imposed methods of service, which (whatever the merits of the arguments for the inclusion of contractually agreed methods) must, I suggest, be seriously questionable.

(v) Can s 80(a)-(d) be displaced by prescription (otherwise than by statute) of a method of service?

98 The two cases referred to in paragraph 97 above hold that s 80(a)-(d) can be displaced. Whether they are displaced is a matter for decision in the individual case.

99 In contrast, in *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 13 above) the Court held that s 80 of the Act would apply even if there were specific provisions in the contract regarding service, because s 12 of the Act prohibits contracting out of the Act, “so s 80 would have effect despite any provision to the contrary in any agreement or Contract”.

The prohibition of contracting out

100 Section 12 of the Act provides:

This Act has effect despite any provision to the contrary in any agreement or contract.

101 The effect of s 12 of the Act has been considered in five High Court cases:

- a. *Willis Trust Co Ltd v Green* (see paragraph 47 above):

This was a judicial review case. The Court proceeded on the assumption (without deciding the point) that it had the right to review the adjudicator's determination for error of law. One of the arguments advanced for the plaintiff principal was that the contractor had waived its statutory right to require a payment schedule or elected not to rely upon it or had agreed that its statutory rights would be superseded by the arbitration process. The Court rejected the argument, on the ground that any such waiver, election or agreement would contravene the prohibition in s 12 of the Act against contracting out of the Act.

- b. *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 11(b) above):

In this case the Court held that s 80 of the Act would apply even if there were specific provisions in the contract regarding service, because s 12 of the Act prohibits contracting out of the Act, "*so s 80 would have effect despite any provision to the contrary in any agreement or Contract*".

- c. *Construction Service Co (Wellington) Ltd (in receivership) v Wellington Waterfront Ltd* (see paragraph 84 above):

In this case the Court 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 a contracting out of the Act.

- d. *Winslow Properties Ltd v Wooding Construction Ltd* (see paragraph 14 above).

In this case the Court held that a contractual provision for service on the engineer for the principal did not amount to a contracting out of the Act.

- e. *Foggo v RJ Merrifield Ltd* (see paragraph 31 above)

In this case, in which it was alleged that the payee was estopped from insisting on the provision of the payment schedule within the statutory

time limit, the Court declined to follow the decision in *Willis Trust Ltd v Green* (see subparagraph (a) above).

The High Court's powers of judicial review

102 Judicial review in New Zealand is conducted in terms of the Judicature Amendment Act 1972, which creates a single procedure for the judicial review of the exercise of, or failure to exercise, a statutory power. The power of adjudication under the Construction Contracts Act 2002 is, obviously, a statutory power and, therefore, subject to judicial review under this Act.

103 Examples of such cases are *Willis Trust Co Ltd v Green* (see paragraph 47 above), *Horizon Investments Ltd v Parker Construction Management (NZ) Ltd* (see paragraph 48 above), *Taylor v LaHatte* (see paragraph 57(b) above), *Spark It Up Ltd v Dimac Contractors Ltd* (see paragraph 49 above), *Redhill Development (NZ) Ltd v Green* (see paragraph 18 above), *Canam Construction (1955) Ltd v LaHatte* (High Court, Auckland, CIV 2009-404-461, 30/10/09, Keane J), and *Petterson v Gatley* (High Court, Auckland, CIV 2009-404-3117, 9/11/09, Harrison J).

104 Under s 8 of the Judicature Amendment Act 1972, the High Court has power:

... at any time before the final determination of an application for review, and on the application of any party, ... [to,] 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 ... purposes [prescribed in the section].

105 Examples of the exercise of that power are *Willis Trust Co Ltd v Green* (see paragraph 47 above) and *Taylor v LaHatte* (see paragraph 57(b) above).

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