

## ADJUDICATION - THE NEW ZEALAND POSITION

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by

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### Introduction

- 1 This paper is intended to do two things:
  - a. Highlight the differences between the Housing Grants, Construction and Regeneration Act 1996, which applies in the United Kingdom, and the Construction Contracts Act 2002, which applies in New Zealand;
  - b. Summarise the decisions on the New Zealand Act.
  
- 2 The paper is divided into three sections:
  - a. Comparison of the United Kingdom Act and the New Zealand Act;
  - b. Cases on the New Zealand Act;
  - c. Concluding comments.
  
- 3 The text of the Construction Contracts Act 2002 and the Construction Contracts Regulations 2003 can be found on the NZ Legislation website at [www.legislation.govt.nz](http://www.legislation.govt.nz). The text of the more recent decisions can be found on the Ministry of Justice's Judicial Decisions Online website at <http://www.moj.govt.nz/judicial-decisions>

[www.jdo.justice.govt.nz](http://www.jdo.justice.govt.nz) or the New Zealand Legal Information Institute website at [www.nzlii.org](http://www.nzlii.org).

- 4 There are two texts on the New Zealand Act: Bayley & Kennedy-Grant: *A guide to the Construction Contracts Act* (Rawlinsons Media Ltd, Auckland, 2003, ISBN 0-473-08814-2) and Smellie : *Progress Payments & Adjudication*, LexisNexis New Zealand Ltd, Wellington, 2003, ISBN 9780408717076).

### Comparison of the United Kingdom Act and the New Zealand Act

#### (a) Structure

- 5 The structure of the New Zealand Act is very different from that of the UK Act. It deals with payment first and then with adjudication, and contains virtually the entire legislative framework for both payment and adjudication, so that there is little need to refer to subsidiary legislation.<sup>1</sup>
- 6 The New Zealand Act also differs from the United Kingdom Act in that the provision which it makes for adjudication is purely statutory. It does not, as the United Kingdom Act does (s 108), permit of a contractual scheme of adjudication.

#### (b) The application of the Act to other than written contracts

- 7 The United Kingdom Act (s107) provides that it will apply “*only where the construction contract is in writing*”.

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<sup>1</sup> For the content of the Construction Contracts Regulations 2003 see paragraph 67 below

8 In contrast, the New Zealand Act (s9) provides that the Act applies to every construction contract that is “*written or oral, or partly written and partly oral*”.

9 The question considered is by Akenhead J in *Treasure & Son Ltd v Dawes* [2007] EWHC 420 (TCC) is unlikely to arise under the New Zealand Act.<sup>2</sup>

(c) The definition of “*construction contract*”, “*construction operations*” and “*construction work*”

10 The United Kingdom Act (s 104) defines a construction contract as:

... *an agreement with a person for any of the following-*

- (a) *the carrying out of construction operations;*
- (b) *arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;*
- (c) *providing his own labour, or the labour of others for the carrying out of construction operations.*

and provides that the term shall be taken to include :

... *an agreement –*

- (a) *to do architectural, design, or surveying work, or*
  - (b) *provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape,*
- in relation to construction operations.*

11 The New Zealand Act, in contrast, limits the term “*construction contract*” to “*a contract for carrying out construction work*” (s 5). None of what the Australian Acts, very aptly, call “*related goods and services*” (ie the additional work referred to in the second quotation from the UK Act contained in paragraph 9 above) is covered by the New Zealand Act.

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<sup>2</sup> The decision, delivered on 25 October 2007, can be found on the British and Irish Legal Information Institute website at [www.bailii.org](http://www.bailii.org)

12 The definitions of the terms “*construction operations*” used in the definition of “*construction contract*” in the United Kingdom Act and “*construction work*” used in the definition of “*construction contract*” in the New Zealand Act are very similar (see s 105 of the United Kingdom Act, and s 6 of the New Zealand Act), although it is obviously necessary to have regard to the precise wording of the particular Act that one is considering in any given case.

13 One respect in which the two Acts differ in their definition of “*construction operations*” (in the case of the UK Act) or “*construction work*” (in the case of the New Zealand Act) is in relation to the question of whether the protection of the Act should be extended to plant and equipment and to supply contracts. The UK Act (s 105(2)(d)) provides that the term “*construction operations*” shall not include:

*manufacture or delivery to site of-*

(i) *building or engineering components or equipment;*

(ii) *materials, plant or machinery, or*

(iii) *components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,*

*except under a contract which also provides for their installation.*

14 The New Zealand Act does not extend to plant and equipment but does provide limited protection in respect of prefabricated components. The definition of “*construction work*” in s 6 of the New Zealand Act includes:

*... prefabricating customised components of any building or structure, whether carried out on the construction site or elsewhere.*

The term “*customised components*” is defined as follows (in s 5 of the Act ):

*... in relation to a building or structure, means components that are specifically designed or modified for that particular building or structure.*

(d) The application of the legislation to residential building

15 The United Kingdom Act (s 106) provides that the Act does not apply “to a construction contract with a residential occupier”. The term “construction contract with a residential occupier” is defined (in s 106(2) of the Act) as meaning:

*... a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.*

16 In contrast, the New Zealand Act applies to residential construction contracts as well as to commercial construction contracts, with the following exceptions:

- a. The default statutory payment regime referred to in paragraphs 22-24 below (s 10(a));
- b. The right of an unpaid payee or claimant to give notice of intention to suspend work (s 10(b));
- c. The right of a claimant to seek approval for the issue of a charging order (see further paragraphs 43-47 below) and thereafter to seek the order (s10(c));
- d. The fast track procedure for enforcing an adjudicator’s determination referred to in paragraph 63 below (s 10(d)).

(e) The prohibition of conditional payment provisions

17 Both Acts effectively prohibit conditional payment provisions in construction contracts. I say “*effectively prohibit*” because the Acts do not use the language of prohibition but simply render such provisions “*ineffective*” (s 113 of the UK Act and s 13 of the New Zealand Act).

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

- 18 The United Kingdom Act differs from the New Zealand Act in that it excludes from the operation of the Act a construction contract which specifies that the duration of the work is to be less than 45 days or in relation to which the parties agree that the duration of the work is estimated to be less than 45 days (s 109). There is no such exclusion in the New Zealand Act.
- 19 The English Scheme contains default provisions which apply where the parties to a construction contract fail to agree on the amount of any “*instalment or stage or periodic payment*” for any work under the construction contract or the intervals at which, or the circumstances in which, such payments become due under the contract.
- 20 The Scheme also contains provisions governing the procedure for obtaining (or more accurately, making) payment. The Scheme provides that, within the prescribed period after a payment becomes due, or would have become due if the other party to the contract had carried out its obligations under the contract and no set-off or abatement was permitted “*by reference to any sum claimed to be due under one or more other contracts*”, the paying party must give notice to the other party, “*specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated*”. If the paying party intends to withhold payment, it must give notice of that intention not later than seven days before the final date of payment of the amount in question. The notice must comply with the requirements of s 111 of the Act.

21 The New Zealand Act, like the United Kingdom Act, covers both entitlement to payment and the procedure for obtaining payment.

22 So far as entitlement to payment is concerned, the New Zealand Act is similar to the United Kingdom Act in that it allows for the possibility of a contractual regime and provides for a default statutory regime (ss 14 and 15-18 respectively).

23 When it comes to providing for the default procedure for obtaining payment, the New Zealand Act is more detailed in its provisions than the United Kingdom legislation. Whereas the United Kingdom legislation merely provides for the steps to be taken by the paying party and then simply says that the person against whom the claim is made “*may not withhold payment ... unless he has given an effective notice of intention to withhold payment*” (s 111(1)), the New Zealand Act provides for the entire process (ss 19-24 of the New Zealand Act). The first step is the making of a payment claim. The person making the claim is called “*the payee*” in the New Zealand Act. The person on whom the claim is served (“*the payer*” in the New Zealand Act) may either reply to the claim by providing a payment schedule or may do nothing. If the payer (to adopt the New Zealand terminology) provides a payment schedule to the payee, the schedule must be in writing, identify the payment claim to which it relates and indicate a scheduled amount. If the scheduled amount is less than the claimed amount the schedule must indicate:

- a. *the manner in which the payer calculated the scheduled amount;*
- b. *the payer’s reason or reasons for the difference between the scheduled amount and the claimed amount;*
- 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.*

(s 21(3) of the New Zealand Act)

- 24 If the payer fails to provide a payment schedule he becomes liable to pay the claimed amount to the payee. If the payer provides the payee with a payment schedule which shows an amount due to the payee (“*the scheduled amount*”), the payer becomes liable to pay the scheduled amount.

(g) Adjudication : subject matter

- 25 The two Acts differ in their definition of what can be referred to adjudication :

- a. The United Kingdom Act (s 108(1)) provides that:

*A party to a construction contract has the right to refer a dispute arising under the contract for adjudication ...*

- b. The New Zealand Act (s 25) provides for the reference of a “*dispute*” to adjudication. The section gives an example of a dispute:

*... 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*

but a clearer indication of the scope of adjudication is found in s 48 (“*Adjudicator’s determination: substance*”), ss (1) and (2) of which read as follows:

- (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 under that contract.*

(h) Adjudication : procedure up to the decision or determination

26 As already noted, the United Kingdom Act allows for the establishment of a contractual adjudication process whereas the New Zealand Act does not. I will only refer to the statutory schemes in this paper.

27 The English Scheme provides for the process to be initiated by the service on the other parties to the contract of a notice of intention to refer a dispute arising under the contract to adjudication (the “*notice of adjudication*”) (paragraph 1). The referring party then requests the agreed adjudicator (if there is one) to act or (if there is no agreement as to adjudicator) requests a nominating body specified in the contract or, in the absence of such specification, an adjudicator nominating body to select a person to act as adjudicator (paragraph 2). A specified nominating body or adjudicator nominating body requested to select an adjudicator, does so and requests that person to act (paragraph 2). The chosen adjudicator then indicates whether or not he is willing to act (paragraph 2). If he is unable or unwilling to act or fails to respond within the prescribed period, the referring party has to start the process again (paragraph 6). If, on the other hand, the chosen adjudicator indicates that he is willing to act, the next step is the actual reference of the dispute to adjudication. This is done in writing (the “*referral notice*”) addressed to the adjudicator and accompanied by “*copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon*”. The referral notice is copied to the other parties to the dispute (paragraph 7). The Scheme then provides for the running to be made by the adjudicator (paragraph 13):

*The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication ...*

The parties are required to comply with any request or direction of the adjudicator in relation to the adjudication (paragraph 14); and provision is made for the adjudication to proceed and the adjudicator to be able to make a decision notwithstanding any default by a party in complying with a request or direction of the adjudicator (paragraph 15). The Scheme provides for the parties to be represented by “*such advisers or representatives (whether legally qualified or not) as [they] consider ... appropriate*” (paragraph 16)..

- 28 The New Zealand Act is similar to the English Scheme in that it provides for a two-step process in all cases:
- a. A notice of adjudication ;and
  - b. An adjudication claim (or, in the English terminology, the referral notice)
- (ss 28 and 36)
- 29 Under the New Zealand Act (s 33) the adjudicator is chosen by agreement between the parties or nominated by an agreed nominating body. If the parties to the dispute are unable to agree either on a person or a nominating body, the claimant must request an authorised nominating authority to select a person to act as adjudicator. In addition, where approval is sought for the issue of a charging order (see paragraphs 43-47 below), the adjudicator must be appointed by an authorised nominating authority (s 63). The only authorised nominating authority at present is the Arbitrators’ and Mediators’ Institute of New Zealand Inc.
- 30 The New Zealand Act provides for the respondent to lodge with the adjudicator a response to the adjudication claim (s 37).
- 31 The New Zealand adjudicator’s powers are very similar to those of his or her English equivalent (compare s 42(1) of the New Zealand Act with paragraph 13 of the English Scheme). A New Zealand adjudicator may:

- (a) *conduct the adjudication in any manner that he or she thinks fit; and*
- (b) *request further written submissions from the parties to the adjudication, but must give the relevant parties an opportunity to comment on those submissions; and*
- (c) *request the parties to the adjudication to provide copies of any documents that he or she may reasonably require; and*
- (d) *set deadlines for further submissions and comments by the parties; and*
- (e) *appoint an expert adviser to report on specific issues (as long as the parties are notified before the appointment is made); and*
- (f) *call a conference of the parties; and*
- (g) *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*
- (h) *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*
- (i) *issue any other reasonable directions that relate to the conduct of the adjudication.*

32 The New Zealand Act (s 42(2)), like the English Scheme, requires the parties to comply with the adjudicator's directions and (ss 43 and 44) contains similar provisions designed to ensure that the efficacy of the process is not affected by default by any of the parties.

33 The New Zealand Act (s 67) follows the English Act in providing for representation to be by whomever a party considers appropriate.

(i) Adjudication : criteria for appointment of the adjudicator

34 The English Scheme provides that the adjudicator must be a natural person acting in his personal capacity, may not be an employee of any of the parties to the

dispute and shall declare any interest, financial or otherwise in any matter relating to the dispute (paragraph 4).

35 The New Zealand Act provides (s 34):

- (1) *A person is eligible to be an adjudicator in relation to a construction contract if the person meets the requirements relating to qualifications, expertise, and experience as may be prescribed (if any).*
- (2) *A person is not eligible to be an adjudicator in relation to a construction contract to which the person is a party.*
- (3) *A person*
  - (a) *must disclose to the parties to the adjudication and, as the case may be, the nominating body or the authorised nominating authority, any conflict of interest (whether financial or otherwise); and*
  - (b) *must not act as an adjudicator in that dispute unless all of the parties to the adjudication agree.*

(j) Adjudication : timing

36 Under the English Scheme (paragraph 19), the adjudicator is required to reach his decision:

*... not later than –*

- (a) *twenty eight days after the date of the referral notice ..., or*
- (b) *forty two days after the date of the referral notice if the referring party so consents, or*
- (c) *such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.*

37 The New Zealand adjudicator is allowed 20 working days after the end of the period within which the respondent may serve on the adjudicator its adjudication response. A New Zealand adjudicator can extend that period for a further 10 working days if the adjudicator considers that, even though the parties to the adjudication do not agree, further time for the determination of the dispute is

reasonably required (s 46(2) (a) and (b)). Under the New Zealand Act, the parties may agree to an extension of time (s 46(2)(c)).

(k) Adjudication : the adjudicator's duties

38 The English Scheme (paragraph 12) provides:

*The adjudicator shall –*

- (a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and*
- (b) shall avoid incurring unnecessary expense.*

39 The New Zealand Act provides (s 41):

*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.*

(l) Adjudication : the decision or determination

40 The English Scheme provides (paragraph 20) :

*The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute.*

*In particular, he may –*

- (a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,*

- (b) *decide that any of the parties to the dispute is liable to make a payment under the contract ... and ... when that payment is due and a final date for payment,*
- (c) *having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for simple or compound rates of interest shall be paid.*

41 Under the New Zealand Act (s 48), the following provisions apply to the adjudicator's determination:

- (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 under that contract.*
- (3) *If an adjudicator determines under subsection (1)(a) that a party to the adjudication is liable, or will be liable if certain conditions are met, to make a payment the adjudicator*
  - (a) *must also determine*
    - (i) *the amount payable or conditionally payable; and*
    - (ii) *the date on which that amount became or becomes payable; and*
  - (b) *may determine that the liability of a party to the adjudication to make a payment depends on certain conditions being met.*
- (4) *Despite subsections (1) and (2), an adjudicator is not required to determine a dispute that has been withdrawn in accordance with section 39.*
- (5) *If a dispute is settled by agreement between the parties before the adjudicator's determination is given, the adjudicator*
  - (a) *must terminate the adjudication proceedings; and*
  - (b) *if requested by the parties, may record the settlement in the form of a determination on agreed terms.*

42 The New Zealand Act lists the matters which the adjudicator may take into account in reaching his determination. A New Zealand adjudicator is required to consider the adjudication claim and the respondent's response (s 45). In addition,

the adjudicator is required to have regard to the report of any experts appointed to advise on specific issues and to any other matters that the adjudicator reasonably considers to be relevant.

(m) Adjudication : the adjudicator’s decision or determination: the additional powers of the adjudicator under the New Zealand Act

43 The New Zealand Act is unique in that it gives the adjudicator to whom a dispute arising under a commercial construction contract has been referred additional powers which are not enjoyed by an adjudicator under either the United Kingdom Act or the Australian Acts.

44 Under the New Zealand Act, a claimant under a commercial construction contract may, in the notice of adjudication, seek the adjudicator’s approval for the issue of a charging order in respect of a construction site owned by a respondent (ss 29 and 49). If the owner of the construction site is not a party to the contract but is an associate of a party to the contract who is liable to pay the claimant under the contract, the adjudicator may be asked to determine that the non-respondent owner is jointly and severally liable with the respondent and to approve the issue of a charging order over the construction site owned by that non-respondent (ss 30 and 50).

45 The claimant who obtains approval for the issue of a charging order must apply to a court for the issue of the charging order.

46 A “*commercial construction contract*” is defined (s 5 of the New Zealand Act) as meaning:

*A contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract.*

A “residential occupier” is defined (s5) as meaning:

*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.*

47 The term “associate” (see paragraph 44 above) is defined in s 7 of the Act in terms very similar to that common in tax legislation.

(n) Adjudication : the effect of the adjudicator’s decision or determination

48 The English Scheme provides (paragraph 23(2)) that:

*The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.*

49 The New Zealand Act, like the English Scheme, provides for the effect of the adjudicator’s determination. Sections 58 and 61 provide that:

- a. An adjudicator’s determination that a sum of money is payable by one party to a contract to another is enforceable; but
- b. An adjudicator’s determination of the rights and obligations of the parties under the contract, whether made in the course of arriving at a determination as to whether money is payable or the sole object of the adjudication, is not enforceable, although any court before whom the rights and obligations in question are subsequently litigated “*must have regard to ... the adjudicator’s determination.*”

(o) Adjudication : its relationship to other proceedings

50 The United Kingdom Act makes no provision regarding the relationship of adjudication to other forms of proceeding.

51 The New Zealand Act, in contrast, (s 26) reads as follows:

- (1) *To avoid doubt, nothing in this Part prevents the parties to a construction contract from submitting a dispute to another dispute resolution procedure (for example, to a court or tribunal, or to mediation), whether or not the proceedings for the other dispute resolution procedure take place concurrently with an adjudication.*
- (2) *If a party to a construction contract submits a dispute to another dispute resolution procedure while the dispute is the subject of an adjudication, the submission to that other dispute resolution procedure does not –*
  - (a) *bring to an end the adjudication proceedings; or*
  - (b) *otherwise affect the adjudication*
- (3) *However, an adjudicator must terminate the adjudication proceedings on a dispute if, before the adjudicator determines the dispute, that dispute is determined under another dispute resolution procedure.*
- (4) *Nothing in any other enactment or rule of law or any contract affects the application of this Part.*

52 In addition, (and this also is a feature that is not present in the United Kingdom legislation) s 25(3) of the New Zealand Act provides that a dispute may not be referred to adjudication if:

- (a) *The parties to the relevant construction contract have agreed to refer disputes between them to arbitration; and*
- (b) *The arbitration is*
  - (i) *an international arbitration as defined in article 1(3) of the First Schedule of the Arbitration Act 1996; or*
  - (ii) *covered by the provisions of the Protocol on Arbitration Clauses (1923); or*
  - (iii) *covered by the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other states and is an arbitration to which the Arbitration (International Investment Disputes) Act 1979 applies.*

An arbitration is “an international arbitration as defined in article 1(3) of the First Schedule of the Arbitration Act 1996” s

- (a) *The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*
- (b) *One of the following places is situated outside the State in which the parties have their places of business:*
  - [i] *The place of arbitration if determined in, or pursuant to, the arbitration agreement;*
  - [ii] *Any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*
- (c) *The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.*

(p) Adjudication : immunity of the adjudicator

53 Both Acts give immunity to the adjudicator, although there are differences in the wording of the immunity.

54 The English Scheme provides (paragraph 26):

*The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability.*

55 Section 70 of the New Zealand Act reads as follows:

- (1) *Neither an adjudicator nor an expert adviser appointed under section 42(1)(e) is under any civil or criminal liability for anything done, or omitted to be done, in the course of the exercise or intended exercise of-*
  - (a) *in the case of an adjudicator, any of the adjudicator's functions, duties, or powers under this Act; or*
  - (b) *in the case of an expert adviser, any of the expert adviser's functions under this Act*
- (2) *Subsection (1) does not exclude the liability of an adjudicator or expert adviser for anything done or omitted to be done in bad faith.*

(q) Adjudication : the adjudicator's fees and expenses and the parties' costs

56 The English Scheme provides (paragraph 25) that:

*The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall jointly and severally be liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.*

The Scheme is silent on the question of the parties' costs.

57 The New Zealand Act deals with the adjudicator's fees and expenses in s 57, which reads as follows:

- (1) *An adjudicator is entitled to be paid, by way of fees and expenses, an amount—*
  - (a) *that is agreed between the adjudicator and the parties to the adjudication; or*
  - (b) *if there is no agreement, that is reasonable, having regard to the work done and expenses incurred by the adjudicator.*
- (2) *The parties to the adjudication are jointly and severally liable to pay the adjudicator's fees and expenses.*
- (3) *The parties to the adjudication are each liable to contribute to the adjudicator's fees and expenses in—*
  - (a) *equal proportions; or*
  - (b) *the proportions that the adjudicator may determine.*
- (4) *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.*
- (5) *An adjudicator is not entitled to be paid any fees and expenses in connection with an adjudication if he or she fails to determine the dispute within the time allowed by section 46(2).*
- (6) *Despite subsection (5), an adjudicator may require payment of his or her fees and expenses before communicating his or her determination on a dispute to the parties to the adjudication.*
- (7) *If an adjudication claim is withdrawn or terminated, or the dispute between the parties is resolved, an adjudicator is entitled to be paid the*

*fees and expenses incurred in the adjudication up to, and including, as the case may be, the date on which—*

- (a) the adjudication claim was withdrawn or terminated; or*
- (b) the adjudicator was notified that the dispute had been resolved.*

58 The New Zealand Act goes further than the UK Act in that it gives the adjudicator power to make costs orders in the circumstances set out in s 56. This section reads as follows:

- (1) 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.*
- (2) If the adjudicator does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.*
- (3) An agreement about how the costs and expenses in adjudication proceedings are to be apportioned (including an agreement that a party is to indemnify another party in relation to those costs and expenses) is not binding on the parties to the adjudication if that agreement was made before the dispute arose.*

(r) Remedies : in relation to progress claims

59 Both Acts provide for suspension of work under the construction contract where there is a failure to pay so much of the progress claim as is due under the relevant Act within the prescribed period after the giving of notice of intention to suspend work. In the United Kingdom Act the period of notice is “*at least seven days’ notice*” (s 112). Under the New Zealand Act (s 72) the period of notice is “*five working days*”.

60 The United Kingdom legislation does not provide any other remedies for non-payment of a progress claim, leaving the claimant to use the remedies available to him under the general law.

61 The New Zealand Act allows for the claimant to recover the unpaid amount as a debt due to him in court (ss 23 and 24).

(s) Remedies : in relation to an adjudicator's decision or determination

62 The English Scheme (paragraph 24) provides for the adjudicator's decision to be enforced under s 42 of the Arbitration Act 1996, ie by an application to the court by the adjudicator or a party.

63 The New Zealand Act provides three remedies for non-payment of an amount ordered to be paid by an adjudicator's determination :

- a. Recovery as a debt in court (s 59(2)(a));
- b. Suspension of work (ss 59(2)(b) and 72); and
- c. Entry of the adjudicator's determination as a judgment in the District Court (ss 59(2)(c) and 73-75)

64 It is appropriate to note that a non-respondent owner of a construction site in respect of which the adjudicator has approved the issuing of a charging order (see paragraphs 43-47 above) has a right to seek the review of that determination by the District Court (ss 52-55)

(t) Limitations on defences available in Court proceedings

65 As noted in paragraphs 61 and 63 above respectively, a party which has not been paid the amount due to it as a result of the payment provisions of the Act or as a result of an adjudicator's determination is entitled to recover that amount as a debt due to him in Court. Section 79 of the New Zealand 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.*

66 As noted in paragraph 63 above, an adjudicator's determination may be entered as a judgment in the District Court (this being intended as a fast track procedure). If application is made for entry of an adjudicator's determination as a judgment in the District Court, the defendant has the right, within a stipulated period, to apply to the Court for an order that entry of the adjudicator's determination as a judgment be refused. However, the grounds on which such an application may be made are limited by s 74(2), which reads as follows:

*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.*

(u) Content of the Construction Contracts Regulations 2003

67 I made the comment in paragraph 5 above that there is little need to refer to the Regulations. Their content is limited to:

- a. Prescribing information to accompany a payment claim or notice of adjudication served on a residential occupier;
- b. Prescribing the form of an adjudicator's determination<sup>3</sup>;
- c. Prescribing the form of application for review of an adjudicator's determination in respect of a non-respondent owner,
- d. Prescribing the information to be submitted to the responsible Minister by an applicant for authority to nominate adjudicators;
- e. Prescribing additional modes of service and the circumstances in which they may be used.

(v) No contracting out

68 The United Kingdom legislation and the English Scheme do not prohibit contracting out of the provisions of the legislation, for the obvious reason that they envisage the possibility of contractual schemes which meet the requirements of the Act. By implication, however, there is no contracting out because, if the contractual arrangement made by the parties does not meet the requirements of the Act, the provisions of the Scheme apply.

69 The New Zealand Act prohibits contracting out of its provisions (s 12).

(w) Judicial review

70 An adjudicator's determination is subject to judicial review.

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<sup>3</sup> Form 3. It is noteworthy that the form makes no provision for the adjudicator to sign his or her determination although in practice they do. The same issue that arose in the *Treasure* case (see fn2) regarding the effect of failure to sign a determination could arise in New Zealand (although I note that that case involved a contractual adjudication not a statutory one).

71 Section 60 of the New Zealand Act provides:

*An adjudicator's determination under section 48(1)(a) is binding on the parties to the adjudication and continues to be of full effect even though –*

- (a) a party has applied for judicial review of the determination; or*
- (b) any other proceeding relating to the dispute between the parties has been commenced.*

A determination under s 48(1)(a) is one for the payment of money. See paragraph 41 above for the text of the section.

### Cases on the New Zealand Act

#### (a) Definitions

72 In *Gulf Harbour Investments Ltd v Y Gulf Harbour Ltd* (High Court, Auckland, CIV 2006 at 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 of the Act.

#### (b) The right to progress payments and the procedure for claiming and making them

##### (i) Payment claims

73 In *Marsden Villas Ltd v Wooding Construction Ltd* (High Court, Auckland, CIV 2006-404-2136, 25/5/06, Asher J) 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 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)).

74 In *George Developments Ltd v Canam Construction Ltd* (CA 244/04, 12/4/05) the Court of Appeal 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] DCR 769 and *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 73 above).

75 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) 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 100 below).

76 In *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 73 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 (for which see paragraph 49 above).

77 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.

(ii) Payment schedules

78 The cases in relation to payment schedules inevitably raise one or both of two issues:

- a. The sufficiency of the alleged payment schedule;
- b. The timing of service of the schedule.

79 In *Solidcrete Technology Ltd v First Pacific Investments Ltd* (see paragraph 74 above) Judge Roderick Joyce QC had this to say about the meaning of the word "*indicate*" in s 21(2)(c) in paragraphs [61]-[63] and [65]-[67] of his judgment:

[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] NSW 1140.*

[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.*

80 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 74 above)
- b. *Westnorth Labour Hire Ltd v SB Properties Ltd* (High Court, Auckland, CIV 2006-404-858, 19/12/06, Rodney Hansen J).

81 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. *Jain Hua Property Ltd v Freemont Design & Construction Ltd* (see paragraph 77 above):

In this case, 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.*

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

In this case (which was one of a number of cases in which the alleged payment schedule took 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 80 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*”.

- e. *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.*

82 In each of *TGC Properties Ltd v Freemont Design and Construction Ltd* (High Court, Auckland, CIV 2005-404-7165, 10/4/06, Doogue AJ) and *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 73 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 both 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 Act.

(c) Adjudication

(i) When is there a dispute?

83 In *Willis Trust Co Ltd v Green* (High Court, Auckland, CIV 2006-404-809) 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 which 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.

(ii) Appointment of adjudicator

84 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 sub-contractor did not seek an appointment by an authorised nominating authority but 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*”. I am glad to say that this is the only such instance of which I am aware.

(iii) The adjudicator's duty to comply with the principles of natural justice

85 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 held (not surprisingly) 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.

(iv) Costs

86 In *Willis Trust Co Ltd v Green* (see paragraph 83 above) the adjudicator's order that the appellant principals should meet a substantial proportion of the respondent contractor's costs and expenses under s 56, on the ground that the principals 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.

(d) Service

87 The service provisions of the Act and Regulations are found in s 80 of the Act and regs 9 and 10 of the Regulations.

88 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).*

89 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, and the date of the record is taken to be the date of receipt of that notice or document.*
- (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.*

90 In *West City Construction Ltd v Edney* (see paragraph 81 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 83 above).

91 In *Marsden Villas Ltd v Wooding Construction Ltd* (see paragraph 73 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*”.

92 In *Halls Earthworks Ltd (In Liquidation) v Donovan Drainage and Earthmoving Ltd* (High Court, Whangarei, CIV 2007-488-144, 10/8/07, Faire AJ) the Court had to consider reg 9(2) of the Construction Contracts Regulations 2003. The Court held that the payment schedule, which had been served by fax, had not been served in accordance with the Act because, due to the disconnection of the receiving telephone, no “*record of the transmission of the notice or document through the fax machine of the recipient*” was available.

(e) Limitations on defences available in Court proceedings

(i) Section 74

93 In *Stellar Projects Ltd v Nick Gjaja Plumbing Ltd* (see paragraph 84 above), 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) (see paragraph 66 above).

(ii) Section 79

94 This is the provision in the Act which has produced the greatest number of decisions. For convenience, I repeat the text of the section here:

*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.*

95 There is no doubt that 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 81 above) and *Halls Earthworks Ltd (In Liquidation) v Donovan Drainage and Earthmoving Ltd* (see paragraph 93 above).

96 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.

97 The real, and as yet undecided, issue is whether the section applies where steps are taken under the Insolvency Act 1967 or the Companies Act 1993. The first of these Acts provides for the service on a debtor of a bankruptcy notice, the latter

for the service on a debtor company of a statutory demand. In the case of a bankruptcy notice, the debtor may apply to have it set aside on the basis that the debtor:

*... has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceeding in which the order was obtained.*

(s 19(1)(d) of the Insolvency Act 1967)<sup>4</sup>

In the case of a statutory demand, the debtor company may apply to have the statutory demand set aside on the ground 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)

98 In chronological order, the cases which have considered this point are as follows:

- a. *In re Capon, ex parte TUF Panel Construction Ltd* (High Court, Auckland, CIV 2004-404-2839, 27/9/04, Gendall AJ).

In this case the Court held that s 79 does not apply to bankruptcy proceedings.

- b. *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd* (2005) 11 TLR 256.

In this case the Court took the view that there was nothing in the Construction Contracts Act to suggest the issue of a statutory demand under the Companies Act “*is not a proceeding contemplated by s 79 for recovery of a debt*”, that there is an apparent inconsistency between s 79 of the Act and s290(4) of the Companies Act, and that “*Parliament intended s 79 [of the] Act to prevail and to preclude a Court giving effect to any*

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<sup>4</sup> On 3/12/07 the Insolvency Act 2006 will come into force. The equivalent section under the 2006 Act is s17(1)(d)(ii).

*set-off in proceedings to recover a debt established under ss 23, 24 or 59 [of the] Act”.*

- c. *Brooklyn Holdings Ltd v Able Handyman Services Ltd* (2005) 9 NZCLC 263, 930.

In this case, the plaintiff accepted that s 79 applied but argued that the counterclaim on which it relied was not disputed and therefore the section was satisfied. It was unnecessary for the Court to determine the issue because it was satisfied that the plaintiff was arguably solvent and that the statutory demand ought therefore to be set aside under s 290(4)(c) of the Companies Act 1993.

- d. *10 Gilmer Ltd v Tracer Interiors and Construction Ltd* (see paragraph 81 above).
- e. *SCI. Development and Construction Ltd v NZ Built Ltd* (High Court, Auckland, CIV 2005-404-3656, 23/12/05, Abbott AJ)
- f. *Freemont Design & Construction Ltd v Natures View Joinery Ltd* (High Court, Hamilton, CIV 2006-419-269, 26/7/06, Faire AJ)
- g. *Kizer Builders Ltd v OEC Construction Ltd* (High Court, Wellington, CIV 2006-485-2287, 16/11/06, Gendall AJ)

In each of these four cases, the Court followed the approach of the Court in *Volcanic* (see sub-paragraph (b) above). In the *Kizer* case the issue arose in the context of an application for an order staying a liquidation proceeding and restraining advertising. In the other cases, the point arose in the context of an application to set aside a statutory demand.

- h. *Silverpoint International Ltd v Wedding Earthmovers Ltd* (High Court, Auckland, CIV 2007-404-104, 30/5/07, Doogue AJ)

In this case the Court rejected the *Volcanic* analysis of the application of s 79 in liquidation proceedings and held that the section did not apply. This was, of course, the position which had been taken by the Court three years earlier in relation to bankruptcy proceedings in *In re Capon* (see sub-paragraph (a) above).

99 This is clearly an issue which requires to be decided by the Court of Appeal.

(f) Court costs under s 23(2)(a) and s 59(2)(a)

100 Where:

a. The party to a construction contract which is liable to make a payment to another party to the contract (“the payer” and “the payee” respectively) fails to provide a payment schedule in response to a payment claim and fails to pay the whole, or any part, of the claimed amount on or before the due date for payment; or

b. A party ordered to pay an amount by an adjudicator fails to pay the whole, or any part, of that amount before the close of the relevant date;

the payee or, as the case may be the successful party in the adjudication, may recover from the payer/unsuccessful party in any court the unpaid portion of the amount owing and “the actual and reasonable costs of recovery awarded against [the payer/ unsuccessful party in the adjudication] by that court” (s 23(2)(a) and s59(2)(a) respectively.

101 In *Auckland Waterproofing Ltd v TPS Consulting Ltd* (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).

(g) No contracting out (s 12)

102 The effect of s 12 of the Act has been considered in three cases:

- a. *Willis Trust Co Ltd v Green* (see paragraph 83 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 principals 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. *Construction Service Co (Wellington) Ltd (in receivership) v Wellington Waterfront Ltd* (see paragraph 97 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.

- c. *Winslow Properties Ltd v Wooding Construction Ltd* (see paragraph 75 above).

(h) The High Court's powers of judicial review

103 Judicial review in New Zealand is conducted in terms of the Judicature Amendment Act 1972, which created 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.

104 Examples of such cases are *Willis Trust Co Ltd v Green* (see paragraph 83 above), and *Horizon Investments Ltd v Parker Construction Management (NZ) Ltd* (see paragraph 85 above).

105 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].*

106 An example of the exercise of that power is *Willis Trust Co Ltd v Green* (High Court, Auckland, CIV 2006-404-809, 1/3/06, Harrison J).

### Concluding comments

107 The Construction Contracts Act 2002 has now been in force for just over four and a half years.

108 It has worked well, even though there are still many in the construction industry (including in that term the related professionals such as architects, engineers and lawyers) who are not familiar with its provisions.

109 The Act's biggest effect has, undoubtedly, been simply because it exists. Employers and contractors (at least those who are familiar with the Act) are, I believe, being more sensible about payment than they were or may have been previously, because they do not wish to get involved in an adjudication.

- 110 As happened in the United Kingdom, the vast majority of disputes that do go to adjudication end there.
- 111 In the case of those disputes that do not end with adjudication, however, anecdotal evidence is that considerable delays are experienced in enforcing determinations, whether under s 74 of the Act or in ordinary proceedings. That is not, of course, the fault of the Act but, rather, a consequence of the strain on the judicial system generally.
- 112 It is interesting to note that there is very little reference to UK or Australian authority in the decisions which have come out of the courts under the Act.
- 113 As noted in paragraph 29 above, the Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) is the sole authorised nominating authority. It also maintains a List of Adjudicators and is the leading educator of adjudicators.
- 114 On the educational front the Institute has run regular adjudication seminars since 2003 and produces a Construction Adjudication Manual, the fourth edition of which was released earlier this year.
- 115 Unfortunately, we only have incomplete statistics of the number of adjudications under the Construction Contracts Act 2002. AMINZ has made 280 nominations from 2003 to the present, 129 under s 63 of the Act (see paragraphs 29 and 43-47 above) and 151 under s 33 (ie either as an agreed nominating body or as the default nominating body – see paragraph 29 above).<sup>5</sup> We have no figures for the number of adjudications where the adjudicator has been appointed by the parties.

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<sup>5</sup> Personal communication from Ms Sharon Wagg, Executive Director, AMINZ, to whom my thanks.

On the basis of my own experience and enquiry of colleagues<sup>6</sup>, the best assessment I can make is that the total figure (AMINZ and private) is between 100 and 200 adjudications per annum.

116 I am not aware of any present proposals to amend the Act.

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*For further information, including my CV, see my website at [www.kennedygrant.com](http://www.kennedygrant.com)*

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<sup>6</sup> Messrs AMR Dean, P Degerholm, DS Firth, RJ Green, and SS Williams, to all of whom my thanks.