

CROSS FERTILISATION – NEW ZEALAND DEVELOPMENTS IN
CONSTRUCTION LAW AND ADJUDICATION

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by

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Introduction

- (1) Those of you who were able to attend the recent Society of Construction Law International Conference in London will know that in my opening remarks as Chairman of the first day's proceedings, I spoke of "the Commonwealth of Learning". A glimpse – it can be no more than that – into recent developments in New Zealand in the fields of construction law and adjudication will, I hope, be found of use in your work here in Singapore. As the notice for this meeting said:

As sister Common Law jurisdictions, New Zealand and Singapore can learn from each other. Reference to decisions in the other jurisdiction is common in the judgments of both Courts.
- (2) This paper is divided into two sections. The first looks at some of the recent decisions in the field of construction law. The second reviews the decisions on those parts of the Construction Contracts Act 2002 which relate to adjudication and the enforcement of adjudicators' determinations.

Recent developments in the field of construction law

(a) Introduction

- (3) With one exception, the cases I will deal with in this part of the paper are cases involving the tort of negligence.
- (4) The one case which does not have to do with the tort of negligence is one in which I, as an arbitrator, ordered specific performance of a construction contract. The correctness of my decision was the subject of an appeal, by

leave, to the High Court on a point of law. I was upheld in the High Court but the unsuccessful party (the contractor) sought leave, and then special leave, to appeal to the Court of Appeal. This was refused.

(b) Cases involving the tort of negligence

(i) Introduction

- (5) I have chosen ## cases from the Court of Appeal. With the exception of the first case, which dates from 2000, these are all decisions made in the last three years.
- (6) I have chosen # cases from the High Court, the first dating from 2004, the rest having been decided in the last two years.

(ii) Court of Appeal decisions: *RM Turton & Co Ltd (in Liquidation) v Kerslake & Partners*¹

- (7) Turton successfully tendered for the head contract to build a new hospital. The Area Health Board had employed a firm of architects to design the building, oversee the tendering process, and supervise construction. The architects had contracted an engineering firm, Kerslake & Partners, to advise on engineering aspects of the project, including preparing the mechanical services specification and the corresponding sub-contract. “the successful tender included the tender for the mechanical services by George Mechanical Ltd. this tender allowed for the provision and installation of the veri heat pumps specified in the mechanical services specification, following installation, the heating system installed by George Mechanical Ltd proved incapable of performing to the specified standards, because of the inability of the specified pumps to generate the required output in the specified conditions.
- (8) Turton sought to cover the additional cost it had incurred in remedying the defect from, among others, Kerslake & Partners, as the engineers who had prepared the mechanical services specification.

¹ [2000] 3NZLR 406 (CA)

- (9) The matter went to trial in the District Court, where the Judge held that Kerslake did not owe Turton a duty of care. That decision was upheld by the High Court and, in turn, by the Court of Appeal.
- (10) The basis for the claim was negligent miss-statement². The Court recognised, and affirmed the validity of, “the modern doctrine of concurrent liability in contract and tort”³, and went on to say⁴:

Acceptance of the doctrine of concurrency of duties does not conflict with the principle that regard must be had to the existence of any contract, or indeed a contractual matrix, in the decision to impose a duty in tort or not. Concurrency is concerned with remedies, specifically that one remedy is not to be preferred over another. While theories of the primacy of contractual remedies over tortious ones found support in some of the early decisions, the main and now accepted rationale behind the contractual matrix principle is concerned not with the existence of a contractual remedy, but with the way in which the contractual intention can help to enlighten the often difficult question of when the relationship between two parties is such as to warrant the intervention of the general law of tort. ... the question is not simply whether there is an established contractual chain of rights, but whether the contractual chain shows or supports intention regarding the assumption or allocation of risk and responsibility inconsistent with the claimed tort duty. As the House of Lords in *British Communications* emphasises, one of the fundamental issues in the imposition of a duty of care is the relationship between the parties. The contracts that regulate the various relationships between the parties involved in the construction work are essential to answering the question.

- (11) The court emphasised that, as is clear from the passage just quoted, it is necessary not only to consider the contractual chain but to consider the provisions which are present in each link of the chain. The court identified the following features as relevant to the question of whether Kerslake owed Turton a duty of care:
- a. Turton undertook to carry out the whole of the contract works, including the mechanical services section⁵;
 - b. Although the mechanical services section was to be carried out under sub-contract by an approved sub-contractor, that was “without affecting the primary liability of Turton to the Area Health Board for completion of that section in accordance with the specifications”⁶;
 - c. The Engineer was aware that Turton would not itself carry out this section of the works but was required to engage expert independent assistance; the specifications required the heat pumps to be tested and a commissioning certificate issued and provided:

² para [7] of the Court of Appeal’s judgment

³ para [8] of the Court’s judgment

⁴ para [9] of the Court’s judgment

⁵ para [17] of the Court’s judgment

⁶ para [17] of the Court’s judgment

By submitting a tender, the tenderer guarantees that the equipment installed will perform as described in the specification/s ...⁷

- d. These provisions formed part of the sub-contract documents as well as the head contract documents, so expressing an obligation on George Mechanical Ltd in the sub-contract context⁸;
- e. The contract under which the Engineer undertook to supply its services contained express terms relating to its liability, including an exclusion of any warranty of performance and a very wide exclusion of liability clause⁹;
- f. In the Court's view Kerslake did not possess "any special skill as against Turton because:

As far as Kerslake's special skill is concerned, the particular terms of the specifications must be critical and be able to be balanced against its expertise in mechanical engineering. We have already mentioned the contractual requirement that Turton employ a sub-contractor with the appropriate expertise and skill to complete their work according to the specification.

(A finding which, I have to confess, I find very surprising).¹⁰

- g. The fact that Turton did not approach Kerslake seeking information in the absence of any clear indication that it would be relying on information given by Kerslake¹¹.

(12) The Court concluded this part of its judgment by saying¹²:

We return to the contract. In our view the duty tendered for in respect of the alleged representation that the componentry would achieve the required output would cut across and be inconsistent with the overall contractual structure which defines the relationship of the various parties to this work, and in the circumstances of this case would not be fair, just or reasonable to impose the claim to duty of care. The factors which demonstrate that conclusion can be drawn from the preceding discussion and summarised. First, the relationships as between the relevant parties – the Area Health Board, the Architect, the Engineer, the Contractor and the Sub-contractor – are carefully spelled out in the separate contracts. All were aware of the existence of the contractual chain. Second, those contracts define the rights and obligations of the respective parties to them. If the loss in question is the cost of work necessary to remedy a defect in the specifications, as between the owner and the Engineer, the risk rested with the Engineer (subject to the exclusion and limitation provisions). As between the owner and the contractor, it rested with the contractor. As between the contractor and the sub-contractor, it rested in the sub-contractor. And as between the sub-contractor and the supplier, it rested (probably) in the supplier. In that overall situation, and taking into account the reliance that Turton placed on the expertise of the sub-contractor, we do not see any justification for holding that in addition the Engineer should be regarded as voluntarily assumed a

⁷ paras [22]-[23] of the Court's judgment

⁸ para [24] of the Court's judgment

⁹ para [25] of the Court's judgment

¹⁰ para [28] of the Court's judgment

¹¹ para [30] of the Court's judgment

¹² para [32] of the Court's judgment

responsibility to the contractor and sub-contractors. Third, the Engineer has carefully defined and confined its potential liability for negligence. Fourth, the Engineer has the right to have any dispute as to its liability resolved by arbitration. Fifth, is the extent of any potential liability which would arise from the imposition of the separate duty of care. Logically the duty must extend to all potential tenderers for the head contract, and to all potential tenderers for the mechanical services sub-contract. Sixth, it would seem that the Area Health Board, which invited tenders on the basis of the specifications would not itself be under any such duty of care to a contractor, notwithstanding the representation.

(iii) Court of Appeal decisions: *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd & Anor*¹³ (CA 259/02, 23/6/04)

- (13) In this case there was a contract between Carter Holt Harvey and Genesis for the provision by Genesis of a co-generation plant to produce power for Carter Holt's timber mill from the waste from the mill, with the surplus power being sold to Genesis. Genesis contracted with Rolls-Royce for the design and construction of the co-generation plant. There was no contract between Carter Holt and Rolls-Royce.
- (14) Carter Holt alleged that the plant is defective and sued Genesis for breach of contract and Rolls-Royce, in tort, for negligence. Rolls-Royce applied to strike out Carter Holt's claim against it on the ground that it was, in effect, a claim that Rolls-Royce owed it a tortious duty of care to perform its contract with Genesis. The matter initially came before me. I upheld the objection to the pleading as it stood and gave Carter Holt 21 days within which to replead (to allege a failure to take reasonable care in the design and construction of the plant) or to file and serve a memorandum saying that it stood by its original pleading.
- (15) The plaintiff repleaded as suggested and the matter came before a Judge of the High Court on review, Rolls-Royce contending that the amended pleading was still defective. The Judge dismissed the application for review, holding that I had approached the matter in the right way. He did, however, accept that, on a proper analysis, the duty might be narrower than I had suggested and ordered the plaintiff to provide further particulars.
- (16) The matter then came before the Court on appeal, by leave, from the Judge's decision. In a unanimous judgement, the Court of Appeal held that Carter Holt's claim was unsustainable except in relation to an allegation that physical damage had been caused to the plant by defects in it and a Hedley-Byrne claim which had not been before me.

¹³ [2005] 1 NZLR 324 (CA)

(17) Rolls-Royce’s argument was throughout that the contractual matrix excluded any tortious duty of care on the part of Rolls-Royce to Carter Holt.

(18) The Court of Appeal adopted the usual New Zealand approach to the determination of whether a duty of care exist (or, in the context of this case, could arguably exist). At paragraph [58] of the judgement, it said:

Should there be a duty of care in a case such as this? The ultimate question when deciding whether a duty of care should be recognised in New Zealand is whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed. The focus is on two broad fields of inquiry but these provide only a framework rather than a straightjacket. The first area of inquiry is as to the degree of proximity or relationship between the parties. The second is whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty in the particular class of case. At this second stage, the court’s inquiry is concerned with the effect of the recognition of a duty on other legal duties and, more generally, on society. See *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 293-294 (Cooke P), 305-306 (Richardson J), 312 (Casey J), 316-318 (Hardie Boys J) and *Attorney-General v Carter* [2003] 2 NZLR 169 at paras [22] and [30].

(19) The Court identified the following factors (in addition to foreseeability) as relevant to the question of whether there is, in any particular case, the requisite degree of proximity for the imposition, or possible (because there are policy issues to be considered as well before deciding whether it is fair, just and reasonable to impose a duty of care in tort) of a duty of care:

- a. The degree of analogy with cases in which duties are already established¹⁴;
- b. The closeness of the nexus between the alleged negligence and the alleged loss¹⁵;
- c. The burden on the defendant of taking precautions against the risk and the proportionality between that burden and the degree of fault on the part of the defendant¹⁶;
- d. The extent of the plaintiff’s vulnerability¹⁷;
- e. The availability of other remedies to the plaintiff¹⁸;
- f. The nature of the plaintiff’s loss, in particular whether it is economic¹⁹;
- g. The statutory and contractual background²⁰;

¹⁴ para [59] of the judgment

¹⁵ para [60] of the judgment

¹⁶ para [60] of the judgment

¹⁷ para [61] of the judgment

¹⁸ para [62] of the judgment

¹⁹ para [63] of the judgment

²⁰ para [64] of the judgment

h. The difficulty of establishing the appropriate standard of care if a duty is imposed²¹.

(20) In the first part of its subsequent analysis, the Court reviewed the case law and academic writing. It summarised its initial findings on this aspect at paragraphs [95]-[96] of the judgment:

[95] On the basis of analogy with existing case law, for there to be a duty of care in this case, one possibility would be to follow *Junior Books* and to hold that tort liability with regard to defects in quality always extends to commercial construction cases. This would mean disregarding the extensive criticism of the *Junior Books* decision and the attempts of later United Kingdom cases to distinguish it. It would also require us to disregard the numerous comments in the New Zealand cases approving *Simaan* as well as those suggesting that there is likely to be a distinction between domestic and commercial cases. There would need to be very strong reasons for us to do that.

[96] Another possibility is to hold that Lord Bridge's complex structure theory applies to New Zealand (and to this case). Finally, it would be possible for us to hold that *Junior Books*, as limited in later cases to where there is an assumption of responsibility in the Hedley Byrne sense, is part of New Zealand law.

(21) The Court then looked briefly at the relevance of assumption of responsibility²² and commented that it cannot be sufficient in itself to found liability, at least in relation to negligent construction cases²³ before considering the factors might favour a finding of proximity, those which militated against such a finding, and those which were neutral.

(22) The Court found²⁴ that the following factors favoured a finding of proximity:

- a. Foreseeability;
- b. The very close degree of contact between Carter Holt and Rolls-Royce provided under the separate contracts.

(23) The Court found that the following factors militated against a finding of proximity:

- a. The contractual structure of the project and the fact that it was freely entered into by sophisticated commercial entities²⁵;
- b. The detailed provisions of the contracts, including the existence of clauses limiting Rolls-Royce's liability to Genesis²⁶.

²¹ para [67] of the judgment

²² paras [97]-[100] of the judgment

²³ para [100] of the judgment

²⁴ paras [100]-[102] of the judgment

²⁵ paras [103]-[104] of the judgment

- (24) The Court found²⁷ that the statutory context (at the time the Building Act 1991) was a neutral factor.
- (25) The Court then consider the policy issues and held that the following policy considerations militated against a finding of a duty of care:
- a. The need for commercial certainty²⁸;
 - b. The numerous suggestions in New Zealand case that tort liability for defects in quality will not extend to commercial construction cases²⁹;
 - c. The fact that in other jurisdictions such liability is recognised, if at all, only in very limited circumstances³⁰.
- (26) The Court then summarised its findings and concluded as noted in paragraph # of this paper.

End of insert 1 from TKG

(iv) Court of Appeal decisions: *Attorney-General v Body Corporate No 200200 & Ors*³¹

- (27) In this case the Court of Appeal was required to determine whether the Building Industry Authority (“the BIA”) under the Building Act 1991 (now replaced by the Building Act 2004) owed a duty of care to the original and subsequent purchasers of units in a 153 unit development affected by the leaky building syndrome.
- (28) Under section 12 of the Act, the BIA had the following functions:
- (1) Under this Act, a building consent authority—
 - (a) issues building consents, but not if a building consent is required to be subject to a waiver or modification of the building code; and
 - (b) inspects building work for which it has granted a building consent; and
 - (c) issues notices to fix; and
 - (d) issues code compliance certificates; and
 - (e) issues compliance schedules.
 - (2) Under this Act, a territorial authority—

²⁶ paras [105]-[114] of the judgment

²⁷ paras [115]-[116] of the judgment

²⁸ paras [117]-[118] of the judgment

²⁹ para [119] of the judgment

³⁰ para [120] of the judgment

³¹ [2007] 1 NZLR 95(CA), (CA 30/05, 1/12/05)

- (a) performs the functions of a building consent authority set out in subsection (1)(a) (including the issue of building consents subject to a waiver or modification of the building code) if—
 - (i) the territorial authority is also a building consent authority; and
 - (ii) an owner applies to the territorial authority for a building consent; and
- (b) issues project information memoranda; and
- (c) grants exemptions under Schedule 1; and
- (d) grants waivers and modifications of the building code; and
- (e) issues certificates of acceptance; and
- (f) issues and amends compliance schedules; and
- (g) administers annual building warrants of fitness; and
- (h) enforces the provisions relating to annual building warrants of fitness; and
- (i) decides the extent to which buildings must comply with the building code when—
 - (i) they are altered; or
 - (ii) their use is changed; or
 - (iii) their specified intended life changes; and
- (j) performs functions relating to dangerous, earthquake prone, or insanitary buildings; and
- (k) carries out any other functions and duties specified in this Act; and
- (l) carries out any functions that are incidental and related to, or consequential upon, the functions set out in paragraphs (a) to (k).

(29) Among the requirements for approval and renewal of approval of building certifiers (private persons or companies that could be substituted for the relevant local authority for the purpose of inspecting and certifying construction work) was a requirement that they satisfy the professional liability insurance requirements set by the BIA.

(30) The Body Corporate claimed that the BIA had been negligent in:

- a. permitting, or failing to control properly, the use in construction of face fixed monolithic cladding systems over untreated timber, which had led, in conjunction with other design failures and failures in construction, to the leaky building syndrome just referred to;
- b. its supervision (including review and approval) of the building certifier which had been engaged by the developer in relation to the construction of the units;
- c. its approval of the insurance cover arrangements for the certifier.

- (31) The Court referred to its earlier judgment in *Rolls-Royce*. In the initial, general, section of its judgment, the Court identified factors relevant to the assessment of proximity and considered the policy considerations involved in deciding whether to impose a duty of care on a public body such as the BIA. It concluded the general, introductory, section of its judgment by dealing with the dangers of reasoning backwards from the alleged negligence to the duty (leading to the imposition of what it described as a “*situational duty*”) and the need, when considering the possible liability of a public body in the tort of negligence, to avoid importing a public law overlay into the enquiry.
- (32) In relation to the issue of proximity, the Court identified as relevant the factors of foreseeability, substantiality of the nexus between the alleged negligence and the plaintiff’s loss, considerations of vulnerability, and the nature of the relevant risk³².
- (33) In relation to the policy question, the Court identified the following policy considerations as relevant:
- a. whether the imposition of a duty of care:

*would be consistent with the terms and policies of the statute which governed the functions of the defendant. A duty of care will not be imposed if the effect will be inconsistent with the scheme and policy of the Act*³³
 - b. noting that it would be improper in considering this factor to:

*judge the policies which underpinned the 1991 Act primarily by reference to the leaky building syndrome. In any event, that sort of evaluation would be irrelevant to our task as it would not be right for us to approach this case on the basis that the policies which were given effect to by the 1991 Act were misguided (even if that was what we thought. Instead, we must take, and give effect to, those policies as we find them*³⁴
 - c. statutory functions that involve quasi-judicial or legislative powers are not appropriately the subject of duties of care³⁵;
 - d. the courts are slower to impose duties of care in relation to omissions as opposed to the positive exercise of statutory powers³⁶;
 - e. the more policy-orientated and less operational the power in question, the less likely a duty is to be imposed³⁷;
 - f. the further removed the public body is from day-to-day physical control over the activity which directly caused the loss, the less likely a duty is to be imposed³⁸.

³² para [37] of the judgment

³³ para [39] of the judgment

³⁴ para [40] of the judgment

³⁵ para [41] of the judgment

³⁶ para [42] of the judgment

³⁷ para [42] of the judgment

- (34) In discussing the dangers of arguing backwards from the alleged negligence to a “*situational duty*”, the Court recognised that this was frequently done but stated that it was not without its difficulties. It referred to its own earlier decision in *Fleming v Securities Commission*³⁹ and to the dissenting judgment of Hayne J in *Crimmins v Stevedoring Industry Finance Committee*⁴⁰ and concluded:

The majority approach inflaming suggests that where a plaintiff’s case proceeds on the basis of an alleged situational duty (that is, closely focused on particular circumstances of risk which are said to have existed), the Court should:

- (a) during the proximity phase of the inquiry, be careful to ensure that the narrow duty alleged can credibly be regarded as discrete from a broad (and untenable) duty of care in relation to the relevant statutory functions; and
 - (b) in assessing policy considerations, analyse carefully the implications, in terms of the scheme and structure of the relevant statute, of recognising even a situational duty⁴¹.
- (35) In relation to the suggestion that public law considerations have a role to play in determining whether a duty of care should be imposed, the Court uttered the following warning:

The public law approach, however, is problematical. It would introduce into the law of negligence public law principles which have been developed for different purposes. As well, it does not provide a convincing explanation for the existing pattern of authorities. For instance, many situations in which duties of care have been imposed (for example, in respect of building inspectors or in the child welfare context) do not have a significant public law overlay, whereas statutory powers which are most commonly subject to judicial review tend to involve the sort of quasi-judicial or quasi-legislative functions which are off limits in terms of the imposition of a duty of care.⁴²

- (36) The Court then considered each of the three claims made against the BIA, identifying them as “*the face fixing claim*”, “*the [certifier] approval claim*” and “*the insurance cover claim*”⁴³.
- (37) In relation to the face fixing claim, the Court identified three elements in the allegation:
- a. an overarching duty owed to all building owners;

³⁸ para [42] of the judgment

³⁹ [1995] 2 NZLR 514

⁴⁰ (1999) 200 CLR 1 at [301]

⁴¹ para [46] of the judgment

⁴² para [48] of the judgment

⁴³ para [52] of the judgment

- b. a duty associated with preparation of establishing compliance with the building code;
 - c. a situational duty *“to respond to what is said to be mounting evidence of the problems associated with the use of face fixed monolithic cladding systems”*⁴⁴.
- (38) In relation to the overarching duty, the Court found that by the late 1990s the BIA could have foreseen that adoption of defective building systems had the potential to cause substantial economic loss, that it had powers it could have used to take steps to put an end to or limit the use of this type of construction, and that it was at least arguable that it was negligent in failing to do so. However, it rejected the overarching duty both on grounds of proximity (or lack of it) and on grounds of policy.
- (39) The Court identified the following factors as militating against a finding of the required proximity between the BIA and the plaintiff body corporate:
- a. The relationship between them was *“extremely limited”*⁴⁵;
 - b. Responsibility for the durability of the units *“might be thought to rest more directly on the developers, designers, builders and code compliance certifiers than the BIA”*⁴⁶;
 - c. Building owners were *“not particularly vulnerable to inaction on the part of the BIA in relation to a particular building system”*⁴⁷;
 - d. Analogous cases did not favour the imposition of a duty⁴⁸.
- (40) The Court identified the following policy considerations as militating against the imposition of the overarching duty:
- a. Many of the roles provided under the Act for the BIA *“are of a quasi-legislative or quasi-judicial nature and aspects of the complaints made ...against the BIA are associated, directly or indirectly, with some of those roles”*⁴⁹;
 - b. The 1991 Act made the certificates of building certifiers conclusive and *“[t]here is no ...indication to suggest that the BIA had a long-stop liability where building certifiers had negligently certified compliance”*⁵⁰ ;
 - c. The primary complaint was of lack of action on the part of the BIA⁵¹.

⁴⁴ para [54] of the judgment

⁴⁵ para [61](a) of the judgment

⁴⁶ para [61](b) of the judgment

⁴⁷ para [61](c) of the judgment

⁴⁸ para [61](d) of the judgment

⁴⁹ para [62](a) of the judgment

⁵⁰ para [62](b) of the judgment

⁵¹ para [62](c) of the judgment

- (41) The Court dismissed the alleged duty in relation to compliance documents (see paragraph #(b) of this paper) on the ground that it was a red herring and, even if it was not a red herring, it was merely part of the larger school of fish that was the overarching duty allegation (I have extended the metaphor)⁵².
- (42) The Court dismissed the alleged situational duty on the grounds that “*maladministration by a public body is not in itself a ground for awarding damages*” and that the proximity considerations identified in relation to the allegation of an overarching duty applied equally to the situational duty⁵³.
- (43) The Court rejected the certifier approval claim for the following reasons:
- a. Many of the factors identified in relation to the overarching duty claim were relevant to this claim also⁵⁴;
 - b. The argument was in a sense a situational duty one⁵⁵;
 - c. The role of approving certifiers was a quasi-judicial one⁵⁶;
 - d. The statutory scheme was “inconsistent with the intensity of scrutiny that a duty of care would presuppose”⁵⁷.
- (44) The Court rejected the insurance cover claim on the grounds that the approval of insurance arrangements was part and parcel of the approval process of building certifiers and that the existence of a duty of care in relation to insurance “would have had the tendency to produce the sort of official over-vigilance that the 1991 Act was intended to avoid”⁵⁸.

End of addition 3

(v) Court of Appeal decisions: *Bella Vista & Anor v Western Bay of Plenty District Council*⁵⁹

(45) X

(46) X

⁵² paras [63]-[66] of the judgment

⁵³ paras [67]-[71] of the judgment

⁵⁴ para [78] of the judgment

⁵⁵ para [78] of the judgment

⁵⁶ para [78] of the judgment

⁵⁷ para [80] of the judgment

⁵⁸ para [93] of the judgment

⁵⁹ [2007] NZCA 33

(47) x

(vi) Court of Appeal decisions: *Body Corporate 202254 & Anor v Taylor*⁶⁰

(48) x

(49) x

(vii) High Court decisions: *Three Meade Street Ltd & Anor v Rotorua District Council & Ors*⁶¹

(50) x

(51) x

(viii) High Court decisions: *Body Corporate No 188273 v Leuschke Group Architects Ltd*⁶²

(52) x

(53) x

(ix) High Court decisions: *Body Corporate 188529*⁶³

(54) x

(55) x

(x) High Court decisions: *Charterhall Trustees Ltd v Queenstown Lakes District Council & Anor*⁶⁴

(56) x

⁶⁰ [2008] NZCA 317

⁶¹ High Court, Auckland, M37/02, 11/6/04, Venning J

⁶² High Court, Auckland, CIV 2004-404-2003, 28/9/07, Harrison J

⁶³ High Court, Auckland, CIV 2004-404-3230, 30/4/08, Heath J

⁶⁴ High Court, Invercargill, CIV 2007-425-588, 27/6/08, Fogarty J

(57) x

(xi) High Court decisions: *Body Corporate No189855 & Anor v North Shore City Council & Ors*⁶⁵

(58) x

(59) x

(xii) High Court decisions: *Altimarloch Joint Venture Ltd v Moorehouse & Ors*⁶⁶

(60) x

(61)

(c) Some guidance on the availability of specific performance as a remedy for breach of a construction contract

(62) I have already mentioned some of the cases before the courts which resulted from the Leaky Building Syndrome. A number of other claims arising from the syndrome have been dealt with in arbitrations.

(63) In one of them, *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*, I was the arbitrator. I found the contractor to be in breach of its contract by constructing units which were not water tight. The respondent in the arbitration was the developer, not the purchasers or subsequent purchasers of the units in the development. The developer sought an order of specific performance and I granted one, on terms.

(64) The contractor sought, and was granted, leave to appeal on a question of law, namely:

In the particular circumstances of this case did the Arbitrator err in law in making an order for specific performance in the terms set out in the schedule to the ...award in that:

- (i) [Silverfield] did not have possession of the land which was the subject of the specific performance order ...;
- (ii) [Silverfield] had no right to sue for the loss suffered by the individual unit owners in respect of defects in their units and resulting damage ...;
- (iii) The only losses suffered by [Silverfield] were:

⁶⁵ High Court, Auckland, CIV 2005-404-5561, , Venning J

⁶⁶ High Court, Blenheim, CIV 2005-406-91, 5/7/08, Wild J

- (a) an unquantified ‘considerable expense’ in endeavouring to determine the nature, extent and effect of defects in the development;
- (b) an exposure to potential claims by the unit owners of the development in respect of defects.⁶⁷

(65) The primary argument for the contractor before the High Court was that the following statement by Romer J in *Wolverhampton Corporation v Emmons*⁶⁸:

There is no doubt that as a general rule the Court will not enforce specific performance of a building contract, but an exception from the rule has been recognised. It has, I think, been for some time held that, in order to bring himself within that exception, a plaintiff must establish three things. The first is that the building work, of which he seeks to enforce performance is defined by the contract; that is to say, that the particulars of the work are so far definitely ascertained that the Court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract by damages. The third is that the defendant has by the contract obtained possession of the land on which the work is contracted to be done ...

Counsel for the contractor submitted that New Zealand courts have adopted Roma LJ’s statement as establishing general principles and that there is now a practice in New Zealand, just as in England, not to award specific performance of building contracts other than in truly exceptional cases.

(66) The Judge considered the three judgments in the *Wolverhampton* case, (because, of course, Roma LJ’s judgment was only one of three), textbook commentaries, and earlier New Zealand cases. The Judge came to the conclusion on this initial, general, point that:

[61] I am not satisfied that Roma LJ’s statement in *Wolverhampton* is of universal or prescriptive application or that the [earlier New Zealand] decisions ... stand as authority for the proposition that there is, based upon that statement, a general principle applicable in New Zealand at least that specific performance of building contracts should not be awarded other than in truly exceptional circumstances. ...

...

[63] In my judgment [the] cases illustrate to obvious. Specific performance is an equitable and thus fact specific discretionary remedy. Its exercise is governed by well settled principles which are flexible and adaptable to achieve the ends of equity; that is, to “do more perfect and complete” justice between the parties than leaving them to their common law remedies ... Building contracts present special features “of a practical nature” ... in the areas of sufficient particularity and superintendence of work. But provided the Court is satisfied they can be accommodated by the imposition of appropriate terms within the order, as the arbitrator was here, there is no principled reason why such contracts should not be the subject of awards for specific performance.

[64] The arbitrator did not err by exercising his discretion to order specific performance of a repair covenant in a building contract. I shall now determine whether the arbitrator erred in law within the terms of the formulated question.

⁶⁷ *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*. CIV 2005-404-6800, 11/5/06, Harrison J, para [32]

⁶⁸ [1901] 1 QB 515 at 524-525: quoted at para [46] of Harrison J’s judgment

- (67) The Judge then went on to consider each of the three grounds of challenge to my award contained in the question of law in respect of which leave to appeal was allowed.
- (68) With regard to the contention that an order of specific performance could not be made because Silverfield “did not have possession of the land which was the subject of the specific performance order” the Judge agreed with my finding that Roma LJ was “not seeking to establish principles that would be applicable to all construction contracts” and that “rights of access to the townhouses, not the possession of the land, is the relevant factor in the case”. I had made my order subject to Silverfield providing Downer:
With written consents from individual unit owners to [Downer] and the Engineer to the contract and/or the Engineer’s representative entering upon the relevant unit for the purpose of carrying out their roles under, and in terms of, these orders.
- (69) The second specific ground of challenge to my order was that Silverfield was disqualified from claiming specific performance because it had no right to sue for the loss suffered by third parties. I had found that Silverfield, indeed, had no right to sue for losses suffered by purchasers. The Judge held that that finding:
Is not germane to whether or not [the arbitrator] erred in granting specific performance . it is a neutral factor. The question is whether Silverfield, not the purchasers, has suffered a loss for which the remedy of specific performance is available. Their losses are not at issue.
- (70) The Judge then went on to consider the third ground of challenge to my order, namely that if findings that: the only losses suffered by Silverfield are [a] unquantified “considerable” expense in attempting to determine the nature, extent and effects of defects and [b] an exposure to potential claims by unit owners disqualify [Silverfield’s] claim for specific performance.⁶⁹
- (71) Counsel for the contractor, relying on the judgment of Lord Hoffmann in *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd*⁷⁰, submitted that the order of specific performance which I had made imposed “financial consequences for Downer [which] are grossly disproportionate to Silverfield’s loss”.
- (72) The Judge dismissed this challenge also on three bases:
a. That, as pointed out by Lord Hoffmann in his judgment in *Argyll Stores*, a distinction should be made between

⁶⁹ para 75 of the judgment

⁷⁰ [1998] AC 1(HL)

“orders which require a party to carry on activities, on the one hand, and those which require it to achieve results, on the other.

[Lord Hoffmann] explained the reasons for judicial reluctance to order specific performance for cases in the first category which did not, by contrast, apply to the second. He identified building contracts and repair contracts within this second category. He cited *Wolverhampton* as an example of cases where the Courts have “in appropriate circumstances” ordered specific performance of such obligations;

b. Downer had

breached its warrantee to build watertight dwellings. That event triggered the contractors liability to repair all defects at its own expense. On the arbitrator’s findings, the defects are widespread. Downer had promised to repair them. This was the remedy stipulated by the parties for the very contingency which has arisen. Downer cannot argue disproportionality where the arbitrator has simply enforced its undertaking to perform the agreed remedy ... Downer’s contractual duty to repair is conditional only upon proof of defects. It is not conditional upon Silverfield’s proof of loss ...⁷¹

c. If, contrary to (b), loss is a relevant consideration, there is no element of disproportionality.

Silverfield’s indirect loss is already substantial and is likely to escalate. The arbitrator’s forecast that unit owners will sue the developer must be correct. Its direct loss in terms of contingent third party liability could equate to the same figure of \$4.2 million emphasised by Mr Williams for Downer’s repair costs. Difficulties in proving loss of a promise benefit in such circumstances do not deter a Court from concluding that the benefit was a real value ...⁷²

(73) The Judge ruled that certain other arguments which counsel for Downers sought to advance before him were not within the scope of the question of law in respect of which leave to appeal had been given. He nevertheless went on to consider them, in case he was wrong in so holding. One of the criticisms was that my order was imprecise or uncertain. The Judge rejected this submission on the following grounds:

a. Downer had been given the opportunity to comment on “any lack of clarity or completeness” but had chosen not to do so, because it proposed to apply for leave to appeal from the order (the Judge characterised this argument as verging “on an abuse of the process”⁷³;

b. On the authority of the decisions of the House of Lords in *Wilson v Northampton Banbury Junction Railway Co and Argyll Stores*⁷⁴:

Precision is of course a question of degree and the Courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs merit appeared strong; like all the reasons which I have been discussing, it is, taken

⁷¹ paras [83]-[84] of the judgment

⁷² see paras [887]-[91] of the judgment

⁷³ para [96] of the judgment

⁷⁴ (1874) 9 Ch.App. 279 (HL)

alone, merely a discretionary matter to be taken into account. ... it is, however, a very important one.⁷⁵

(74) The order which I had made had been summarised by the Judge in paragraph [30] of his judgment:

The arbitrator made an order for specific performance in the form attached to the schedule. He noted that its draft terms had been amended in accordance with Silverfield's suggestions. The schedule provided that:

1. [Downer] is ordered to remedy all examples of the following defects in the following units together with all damage to the structure and building components of such units resulting from such defects and the remediation of those defects, **so as to render the units in question watertight** [extensive particulars are given].
2. [Downer] shall notify the engineer to the contract and/or the engineer's representative in writing, not later than two working days prior to commencing work on any unit, of the location of all examples of each of the defects in that unit.
- ...
6. The terms of the contract entered into by the parties on 9 August 2000 shall apply in all respects to the work to be carried out by [Downer] in terms of orders numbered 1-5.
7. Leave is reserved to either party to apply on 24 hours written notice, for rulings in respect of any issues arising from [Downer's] performance, non-performance or manner of performance of its obligations under orders number 1-6.
8. Orders number 1-7 shall lapse if, or to the extent that, [Silverfield] is unable, within the period of one calendar month from the date on which these orders are made, to provide [Downer] with written consents from individual unit owners to [Downer] and the engineer to the contract and/or the engineer's representative entering upon the relevant unit for the purpose of carrying out their roles under, and in terms of, those orders.

(75) The Judge found that the terms of the order "are sufficiently specific and precise to enable this Court or the arbitrator 'to satisfy itself' *expo facto*, that the covenanted work has been done"

(76) As I mentioned earlier, the contractor sought leave and, then special leave, to appeal to the Court of Appeal against Harrison J's judgment upholding my order of specific performance. In its judgment⁷⁶ the Court of Appeal rejected the argument advanced by counsel for the contractor based on the *Wolverhampton* decision:

... we do not consider that Roma LJ's statement is 'a universal or prescriptive application. It did not even command the express support of the other two members of the Court of Appeal in which he was sitting. Roma J's dictum has been described as "too

⁷⁵ quoted in para [97] of Harrison J's judgment

⁷⁶ [2007] NZCA 355 (16/8/07) at para [48]

rigid to accord with equitable principles”: Spry: Principles of Equitable Remedies (6ed 2001) 114. We agree with that view.

- (77) With regard to the “imprecision” question, the Court of Appeal held Harrison J had been right to say that this did not come within the question of law in respect of which leave to appeal had been granted. The Court of Appeal expressed no views on the subject.

Review of the first 5 years of cases on adjudication and the enforcement of adjudicators’ determinations under the Construction Contracts Act 2002

(a) Introduction

- (78) This part of my paper was originally part of a broader paper covering all aspects of the Construction Contracts Act 2002. The full paper is available on the Recent Papers page of my website at www.kennedygrant.com

(b) Brief comparison of the relevant provisions of the New Zealand Construction Contracts Act 2002 and the Singapore Building and Construction Industry Security Payment Act (Chapter 30B)

- (79) There are significant differences in the structure and content of the New Zealand Construction Contracts Act 2002 and the Singapore Building and Construction Industry Security of Payments Act (Chapter 30B).
- (80) The principal differences are in the scope of what can be referred to adjudication, the method of selecting and appointing adjudicators, and the method of enforcing adjudicators’ determinations. I have nevertheless included the cases on those aspects in this paper so that you have a complete picture of what our Act provides in relation to adjudication and of the decisions on our Act.
- (81) Despite the differences between the two Acts, there are aspects of the New Zealand Act and the decisions on it which are potentially of interest to you:
- a. The procedure for selecting and appointing adjudicators and the effect of failing to follow that procedure (sections 33 and 35 of the New Zealand Act and 14 of the Singapore Act);
 - b. The requirement that an adjudicator “*comply with the principles of natural justice*” (section 41(c) of the New Zealand Act and section 16(3)(c) of the Singapore Act);

c. Costs (sections 56 and 57 of the New Zealand Act and sections 17(2), 30 and 31 of, and the definition of “costs” in, the Singapore Act).

- (82) I deal with these topics in the following paragraphs of the paper:
- a. Selection and appointment of adjudicators – paragraphs #-#;
 - b. Compliance with the requirements of natural law - paragraphs #-#;
 - c. Costs – paragraphs #-#.

(83)

(c) The New Zealand decisions

(i) Introduction

- (84) Part 3 of the Act (ss 25-71) provides for the adjudication of disputes.
- (85) The term “dispute” is not defined in the Act, although 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.*

(ii) The selection and appointment of the adjudicator

- (86) 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.
- (87) The procedure for the selection and appointment of an adjudicator is prescribed in ss 33 and 35 of the Act.

- (88) 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.*

- (89) 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 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*”. I am glad to say that this is the only such instance of which I am aware.

- (90) 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*

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

- (91) The term “*natural justice*” normally includes both the duty to act independently and impartially and the duty of procedural fairness⁷⁷. 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.
- (92) 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* (High Court, Wellington, CIV 2007-485-332, 4/4/07, Simon France J)
In this case, 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.
 - b. *Taylor v LaHatte* (High Court, Auckland, CIV 2007-404-6843, 24/6/08, Stevens J)
In this case, in which the Court reviewed the law relating to judicial review in some detail, 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.

(iv) Costs in adjudications

- (93) 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).
- (94) 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

⁷⁷ 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. The paper has also been published, in a slightly different format, in (2008) 4 *Asian International Arbitration Journal* 1-63

default position is that the parties are each liable to contribute to the adjudicator's fees and expenses in equal proportions.

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

(96) 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.*

(97) 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.*

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

(99) In *Willis Trust Co Ltd v Green* (see paragraph ## 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.

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

(v) Enforcement of adjudicators' determinations: introduction

(101) 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.

- (102) In the case of ss 23-24 of the Act, the consequences (so far as is 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;*

- (103) 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.

- (104) 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:*

- (105) There is a special regime for the fast-track enforcement of an adjudicator's determination in ss 73-75 of the Act.

(v) Enforcement of adjudicators' determinations: the fast track procedure

- (106) 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)).

- (107) 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.*

- (108) In *Laywood v Holmes Construction (Wellington) Ltd* (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.

This decision is subject to appeal to the Court of Appeal⁷⁸.

- (109) In *Stellar Projects Ltd v Nick Gjaja Plumbing Ltd* (see paragraph 39 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) (for which see paragraph 57 above).

⁷⁸ See the further judgment of Asher J in the same matter dated 15/2/08 for the four points in respect of which leave to appeal was granted by the Judge. In *Page & Macrae Ltd v Real Cool Ltd* (High Court, Tauranga, CIV 2007-404-5774, 29/4/08, Heath J), where judgment had been entered in the High Court not the District Court, the Court noted the position regarding *Laywood* but declined to remove the High Court judgment to the District Court, on the grounds that the High Court is a court of unlimited jurisdiction and there had been no application to set aside the judgment nor appeal from it and it therefore was, and remained, valid.

(vi) Enforcement of adjudicators' determinations: proceedings for recovery of a debt: section 79

(110) 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.*

(111) 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 27(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).

(112) 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.

(113) The real, and as yet undecided, issue is whether the section applies where steps are taken under the Insolvency Act 2006 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.

(114) 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 creditor⁷⁹.

(115) 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.*

⁷⁹ 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).

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

(116) In chronological order, the cases which have considered whether s79 applies in personal or corporate insolvency proceedings 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 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 25(b) 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 subparagraph (a) above).⁸⁰

- (117) This is clearly an issue which requires to be decided by the Court of Appeal or even the Supreme Court.

(vii) Enforcement of adjudicators' determinations: proceedings for recovery of debt: costs

- (118) As noted in paragraphs # and # 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.

- (119) 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).⁸¹

(ix) Judicial review of adjudications

- (120) 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.

⁸⁰ This case has been followed, in the context of a consideration of s 104(1) of the Patents Act 1953, which includes the expression "*any action for the recovery of any fees, charges or disbursements*": *Blossom Wool Ltd v Piper* (High Court, Auckland, CIV 2008-404-161, 30/6/08, Abbott, AJ)

⁸¹ This decision was followed in *Suanui v Hi-Qual Builders Ltd* (High Court, Auckland, CIV 2008-404-1576, 26/6/08, Wylie J)

(121) Examples of such cases are *Willis Trust Co Ltd v Green* (see paragraph 36 above), *Horizon Investments Ltd v Parker Construction Management (NZ) Ltd* (see paragraph 42(a) above) and *Taylor v LaHatte* (see paragraph 42(b) above).

(122) 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].

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

(x) The prohibition of contracting out

(124) Section 12 of the Act provides:

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

(125) The effect of s 12 of the Act has been considered in three cases:

a. *Willis Trust Co Ltd v Green* (see paragraph # 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. *Construction Service Co (Wellington) Ltd (in receivership) v Wellington Waterfront Ltd* (see paragraph # 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 # 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.

(126) X

(127) X

(128)

(129)

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