

From the Courts – Recent Cases decided under the Construction Contracts Act 2002.

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Introduction – The Construction Contracts Act 2002

The Construction Contracts Act 2002 (CCA) was passed into legislation at about the same time as the Weathertight Homes Act 2002 (WHRS Act).

I do not think I would be speaking out of turn in saying that the Act has been much more successful than the WHRS Act. I can say this with real confidence in that the WHRS Act 2002 has just been superceded by a new Act, the Weathertight Homes Resolution Services Act 2006, whereas to this day, no amendments have been made to the CCA. It remains in the same form today as it was when it was passed into legislation.

It is beyond the scope of this presentation to delve into the reasons why this is so, but in giving it some only passing thought, I believe these factors may have contributed to its success:

- The CCA was very much developed by industry itself, the subcontractor interest groups had a large hand in drafting the provisions of it, so they were coming from a hands on practical perspective.
- The law drafters had a NSW model to base itself around
- It was around in Bill form for a considerable period of time, and it was not a reactionary piece of legislation such as the WHRS Act was, i.e. responding to a national crisis.

There were three key events that ensured the passage of the CCA. Firstly in 1987 the NZ Parliament repealed the Wages Protection and Contractors' Liens Act 1939. At the time of the third reading of the Appeal Bill, the then Minister of Justice, Rt. Hon. Geoffrey Palmer said at one point:-

There is no reason to assume that the building industry is incapable of looking after itself in the same way as its overseas counterparts.The position is hopeless. The law must go, and I commend the repeal of the Act to the House."

Accordingly, the legislation was repealed, and the protection previously afforded by way of contractors liens and charges over construction monies, was no longer available to the contractor. The position had been under the 1939 Act, that a right of payment was provided to any contractor, subcontractor, supplier of materials or workman by way of security given over money (called a "charge") or security given over the owner's interest in land or chattels (called a "lien").

The second key event was the collapse of Goodall ABL which went into liquidation owing unsecured creditors approximately \$20.4 million on or about 1 March 2000.

The third key event was the collapse of Hartner Construction on or about 1 February 2001. This was arguably the largest single construction company collapse in New Zealand's history. The Hartner liquidator's report, filed by the Official Assignee in late June 2002, indicated that \$30.235 million was owed to 1105 unsecured creditors. I had in fact commenced practising on my own account only one year previously. I remember sitting in my office with the liquidator's report in my hand, scanning through the list of creditors, and then simultaneously looking out to the partially completed Princess Wharf development, wondering how exactly such a major collapse could have come about.

However even prior to the CCA, one rather prominent English judge had attempted to ensure the prompt payment of progress claims, through judicial intervention. Quoting Lord Denning in the decision of Dawnay Ltd v FG Minter¹ he states:-

¹ [1971] 2 All ER 1349

“When the main contractor has received the sums due to the subcontractor – as contained in the architect’s certificate – the main contractor must pay those sums to the subcontractor. He cannot hold them up so as to satisfy his cross-claim. Those must be dealt with separately in appropriate proceedings for the purpose. This is in accord with the need of business. There must be a “cash flow” in the building trade. It is the very lifeblood of the enterprise. The sub-contractor has to spend money on steel, work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it. The main contractor is in a like position. He has to pay his men and buy his materials. He has to pay the subcontractor. He has to have cash from the employers, otherwise he will not be able to carry on. So, once the architect gives his certificates, they must pay the main contractor; the main contractor must pay the sub-contractor, and so forth. Cross-claims may be settled later”.

However this decision and Lord Denning’s judicial interventionism was somewhat criticized by Lord Diplock in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd². He makes the point that cash flow is not just the “life blood” of the construction industry, but rather it also is the lifeblood of most commercial enterprises. The green grocer is used as an example.

“Cashflow is the lifeblood of the village grocer too, though he may not need so large a transfusion from his customers as the shipbuilder in Mondel v Steel or the subcontractor in the instant appeal. It is also the lifeblood of the contractor whose own cash flow has been reduced by the expense to which he has been put by the sub-contractor’s breaches of contract.”

Robert Smellie in his article “Adjudication on construction contracts”³ Described the enactment of the CCA as being a vindication of Lord Denning’s view of the construction industry, albeit some thirty years later.

² [1973] ALL ER 195

³ NZ Law Journal, October 2002 at p379

So there we have it, the CCA now forms a starting point of all discussions by lawyers, when instructed by either a contractor that has not been paid, or a principal and/or Head Contractor who refuses to pay. It is now the bedrock of the construction industry and payment procedures.

OUTLINE OF THIS PRESENTATION.

Now I have provided the above introduction as a bit of a background to the legislation itself. The aim of this talk was to discuss some of the decided cases under the CCA. Fortunately for me, as is the case with recently passed legislation and I would describe the CCA as this, there have not been hundreds of decided cases.

This is another very good sign of the strength and clarity of this piece of legislation.

Using the cases that have been decided this far I want to cover the following issues:

1. Where summary judgment applications have been brought in the Courts, in what instances will the application be declined?
2. Can you claim in later payment claims, previous payment claims that have not been paid?
3. Does s79 allow prevent set off/counterclaims to be used to prevent summary judgment?
4. In the context of statutory demands/liquidation proceedings in the High Court, can a statutory demand be set aside where it is made on the basis of a non-responded to payment claim, or non-paid payment schedule? What is sufficient evidence to establish solvency.
5. On what basis can an Adjudicator's determination be reviewed?
6. Can interim relief be sought under the Judicature Amendment Act 1972 to prevent enforcement of an Adjudicator's determination?

1. Where summary judgment applications have been brought in the Courts using the CCA, in what instances will the application be declined?

The starting point for this discussion is the s23(2)(a) and s24(2)(a) of the CCA which states:-

“s23 Consequences of not paying claimed amount where no payment schedule provided

(2) 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; and ”

s24(2)(a) uses exactly the same terminology, however it relates to non-paid payment schedules. Effectively the amounts claimed in an unresponded to payment claim or non-paid payment schedule, become debts that are due and owing. They are appropriate amounts to claim using the summary judgment process in either the District Court for amounts sought up to \$200,000, and the summary judgment process in the High Court for amounts sought over and above \$200,000.

By way of background, the summary judgment process is a procedure whereby an Applicant seeks to have judgment entered by way of a short track process. No oral evidence is to be heard, a Judge decides whether judgment ought to be entered based upon the papers/evidence filed.

The Court must be convinced that there is not so much as an arguable defence to the Plaintiff's claim. If this threshold is reached by the Applicant, then summary judgment will be entered. As put by Judge Joyce in the decision of Solidcrete Technology Ltd v First Pacific Investments Ltd ⁴

“This is a summary judgment application. Such a judgment can only be got in the proven absence of room for material (and thus legitimate) contention of a kind requiring either a hearing in respect of a question or the full trial process to achieve resolution in time-honoured fashion.”

These provisions if the CCA more fully set out above, set up claims such as these perfectly for summary judgment applications in the courts.

⁴ [2005] DCR 769

In Asten Building Limited v Rae⁵ Asten supplied Rae with labour at agreed rates. He then brought a summary judgment application to recover \$22,000 plus interest and costs in terms of unpaid payment claims. There were a number of issues at stake however the first issue proved fatal to his claim. The first issue was whether in fact the contract of Asten Building was with Rae or another entity.

The Court held that in order to resolve this issue, oral evidence had to be adduced thus summary judgment was declined.

The first decision to allow summary judgment under the CCA was the decision of T U F Panel Construction Limited v RE Capon⁶ The Plaintiff had supplied concrete panels to the Defendant, and served payment claims in respect of these items. These payment claims were neither paid by Mr Capon nor did he serve a payment schedule in terms of the CCA. Accordingly summary judgment was applied for by the Plaintiff.

In response Mr Capon argued that:-

- The plaintiff had issued proceedings against the wrong defendant
- The correct defendant had a set-off/counterclaim that equaled or exceeded the amount of the plaintiff's claim;
- The plaintiff did not complete the contract works;
- The payment claims did not comply with the CCA;
- Summary judgment is inappropriate in the context of a building dispute.

The District Court Judge found against the Defendant on all of these grounds and entered summary judgment for the Plaintiff. In respect of the assertion by Mr Capon that summary judgment is inappropriate in the context of a building dispute he had the following to say:-

⁵ (Unreported, District Court, Waitakere, CIV 2005-090-00015 Taumaunu J, 30.05.05)

⁶ (Unreported, District Court North shore, CIV 2003-044-280 Wilson J)

“When a payment schedule is not forthcoming from the contractor/payee, the payee may proceed under the statute to claim the amount as debt due under s23(2)(a). Previous authority to the effect that summary judgment proceedings are inappropriate in the context of a construction dispute has been overtaken and can now be firmly put aside.”

Only one decision under the CCA has gone as far as the Court of Appeal. This is the decision of George Developments Limited v Canam Construction Limited.⁷ The facts of this case were as follows:

- George owned property in Parnell. It engaged Canam to demolish an existing building and construct apartments on site.
- Canam issued payment claims based upon clause 12 of NZS 3915:2000, Conditions of Contract for Building and Civil Engineering Construction.
- The subject matter of this proceeding was Payment Claim 15 (PC15) which was served on George on 3 June 2004.
- Clause 2.2.1 and 15.6.4 of the General Conditions of contract provided that George had 7 working days to assess payment, and notify Canam of any proposed amendments. Clause 12.2.4 provided that if George gave no amendments, then Canam was entitled to be paid the amount of its claim within 5 days. In accordance with s22(b)(i) of the Act and clause 12.2 of the general conditions, George was required to serve a payment schedule on Canam within 7 working days of being served with the payment claim (by 15 June 2004).
- PC 15 was seeking the sum of \$443,053.61 and it included the sum of \$158,591.76 which had been invoiced but was now the subject of an adjudication under the Act. The balance being sought was \$264,637.88, which was being sought on the basis that George had not served its payment schedule within the 7 day period.
- In the High Court contemporaneously, George made application for summary judgment in relation to an earlier payment claim PC12. A dispute arising out of PC12 had been referred to an adjudicator however George did not appear at the adjudication. The adjudicator determined that George’s payment schedule was

⁷ [2006] 1 NZLR 177

presented one day late and accordingly out of time to affect Canam’s entitlement. Canam filed proceedings in the District Court to enforce the adjudicator’s determination. These proceedings were opposed by George, but the opposition to those proceedings became the subject of the George summary judgment application.

- In short George sought a determination in the High Court via the summary judgment process that the principal’s representative was someone other than found by the Adjudicator and that therefore the Adjudicator’s ought to be reversed by the High Court and judgment entered in favour of George on this point.
- George’s application for summary judgment was quickly disposed of in the High Court. The Court held that this issue could not be determined at summary judgment level. Oral evidence was required and therefore summary judgment inappropriate. The Court went onto state at paragraph 89 that:-

“I have dealt with George’s summary judgment application on the basis, thus far, that on the analysis of the affidavit evidence there is insufficient proof of a claim that Mr Barton was the principal’s representative. I need not have gone that far because for other reasons I believe George’s summary judgment application is misconceived and inappropriate. My reasons are that in my judgment this Court does not have the jurisdiction to hear by way of summary judgment an application which in effect is designed to review the adjudicator’s determination at a time when that determination is subject to review before the District Court. But if I am wrong in that judgment then I am firmly of the view that George’s summary judgment application amounts to an abuse of process”. Canam Construction Limited v George Developments Limited.⁸

- The Court ordered costs above scale against George as it ruled that their application was an abuse of process.
- As regards the summary judgment application by Canam, the crucial issue for the High Court and the Court of Appeal to decide was whether PC15 was a valid payment claim. Both Courts had to consider whether the Payment Claim complied with s20 of the Construction Contracts Act 2002 in every respect.

⁸ (Unreported, High Court Auckland, CIV 2004-404-4770, Christiansen AJ)

- The High Court and then the Court of Appeal ruled that a Payment Claim could be cumulative and include prior claims, and agreed that this was in accordance with normal construction practice. The Court of Appeal did suggest that Canam could have made PC15 clearer by showing precisely what charges had been incurred during this calendar month, but it found that all s20 requirements were met.
- It also ruled that extension of time costs could be included in payment claims.
- It was decided that the PC15 was a valid payment claim under the Act and that no payment schedule was received in time such that the amount claimed of \$264,637.88 became a debt that was due and owing.
- The Court of Appeal made mention of Windeyer J's comment in an Australian decision dealing with the Australia version of the CCA, Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd⁹ It agreed that technical objections as to the form of a payment claim ought not to defeat a party's claim.

Accordingly this is Court of Appeal authority to the effect that a payment claim can include old payment claims in a cumulative effect.

In West City Construction Ltd v Edney & Anor.¹⁰ again the District Court and High Court were concerned as to whether summary judgment was appropriate as regards an unpaid and unresponded to payment claim. It was ruled in the District Court that the payment claim issued on 30 June 2004 by West City complied with the s20 of the Act. It was however ruled that proper service had not been effected by West City. It was served upon one party who did not necessarily have authority to accept service of payment claims. Accordingly because the District Court Judge ruled that there was no service, the failure to respond with a payment schedule in time was no longer in issue, because there was nothing that Edney had to respond to.

However, on appeal it was found that service had been effected by Justice Venning (see West City Construction v Edney¹¹). He ruled that in fact the payment claim had been

⁹ (2001) 163 FLR 18.

¹⁰ (Unreported District Court Auckland, CIV 2004-004-2477 Joyce J)

¹¹ (17 PRNZ 947)

served by simply leaving it at the usual place of business, and a location where Mr Hennah as the Property Manager of the Rockfield Trust, had agreed to meet him in order to present the claim. This was the respondent’s usual or last known place of business.

It was further ruled that the payment schedule was served out of time and did not comply with s21 in that it did not indicate a scheduled amount, or specify an amount. Venning J stated that for the purposes of s21 a mere formula is not enough to make it comply.

The decision of Construction Service Company (Wellington) Limited (In Receivership) v Wellington Waterfront Limited (In Receivership)¹² Specifically deals with the correlation between payment terms specifically agreed to by the parties when contracting, and the effect of the provisions of the CCA. The contractor sought summary judgment against the Developer for non-paid payment claims.

- The Court approached the summary judgment opposition and defence in a “robust and realistic” manner in accordance with the principles laid out in the decision of Bilbie Dymock Corporation v Patel¹³
- However, it ruled that it was reasonably arguable (which is enough to dispose o a summary judgment) that clause 14.2.3 of the contract specifically prescribed a deferment of monies being payable under the contract once the Developer took possession of the site. Clause 14.2.3 states:-
“In any such case (of the principal electing to resume possession of the site and expelling the contractor) the contractor shall not be entitled to any further payment until the completion of the contract works.”
- It also ruled that a provision in the contract that allowed the Developer to pay direct subcontractors, where there had been default in payment of them, also arguably changed the payment provisions such that the payment provisions set out in the CCA had been altered by agreement.

¹² (Unreported, High Court, Auckland, CIV – 2006-485-1117 Gendall J)

¹³ (1997) 1 PRNZ 84 (CA).

- Important in the Court’s decision was s14 of the Act which permits the parties to a construction contract “to agree between themselves on a mechanism for determining...the amount of each of those payments and the date when each of those (progress payments) becomes due”. It was arguable that the parties had done this in this instance, and this was enough for summary judgment to be avoided.

The decision of Martin Roofing Co Ltd v William John Thompson¹⁴ was another decision as to the summary judgment application and the CCA. This is a District Court decision where summary judgment was sought by the contractor.

- The Court ruled that the technical objections to the form of the payment claims was not to be entertained as had been set out in George Developments¹⁵
- The Act provides a mechanism for claims of diminution of price by way of filing a payment schedule, an option which was not taken by the Defendant.
- The Court ruled that the Defendant was not stripped of remedies for defective work, however that in the interim it needed to pay.
- The Court also held that the counterclaim could not be given effect to in order to defeat the claim, as it did not fit the criteria set out in s79.

The decision of Solidcrete Technology Ltd v First Pacific Investments Ltd¹⁶ concerned a contract to build a commercial building for First Pacific. Summary judgment was sought by the Plaintiff on the basis that a payment claim was served upon the Defendant, but that no payment schedule had been served upon the Plaintiff. Summary judgment was opposed on the basis that a payment schedule had been served upon the Plaintiff within the requisite period of time.

The District Court Judge had to consider whether in fact a payment schedule had been served, and complied with s21 of the CCA. He concluded that it did indicate the manner in which the payer calculated the scheduled amount. He ruled that it did explain the payer’s reason for withholding payment on any basis. He then went onto state:-

¹⁴ (Unreported, District Court, Hastings, CIV- 2005-070-495, Watson J)

¹⁵ Supra at 7.

¹⁶ [2005] DCR 769

“As has just been confirmed by the Court of Appeal in George Developments Limited v. Canam Construction Ltd., the key is the provision of sufficient information to make clear the manner in which the amount claimed has been calculated. If the response is an adequate response to the degree of particularity of the payment claim then the claimant should have no cause to complain. The inquiry is contextual.”

He also made the following statement as to summary judgment in general at paragraph 49:-

“This is a summary judgment application. Such a judgment can only be got in the proven absence of room for material (and thus legitimate) contention of a kind requiring either a hearing in respect of a question or the full trial process to achieve resolution in time-honoured fashion.”

It was held that summary judgment could not be entered, as it was not shown that the Payment Schedule did not comply with the CCA.

The final decision worthy of mention in this context is the District Court decision of O’Connor Holdings Ltd v Ace Builders Construction Ltd¹⁷ The facts of this case were that Ace was contracted to supply carpentry for building of an Oteha Valley School, under subcontract to Meridian Construction. In short Ace had contracted with O’Connor to provide manpower. There was in fact a written labour contract between Ace and O’Connor. The Plaintiff supplied men to Ace and payment claims were served upon Ace. The terms and conditions of contract required payment or a payment schedule to be furnished within 7 days.

It was argued for O’Connor that supply of labour and/or manpower, was not a construction contract for the purposes of the CCA. It was conceded that no payment schedule had been served upon Ace contesting the Payment Claim.

¹⁷ [2005] DCR 193.

It was also argued that O'Connor had a set off pursuant to s79 of the CCA. The Court ruled that this did amount to a construction contract, and that there was no applicable set off of a liquidated amount where judgment had been entered. Summary judgment was entered.

In conclusion it is clear that summary judgment will not be entered where:-

- Oral evidence is required to establish the claim;
- If the summary judgment application attempts to review an Adjudicator's determination, and where it ought to be reviewed in another Court;
- Where proper service of a payment claim has not been effected, as prescribed by s80 of the CCA;
- Where the contractual terms specifically prescribe a deferment of monies payable, once an Owner/Principal takes possession of site;
- Where the Respondent has an applicable set off of a liquidated amount and judgment has been entered, or where there is no dispute as to the claim for the set off amount, see s79 of the CCA;
- Where a payment schedule has been served within the requisite time, however it is not in accordance with the model form, but it provides sufficient information to make clear the manner in which the amount claimed has been calculated, and is in fact a response to the payment claim.

2. Can you claim in later payment claims previous payment claims that have not been paid?

This point was specifically argued in Canam Construction Ltd v George Developments Ltd in both High Court ¹⁸ and Court of Appeal ¹⁹. It was argued by George that PC 15 did not comply with the CCA in that it was cumulative. It included amounts of previously claimed payment claims, in particular PC12. It was argued by George that Canam could not claim for previous payment claims which had been responded to. It also argued that the work that this payment claim was seeking payment for, as regards PC12, this work had been completed outside the period specified in PC12. In the High Court the Judge held that this payment claim did comply and stated at paragraph 68:-

“There is nothing in the process which disqualifies a payment claim for rolling over sums unpaid on previous payment claims. In any event it is clear from PC-15 and other progress claims previously submitted that this process was not only identified but well understood by the parties. This process does not undermine the integrity of PC-15 nor disqualify it pursuant to the provisions of s20.”

In the Court of Appeal it was argued by Canam’s solicitors that George’s argument that the PC15 could not be cumulative ignored how claims were presented and valued in the construction industry. It was further argued by Canam that if George’s contentions were adopted, it would mean that a contractor would have to present an artificial claim for work done just in that particular month, without reference to work previously done for the overall completion. It would also mean that if an amount was overlooked in an earlier month, or a subcontractor’s claim was late, the contractor couldn’t claim it in the following month.

The Court of Appeal adopted Canam’s submissions on this point in ruling that in fact payment claims can include previous payment claims. At p186 paragraph 47 the Court states:-

“The inclusion of claims for work in prior periods appears to be common practice in the building industry: see Wallace at para 8 105. Although it would have been better practice to include a column identifying previously claimed amounts, its absence did not nullify PC-15’s effect as a claim for works registered. If such a factor could vitiate a payment claim it could frustrate the intent of the Act which was to secure “cash flow” in the industry.”

¹⁸ Supra at 8.

¹⁹ Supra at 7.

The principle then to glean from this decision is clear. The cumulative inclusion of previously claimed payment claims in a later claim is permissible, and will not render the payment claim invalid on the basis that it includes work carried out in an earlier time period. It would be good construction practice to separately identify the amounts claimed that relate to previous payment claims, in the actual payment claim document.

3. s79 of the CCA, does this allow setoff/counterclaims to be set up to prevent summary judgment?

s79 states:-

“79

Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand

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”

So it is clear that set off/counterclaim can not be used to prevent summary judgment unless there is either an actual judgment in favour of the party attempting to prevent summary judgment, or it is agreed by the parties that there is no dispute as to the claim for that amount.

s79 was considered in the decision of Top End Homes Ltd v Salem²⁰ The facts of this decision were as follows. The Plaintiff carried out building work on the Defendant’s property. A contract was entered into on 7 July 2004. The Defendant made payments totaling \$920,000. In early February 2005 the plaintiff delivered a payment claim under

²⁰ (Unreported, High Court, Whangarei, CIV – 2005-488-000332, Venning J)

the CCA seeking payment of \$279,000. No payment of this amount was made nor was a payment schedule sent within the timeframe specified. On 3 February 2005 the solicitors acting for the Plaintiff wrote to the Defendant enclosing the payment claim and asserting that it complied with the Act, had been served and the latest date to reply was on 7 March 2005.

On or about 24 March 2005 the first letter purporting to be a payment schedule on behalf of the Defendant pursuant to s21 was sent to the Plaintiff. This was sent well outside the timeframe specified for serving a payment schedule.

The Court was required to consider the application of s79. He stated that the precise wording of that section only allowed a party in the position of the Defendant to raise a set off in very limited circumstances. At paragraph 28 Venning J states:-

“The section prevents the Court from giving effect to any counterclaim, set-off or cross demand raised by the party in the position of the defendant in proceedings such as these. The only exception is that if there is a set-off of a liquidated amount in relation to which either judgment has been entered or there is not any dispute between the parties in relation to it. Neither of these circumstances apply in the present case.”

The Court then followed the Court of Appeal decision in George Developments Ltd v Canam Construction Limited.²¹ Venning J held that where a defence is a challenge to the quantum of the claim, the appropriate way for that to be challenged is by means of the payment schedule process. In this instance the Court ruled that summary judgment was appropriate.

s79 was also at the heart of debate in Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd.²² An adjudication had determined that Volcanic was liable to pay \$62,000 to Dempsey. Dempsey relying upon s290(4) of the Companies Act 1993 served a statutory demand upon Volcanic seeking the monies awarded at adjudication. This proceeding was

²¹ Supra at 7

²² 18 PRNZ 97

brought by Volcanic in an attempt to set aside the statutory demand. Volcanic relied upon the following grounds to support its application under s290:-

- Volcanic is solvent and able to pay its debts;
- There is substantial dispute as to whether the amount specified in the demand is due;
- Volcanic has a set off and/or cross demand against Dempsey & Wood which exceeds the amount specified in the demand;
- The demand is an abuse of process.

However the principal ground was the claimed existence of a set-off for losses said to have been incurred as a consequence of delay by Dempsey in carrying out the work. Dempsey relied upon s79 in opposing this ground.

Randerson J ruled that the recovery of a debt by the lawful process of the issue of a statutory demand and the bringing of winding up proceedings against a debtor company are “proceedings” contemplated by s79. At page 102 paragraph he states:-

“In my view the meaning of s79 is plain. In any proceedings for the recovery of a debt under the identified sections, the Court is forbidden from giving effect to any counterclaim, set-off or cross-demand raised by a party to the proceedings except a set-off of a liquidated amount and then, only if judgment has been entered for that amount or there is no dispute in fact between the parties in relation to the claim for that amount.”

The Court ruled that the set-off of Volcanic could not have effect because judgment had not been entered for the amount of claim, and there was no agreement between the parties as to the existence of a set off for that amount.

In summary then, the Court’s have shown a determination to enforce the strict words of s79, allowing only the two specified situations for a set-off and/or counterclaim to be set up as a defence to proceedings for a debt issued pursuant to the CCA. The Court have also ruled that a statutory demand pursuant to the Companies Act 1993 is a proceeding for the purposes of s79 of the CCA.

One final and interesting issue was raised and decided in Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd²³ The issue was described as “Does s290(4) Companies Act override s79 Construction Contracts Act?”. This issue came up because of s290(4)(b) of the Companies Act 1993 which says a Court may set aside a statutory demand if satisfied that the company appears to have a set-off which, when deducted from the amount of the demand, would result in a figure below the “prescribed amount” (currently \$1000). At p103 at paragraph 29 Randerson J stated:-

“In the present case, the amount of the set-off would exceed the amount of the statutory demand so the Court would have a discretion under s290(4)(b) to set aside the demand. In contrast, s79 Construction Contracts Act would preclude the Court giving effect to the set-off.”

Randerson J ruled that Parliament intended s79 to prevail. He gave three reasons for this:-

- The CCA is specific piece of legislation dealing with the recovery of special types of debt under a special type of contract. The later specific legislation ought to prevail over the earlier more general enactment.
- There is a clear statutory intention that payments due under construction contracts should be paid and disputes resolved quickly. It is intended that the recovery of debts found to be due following an adjudication or which become payable under ss23 and 24 of the Act, should be promptly recoverable with very limited opportunity for dispute.
- Volcanic is not prevented from pursuing the set-off in the District Court proceedings it has launched. s79 simply requires that the set-off may not be given effect to defeat recovery proceedings.

4. In the context of statutory demands/liquidation proceedings in the High Court, can a statutory demand be set aside where it is made on the basis of a non-

²³ Ibid, 20

responded to payment claim, or non-paid payment schedule? What is required to establish solvency?

By way of background, s289 of the Companies Act 1993 allows individuals owed money by companies to serve upon these companies a demand for the monies owed. It is a formal process and effectively commences the liquidation process. An unresponded to statutory demand provides to the Court and to the party making the demand, a presumption of insolvency which it can then act upon by commencing liquidation proceedings. It has long been a powerful debt collecting tool, and in the context of construction contracts, has now been given further “teeth” as a result of the CCA. Accordingly a number of decisions have now come through the Courts as to statutory demands made on the basis of non-responded to payment claims.

It should be set out that once a company has been served with a statutory demand the Companies Act 1993 leaves a company with 2 choices. Firstly to pay the amount claimed or enter into an arrangement such that the party claiming gets security for the monies it demands. This must be done within 15 working days. However the other option is for the Debtor company to make application to set aside the statutory demand. This step must be taken within 10 working days from service.

This was the step that was taken in Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd²⁴, the decision referred to above. This decision as stated earlier is clear authority for the proposition that simply asserting a set-off will not be enough to defeat a statutory demand because of operation of s79 of the CCA. In Volcanic it was also argued that it was a solvent company and therefore the statutory demand ought to be set aside on that basis. The Court entertained such an argument, however ruled that the evidence that had been adduced to establish the liquidity of Volcanic did not establish solvency. The evidence of solvency adduced by the company was an affidavit by the Managing Director of Volcanic in which it stated that the company had an equity of just over \$900,000 and that the company was solvent. At page 103 at paragraph 37 Randerson J stated:-

²⁴ Supra at 20

“I am not satisfied on the evidence presented that it has been established that the company is solvent in terms of the solvency test under s4 Companies Act. By virtue of s287, unless the contrary is proved, a company is presumed to be unable to pay its debts if it fails to comply with the statutory demand. That presumption has not been overcome on the basis of the evidence presented. Specifically, there is no evidence that Volcanic is able to pay its debts as they fall due.”

It was ordered by Randerson J in this instance that no grounds had been established to set aside the statutory demand, and that unless the amount demanded in the statutory demand was paid within 14 days, then Dempsey could apply to put Volcanic into liquidation.

Another decision dealing with precisely the same issue is the decision of 10 Gilmer Limited v Tracer Interiors and Construction Limited²⁵. This case was a Wellington High Court decision dealing with the relationship between the winding up provisions of the Companies Act 1993, and sections 19-24 and 79 of the CCA.

- The Plaintiff and Defendant were developer and contractor respectively. The Defendant had issued a statutory demand on the basis of 4 unresponded to payment claims. The sum sought via statutory demand was the sum of \$226,374.92, however it was agreed at trial that the sum of \$144,080.30 was claimed by the Defendant.
- The Plaintiff applied to have the statutory demand set aside on the basis that it was solvent and that the debt was disputed.
- The High Court Judge found that it was too late to dispute the claim, as that time was within the time period prescribed by the Act in terms of responding by way of payment schedule, s22.
- Accordingly the amount claimed in the payment claim became a debt due and owing pursuant to s23(2).

²⁵ (Unreported, High Court, Wellington, CIV – 2005-485-2009, Gendall J)

- As regards solvency, the Court left it open for a Plaintiff to have proved solvency, but ruled that in this instance it had failed to establish its solvency via the evidence filed.
- An order was made for the Plaintiff to pay the amount claimed otherwise the defendant was free to apply to liquidate the company.

This case demonstrates the power of the Act in the face of the usual dispute arguments that are raised when a defaulting company alleges dispute on receipt of a statutory demand. It again leaves open the debtor company being able to prove solvency but it is clear that good, solid financial evidence is necessary from a party. In this proceeding the Plaintiff provided the following financial information:-

- An affidavit from a company director stating that the company is able to pay its debt;
- A statement of assets and liabilities to show that a company has sufficient funds and assets to meet its commitments;
- Letters from financiers stating that all payments have been made in the normal manner.

The Court ruled that such evidence was insufficient to establish solvency. In particular he commented upon the fact that both on the profit and loss statement, and the balance sheet, there was no identification of whom had prepared them.

In the decision of Freemont Design & Construction Limited v Natures View Joinery Ltd t/a Nebulite Waikato²⁶ again an application was brought to set aside two statutory demands served on 22 February 2006. The first statutory demand was in respect of an amount ordered owing pursuant to an adjudication, payable to “Install for a View”. The second statutory demand related to a further amount ordered to be owing pursuant to an adjudication, this time payable to “Natures View”.

²⁶ (Unreported, High Court, Hamilton, CIV – 2006-419-269, Faire AJ)

The first inquiry that the Court had to make was whether in fact there existed a dispute as to the amounts owing in the statutory demands. In analysing this issue the Court considered s73 and s74 of the CCA. These sections cover the process of enforcing an adjudicator's determination, and opposing entry of an adjudication as a judgment. At paragraph 30 Associate Judge Faire concluded that:

“The above analysis, therefore, leads to one conclusion only. There is no basis, on the material placed before me, which would prevent the respondents in this case proceeding to the District Court to have Mr Moyle’s determination enforced as a judgment of the Court. That result leads to the inevitable conclusion that there can, in this case, be no substantial dispute whether or not the debts claimed in the statutory demands are owing or are due for the purposes of s290(4)(a) of the Companies Act 1993.”

The Court then had to consider whether in fact there existed a counterclaim, set off or cross demand. Before deciding on this point though Associate Judge Faire ruled that since all counterclaim items had been ruled upon at Adjudication, the parties are estopped from disputing or questioning that decision on the merits in any subsequent litigation.

That aside, the Judge ruled also that for the purposes of s79 of the CCA, this application to set aside statutory demand was a proceeding. Accordingly, unless Freemont could come within the very limited basis prescribed in that section for opposing proceedings issued pursuant to the CCA, then it would be unsuccessful in its application. The decision of Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd²⁷ was specifically upheld by the Court in this instance despite the challenge to it by Freemont.

Accordingly the Court ordered that the statutory demand ought not to be set aside, and that unless payment was made of the amounts demanded pursuant to the statutory demands within 14 days, then an application for liquidation could be brought by the Respondent.

Principles that can be taken from this series of cases are as follows:-

²⁷ Supra at 20

- To set aside a statutory demand made on the basis of non-compliance with payment provisions under the CCA, normal disputes as to whether monies are owed is not enough, non-compliance with the Act itself would need to be established, or a party would need to come within the limited criteria set out in s79.
- A Court will not entertain arguments of dispute in the statutory demand process where the Creditor company has already obtained a determination in its favour, this would amount to re arguing a case already decided.
- In order for a debtor company to successfully set aside a statutory demand, it can rely upon establishing solvency. The burden of proof is high.
- Paying into Court the amount demanded by way of statutory demand, may be a practical route for a Debtor party to establish solvency, without the need to rely upon detailed financial information being adduced.

5. On what basis can an Adjudicator’s determination be reviewed?

Can interim relief be sought under the Judicature Act 1908 to prevent enforcement of the determination?

s52 of the CCA states:-

“52

Owner who is not respondent may apply to District Court for review of adjudicator's determination

(1)

An owner who is not a respondent may apply to a District Court for a review of—

(a)

an adjudicator's determination that the owner is jointly and severally liable with the respondent to make a payment to the claimant; and

(b)

an adjudicator's approval for the issue of a charging order in respect of the construction site.

(2)

A District Court has the jurisdiction to hear and determine an application for review under this section despite any limits imposed on District Courts in their ordinary civil jurisdiction by sections 29 to 34 of the District Courts Act 1947.”

s60 of the CCA also clearly contemplates that an Adjudicator’s determination can be subject to judicial review.

John Ren in his article entitled “*Judicial Review of construction contract adjudicator’s*”²⁸ relying upon UK and NSW Court precedent makes the general proposition that it is only jurisdictional errors that provide a grounds for judicial review of Adjudicator’s determinations. He then sets out examples of jurisdictional errors that are open to review. They can be broadly summarized as the following:-

- Adjudication notice not valid or not validly served. This is why it is more important that the Adjudicator only decides upon issues covered in the initial notice. Extreme care must be exercised in drafting the Notice of Adjudication, and I would encourage practitioners to exercise the same precision as they might if they were drafting a statement of claim
- The Adjudicator is selected out of time. s33 of the CCA requires the Claimant to request the person chosen to act as Adjudicator as soon as practicable after the adjudication notice has been served. John Ren argues that even if there is no prejudice in the late appointment of the Adjudicator, it provides grounds for judicial review.
- A failure to serve a claim would not provide a basis for judicial review. s36 provides that a Claimant must within 5 working days of receiving the adjudicator’s notice accepting appointment, refer the dispute to the adjudicator. If this is not done, John Ren argues that the Adjudicator still has jurisdiction to make a ruling on the adjudication without the Claimant’s evidence and claim.
- Similarly, where a response is not served on time, the Adjudicator can make his determination without considering the response, and has jurisdiction to do so. A determination achieved in such fashion would not be open to judicial review.

²⁸ NZ Law Journal December 2005 at 461.

- Any breaches of natural justice and bias would open up a determination for judicial review.
- If a determination was not completed within either the 20 or 30 working days prescribed by the CCA, and no agreement was reached for a further extension, then the determination would be open to judicial review. However, John Ren argues that there are conditions on this. Where the Adjudicator is late with his decision, then one of the parties must have positively objected to the adjudication extending beyond that time. That objection must have been communicated prior to the determination being communicated to the parties.

While Mr Ren's article and reasoning is sound, he relies upon decided cases both in NSW and the United Kingdom. As it stands in New Zealand at the moment, we do not have a wealth of decisions on when it may be appropriate to judicially review an Adjudicator's decision. However what clearly is apparent, is that the CCA specifically contemplates review in the District Court where a determination is made effecting an owner that is not a Respondent to an adjudication. Secondly, s60 of the CCA seems also to contemplate judicial review of an Adjudicator's determination.

One of the few decided New Zealand decisions to consider the review of an Adjudicator's determination, is the decision of Wills Trust Company Ltd v Green.²⁹ This decision specifically dealt with the review of an Adjudicator's determination, and an application by the Developer to have enforcement of that determination stayed, until such time as the judicial review had been heard. In this decision:-

- The Contractor had successfully obtained a determination in its favour against Wills Trust Company using the adjudication procedure under the CCA. It was for a sum of money in excess of \$1m.

²⁹ (Unreported, High Court, Auckland, CIV – 2006-404-809, Harrison J)

- Wills issued proceedings in the High Court for judicial review of the Adjudicator’s determination, and also applied for interim orders pursuant to s8 of the Judicature Act 1908 preventing the Adjudicator’s determination being enforced.
- It was argued by Wills that if interim orders were not made, then the substantive application would be imperiled. In response it was argued that the overall justice of the case did not require it, and that if it was granted the whole land may be disposed of, and funds dissipated.
- The Court decided that some of Wills’ argument ought to proceed to a hearing, and thus made an order prohibiting Holmes from taking any steps to enforce the determination, but also imposed a condition to the effect that Wills pay to a stakeholder the sum of approximately \$1.65m.

This decision has been criticised in legal writings, in particular a recent article of Darise Ogden entitled *“To stay or not to stay: keeping the construction lifeblood flowing,”*³⁰ It appears that she and other legal authors believe that a stay as to an Adjudicator’s determination should only be allowed for where there is the real risk of insolvency of the party receiving the benefit of the determination. I note that the insolvency of the contractor was never raised in this decision, rather just the dissipation of assets.

Certainly the express wording of s60 of the CCA is clear. It provides:-

“60

Effect of review or other proceeding on adjudicator's determination under section 48(1)(a)

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.”

³⁰ NZ Lawyer (39) 5 May 2006: 12-13

Incidentally Wills eventually failed on its judicial review of the Adjudicator's determination.

It seems that the correct position may well have been not to grant the stay in this instance. However the same point came up again for consideration in the decision of Concrete Structures (NZ) Limited v Palmer³¹. The Second Defendant had obtained a determination in its favour from the First Defendant as Adjudicator. It applied for entry of the determination as a judgment pursuant to s73 of the Act. The Plaintiff applied for judicial review of the determination on the basis that there had been a breach of natural justice.

The Second Defendant relied upon s60 above saying that the Adjudicator's determination was binding, was in full force and effect notwithstanding the application for judicial review. It also said that the judicial review had no merit as it simply was a complaint that the Adjudicator had erred.

In fact the judicial review was based primarily on the procedure followed by the Adjudicator in receiving and considering information from the Second Defendant.

It was held by Courtney J:-

- There are limited rights to challenge an Adjudicator's determination;
- The CCA stops short of precluding judicial review of determinations;
- An adjudicator's determination can be enforced, and there are very limited grounds for opposing entry of judgment;
- s60 says that an adjudicator's determination remains binding even if judicial review is applied for;
- s60 does not preclude interim relief under the Judicature Amendment Act 1972.

³¹ (Unreported, High Court, Auckland, CIV – 2004-463-825, Courtney J)

- However for the Plaintiff to get interim relief it must show a real risk that if it pays the sum in the determination, then in the event it succeeds with judicial review, the Second Defendant would be unable to repay the amount.
- She held that the evidence tendered did not reach that threshold and thus the application was rejected.

Conclusion.

The CCA is in its infancy, but the cases decided thus far give a clear indication of how strongly the Courts will enforce its speedy payment processing mechanisms. The cases show that the Courts will not tolerate spurious defences brought well out of time, nor complicated legal arguments that allow matters already determined at Adjudication to be heard in the Courts again. The Courts have already shown their willingness to promote the clear aims of the CCA as is more fully set out in s3 below:-

“3

Purpose

The purpose of this Act is to reform the law relating to construction contracts and, in particular,—

(a)

to facilitate regular and timely payments between the parties to a construction contract; and

(b)

to provide for the speedy resolution of disputes arising under a construction contract; and

(c)

to provide remedies for the recovery of payments under a construction contract.”