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JUDGMENT OF HARRISON J : High Court. New Zealand. Auckland Registry. 25th May 2006.

Introduction

- [1] Willis Trust Co Ltd owned an apartment building on Willis Street, Wellington which was formerly the Dental School. Messrs Ian Laywood and Gary Rees are Willis' directors. They decided to redevelop the property into residential apartments to be known as Augusta Apartments.
- [2] Willis engaged Holmes to undertake the necessary demolition and reconstruction work. They entered into a contract at a price of \$8,066,450 plus GST. Messrs Laywood and Rees entered into a separate contract with Holmes to pay an additional \$250,881 for the same work.
- [3] In August 2005 Holmes submitted a final claim to Willis for payment of \$1,283,696 plus GST. Its claim was expressed to be made pursuant to the Construction Contracts Act 2002. Willis neither paid the claim nor, Holmes alleges, filed the requisite payment schedule in accordance with the statutory provisions. Holmes then invoked its right to adjudicate its claim against both Willis and Messrs Laywood and Rees. In February 2006 the adjudicator, the first defendant, Mr John Green, issued his determination in Holmes' favour. On 1 March 2006 I made interim orders subject to conditions.
- [4] Willis and Messrs Laywood and Rees have applied to this Court for judicial review of the adjudicator's decision alleging lack of jurisdiction and numerous errors of law. They seek orders setting aside the determination and associated relief. Mr Sherwyn Williams, Holmes' counsel, accepts that the Court has a limited power of review but denies that the adjudicator erred. The adjudicator has agreed to abide this decision.

Adjudication

- [5] The adjudicator's determination is comprehensive. I shall only refer to those facts from his summary which are material to Willis' application:
 - (1) The parties first contracted by an exchange of correspondence in September 2003 for Holmes to carry out what was described as Stage 1 of the Augusta Apartments Project to convert 37 apartments. The Stage 1 work involved partial demolition of the existing building, excavation, services, isolation and structural engineering. Holmes commenced work in November 2003;
 - (2) The parties entered into a formal written agreement on or about 26 March 2004 covering Stage 1 and the remainder of the work including construction of two additional levels to the building, additional annexes to the west side and courtyards. The contract documents included NZS3910. The stated price of \$8,066,450 plus GST was less than the true contract price. Holmes agreed to this course to assist Willis and Messrs Laywood and Rees with their funding arrangements. In consideration Messrs Laywood and Rees agreed personally with Holmes to pay the differential of \$250,881;
 - (3) The originally intended date for completion of the works was 16 November 2004 but the engineer did not certify practical completion until 9 June 2005. The contract works 'were not without their difficulties'. There were various delays. Holmes first claimed for a time extension in April 2004. Further extensions were claimed through until 23 August 2005;
 - (4) During the course of performance of the contract Holmes made and Willis paid progress claims on a monthly basis. Initially the engineer certified payment on most progress claims. As the work progressed, Holmes claimed almost 300 variations to the contract works. The engineer did not issue any variation price requests and only around 20 formal variation orders;
 - (5) Holmes gave notice on 28 February 2005 of its intention to suspend all work on 30 March 2005. It was dissatisfied with the engineer's treatment of its progress and variation claims. A meeting followed, resulting in

- Willis' agreement to pay Holmes \$654,114 less retentions and plus GST by 8 April 2005 in settlement of a particular progress claim;
- (6) The parties were unable to resolve other issues outstanding between them, although Willis made another payment of \$129,749 including GST to Holmes in May 2005. Holmes, as noted, made a final payment claim on 23 August 2005 for \$1,283,696 plus GST. On that date Holmes also applied for a further extension of 106 working days, additional to 40 days earlier granted, to 30 June 2005. The engineer did not determine this application until 22 November, granting an extension of 44 days;
- (7) The engineer sent a progress payment certificate to Holmes on 20 September in response to its final claim, certifying a nil balance owing of \$0.00. He wrote again to Holmes on 21 October advising that a final payment schedule was 'not able to be issued at this time'. Holmes filed its adjudication claim on 9 November. Counsel then submitted extensive memoranda of submissions.
- [6] The adjudicator identified six principal issues for determination, namely (1) whether he had jurisdiction to determine Holmes' claim; (2) whether Willis had provided a valid payment schedule in response to Holmes' payment claim; (3) if Willis did not provide a valid payment schedule, what amount is it liable to pay; (4) if Willis did provide a valid payment schedule, what part or parts of the claimed amount is it liable to pay; (5) to what extensions of time is Holmes entitled; and (6) whether Holmes is entitled to the release of Willis' performance bond.
- [7] The adjudicator dealt extensively with the threshold subject of jurisdiction, noting Willis' submission that Holmes claim was premature and that only \$102,977 from the final claim was in dispute. Willis contended that the other items claimed had not been determined by the engineer prior to Holmes commencing the adjudication process. Thus the adjudication should properly be confined only to those matters in dispute.
- [8] The adjudicator concluded:
42. In the present case, the answer would seem quite straightforward. All of the matters raised in the adjudication claim (with the exception of the release of the contractor's bond) were included in the subject payment claim, that claim was expressly rejected by the engineer when he issued his certificate indicating a nil amount payable in relation to Holmes' final claim on 20 September 2005, and no contrary advice or payment schedule indicating acceptance of any part of the claim was subsequently provided by [Willis or the trustee] in terms of the Act and in accordance with the procedures established under the agreement. Accordingly, by application of the principles established in the authorities referred to by [Holmes] ..., I am driven to conclude that those circumstances were, on an objective analysis, sufficient to establish that Holmes' claim was not admitted, that the claim was contested and a dispute had arisen, and thus I had the jurisdiction to make a determination in relation to all matters in that claim save for the issue raised in relation to the release of the contractor's bond.
- [9] The arbitrator found for Holmes on all other issues. In particular, Willis was liable for the full amount of Holmes' claim of \$1,283,696 plus GST for failing to pay on or before 21 October 2005 (paras 43-45); Willis could not claim a set-off for general damages for delay (para 46); Messrs Laywood and Rees were liable for an additional sum of \$250,881; and both were liable for interest at the contractual rate compounding monthly and for costs.

Statutory Framework

- [10] It is necessary at this stage to refer in some detail to the relevant provisions of the Construction Contracts Act (all future statutory references will be to it), which came into force on 1 April 2003. It was plainly remedial, for these express purposes (s 3): "... 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."
- [11] The definitions of 'dispute' as meaning 'a dispute or difference that arises under a construction contract' and 'a progress payment' as including 'any final payment under the contract' (s 5) are of relevance to this proceeding. The Act '... applies to every construction contract ... that relates to carrying out construction work in New Zealand' (s 9) (subject to two very limited and irrelevant exceptions (s 11)). It expressly prohibits contracting out (s 12); I shall return to this provision later.
- [12] The Act allows the parties to agree on express terms for progress payments (s 14) and also contains default provisions in the absence of express terms (ss 15-18). The procedure for making and responding to payment claims is strict (ss 19-24). The requirements for the timing and contents of a payment claim are express. It must be in writing; contain sufficient details to identify a contract, the construction work and the relevant period to which the payment relates; indicate the claimed amount and the due date for payment and the manner in which the payee calculated the claimed amount; and state that it is made under the Act (s 22).
- [13] The recipient is entitled to respond to a payment claim by providing the payee with a payment schedule (s 21(1)). Its right, not obligation, presumably allows for the circumstance of acceptance of the claim. The Act provides that (s 21):
(2) A payment schedule must--
(a) be in writing; and
(b) identify the payment claim to which it relates; and
(c) indicate a scheduled amount.

- (3) *If the scheduled amount is less than the claimed amount, the payment schedule must indicate--*
- (a) *the manner in which the payer calculated the scheduled amount; and*
 - (b) *the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and*
 - (c) *in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.*
- [14] The Act further provides (s 22) that:
A payer becomes liable to pay the claimed amount on the due date for the progress payment ... if--
- (a) *a payee serves a payment claim on a payer; and*
 - (b) *the payer does not provide a payment schedule to the payee within--*
 - (i) *the time required by the relevant construction contract; or*
 - (ii) *if the contract does not provide for the matter, 20 working days after the payment claim is served.*
- [15] The consequences of failing to pay a claimed amount where no payment schedule is provided are equally arbitrary. The payee may recover from the payer as a debt due in any Court the unpaid portion of the claimed amount together with the actual and reasonable costs of recovery; it may also serve notice of its intention to suspend any further construction work (s 23(2)).
- [16] The absolute effect of the no contracting out provision (s 12) is reinforced by Part 3. In particular (s 25):
- (1) *Any party to a construction contract--*
- (a) *has the right to refer a dispute to adjudication; and*
 - (b) *may exercise that right even though the dispute is the subject of proceedings between the same parties in a court or tribunal.*
- The only exception to this right is where the parties have agreed to refer disputes between them to an international arbitration covered by international protocols (s 25(3)).
- [17] The Act acknowledges that the parties to a construction contract are entitled to submit a dispute to arbitration whether or not the hearing of the reference takes place concurrently with an adjudication (s 26(1)). However (s 26):
- (2) *If a party to a construction contract submits a dispute [to arbitration] while the dispute is the subject of an adjudication, the submission to [arbitration] does not--*
- (a) *bring to an end the adjudication proceedings; or*
 - (b) *otherwise affect the adjudication.*
- (3) *However, an adjudicator must terminate the adjudication proceedings on a dispute if, before the adjudicator determines the dispute, that dispute is determined under another dispute resolution procedure.*
- (4) *Nothing in any other enactment or rule of law or any contract affects the application of this Part. Also, nothing in this part of the Act 'affects any civil proceedings arising under a construction contract' (s 27). 'Civil proceedings' include 'arbitral proceedings' (s 5). Furthermore, an adjudicator's determination is 'binding on the parties' and 'continues to be of full effect' even though one party has applied for judicial review or any other proceedings relating to the dispute have been commenced (s 60).*
- [18] The Act provides tight timeframes for selection and appointment of an adjudicator (ss 28-37). In particular, within five working days of the adjudicator's appointment, the claimant must refer the dispute in writing (s 36) and the respondent must serve a written response within five days after receiving the claim (s 37). The adjudicator is bound to act independently, impartially and in a timely manner and to comply with the interests of natural justice (s 41). He or she has wide powers for conducting the adjudication and requiring provision of written submissions and production of relevant documents (s 42). There are strict constraints on the matters which the adjudicator may consider (s 45). He or she must determine a dispute no later than 30 working days after receipt of the respondent's response (s 46).
- [19] An adjudicator's determination that money is to be paid is enforceable by a number of means. The party entitled to payment may recover the amount as a debt due in any Court (s 59), serve notice of intention to suspend the carrying out of construction work, and apply for the adjudicator's determination to be enforced by entry as a judgment in the District Court (s 73). The judgment may be enforced by execution in accordance with the District Courts Rules (s 77). In any proceedings for the recovery of a debt (s 79): "... the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a setoff 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.*

Judicial Review

- [20] The Construction Contracts Act was enacted following a series of high profile financial collapses in the construction industry in the 1980s and 1990s, causing substantial and widespread losses. I accept Mr Williams' informed explanation that the statute was designed to protect a contractor through a mechanism for ensuring the benefit of cashflow for work done on a project, thereby transferring financial risk to the developer. The scheme of the Act is to provide interim or provisional relief while the parties work through other, more formal, dispute resolution procedures. This is because, as Mr Williams observed, an adjudicator cannot be expected to come to grips with

the whole range of potential arguments, whether legal or factual, within the tight timeframes provided by the Act to achieve the objective of cashflow. The parties retain their rights to refer disputes to arbitration or litigation for final or binding determination.

- [21] Mr Williams accepted that an adjudicator is exercising a statutory power of decision when performing his or her functions under the Act. The adjudicator's decisions are thus subject to judicial review. However, by reference to English and Australian authorities he submitted that the High Court's power on review is strictly circumscribed. In summary, he said, the trend of authority is that errors of law, fact or procedure by an arbitrator in making a decision are insufficient to set aside the determination, for the reason that the procedure is designed to be prompt and efficient without finally determining a party's rights (*Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWHC 778, Jackson J at para 80); the only errors amenable to judicial review are those going to jurisdiction.
- [22] I question but do not need to decide whether Mr Williams' restrictive submission is correct. As noted, the adjudicator was exercising a statutory power of decision (s 3 Judicature Amendment Act 1972). The jurisdiction to interfere on review relates to the adjudicator's exercise of that power (s 4) and normally includes what is traditionally understood to constitute a question of law in the nature of statutory misconstruction (Joseph: Constitutional and Administrative Law (2nd Ed, 2001) at para 21.4.2).
- [23] Mr Williams' pragmatic submission that a right to interfere for pure error of law (that is, statutory misconstruction) would place this Court in an appellate position, slowing down and frustrating the whole purpose of the Act, may be inconsistent with its express recognition of the right to review without effecting the adjudication process (s 60). There may be an issue of whether or not a decision is amenable to review for error of law by reference to particular or general factors (see *Peters v Davison* [1999] 2 NZLR 164 (CA) at 184-185). In the absence of developed arguments from counsel I intend to proceed on the assumption, without deciding the point, that this Court has a right to review for error of law.

Decision

(1) Estoppel

- [24] Willis' second cause of action raises affirmative and alternative claims of estoppel and waiver against Holmes but its counsel, Mr David Carden, accorded it primacy in argument. He relied principally on two documents. One was Holmes' letter dated 23 August 2005 enclosing its final payment claim. It is necessary to recite its terms in full:

"We are pleased to enclose our final account for the above project. As required by section 12.4 of the General Conditions of Contract this account has been endorsed as being our final payment claim. For the avoidance of doubt this letter forms part of our final payment claim..."

The agreement signed on 6 April 2005, following our meeting at Kensington Swan that day, provided for us to meet in Auckland within a week to endeavour to resolve as many as possible of the outstanding issues between us as to variations, extensions of time and general damages for delay. We did meet, but most issues remain unresolved. The agreement went on to provide that any matters not so resolved would be referred to arbitration, on the terms so set out.

Our final payment claim sets out the outstanding issues as far as we are concerned. You will note that we have recorded the approval status of each item, based on the information presently available to us from our meeting, the Engineer's payment schedules, and contract correspondence. We are hopeful that you will be prepared to agree to and pay many of our claims. Any which are not paid by the due date for payment shown in our final payment claim we will regard as still in dispute. These will be referred to Mr Dean as arbitrator in terms of our agreement.

This is not intended to relieve either the Engineer or Willis from their respective obligations under the contract in relation to the final account and our final payment claim."

- [25] The second document was the agreement to which Holmes' letter referred. It was signed by the parties on 6 April 2005 and materially provided: *"The parties agree that they will meet in Auckland within one week of the date of this agreement to endeavour to resolve as many as possible of the outstanding issues between them as to variations, extensions of time and general damages for delay. Any matters not so resolved will be referred to arbitration in accordance with clause 13.4 of the General Conditions, the arbitration to be on the following basis..."*

- [26] Willis did not reply to Holmes' letter. The only written communication was from the engineer who wrote on 20 September as follows:

"Please find enclosed Progress Payment Certificate no. 21 on the above Contract dated 20 September 2005 in the amount of \$00. This certificate has been issued to comply with the requirements of the Construction Contracts Act after receipt of legal advice on the matter.

Your Final Payment Claim is being reviewed and processed in accordance with clauses 12.4, 12.5 and 12.6 of the general conditions of contract NZS3910.

In accordance with clause 12.5.4 of the Contract I advise that a Final Payment Schedule is not able to be issued at this time. The contract of variation claims and extension of time claims made in the Final Account and Final Payment Claim are currently under review by the client's advisors and no payments or decisions in respect of that claim are able to be made at this time.

To assist in this process the client has engaged the services of additional consultants (consultant programmer and quantity surveyor) to support the existing consultants. This has been done to ensure that a thorough and comprehensive review of your submission is completed. This process is ongoing.

Although the Contract does not identify any ultimate time for the review of your claim to be completed and allows for a reasonable time, it is intended at this stage to try and have the full review and decisions made some time in November. This will be dependent on any ongoing negotiations that are required and any supporting information that is requested to allow the review to be completed."

- [27] Mr Carden submitted that Holmes' 23 August letter amounted to either its waiver of or election not to rely upon its statutory right to require a payment schedule (ss 20-22) or an agreement that its statutory rights would be superseded by the arbitration process. He submitted that Willis acted to its detriment accordingly; instead of focusing on its statutory obligation to provide a payment schedule it prepared in greater detail for the arbitration process. He noted that Holmes' claim contained extensive schedules and appendices, including a consultant's report of 48 pages in support of each item within the claim.
- [28] Mr Carden submitted that Willis has satisfied the requisite criteria for an estoppel in that (1) on both 6 April 2005 and 23 August 2005 Holmes made clear and unambiguous representations or promises that it would agree to submit any disputes between the parties to arbitration, rather than adjudication under the Act; (2) Willis relied on those representations or promises to its detriment so that it would be inequitable to allow Holmes to go back on its word; and (3) any relief granted must be what is necessary to remove the inequity and only so far as is necessary to avoid the detriment (Burrows Finn & Todd: The Law of Contract in New Zealand, 2nd Ed., pp140-145).
- [29] Mr Carden submitted that Holmes is consequently estopped from denying that (1) it is not entitled to or has no requirement for a payment schedule in response to its final payment claim; (2) it does not have any legal entitlement to have its adjudication claim based on the final payment claim determined by an adjudication under the Construction Contracts Act; and (3) it has no right of enforcement of any determination that may come from such an adjudication claim including this determination.

(a) Contracting Out

- [30] In my judgment Willis' pleas of estoppel or waiver must fail on a number of alternative grounds. First, I agree with Mr Williams that the provisions of the Act applied to Holmes' final claim notwithstanding the parties' 6 April agreement to refer disputes to arbitration and Holmes' offer to the same effect in its 23 August letter. The statutory prohibition on contracting out is unambiguous (s 12):
- "No contracting out of Act**
This Act has effect despite any provision to the contrary in any agreement or contract."
- [31] This section is reinforced by subsequent provisions governing the relationship between adjudicative and other dispute resolution procedures. The Act allows the processes to run concurrently, even though they deal with the same dispute. But, unless the dispute is earlier decided by the arbitral process, the adjudication takes precedence (s 26), although when making an award the arbitrator must take into account any moneys paid in accordance with an adjudicator's determination.
- [32] Nevertheless, Mr Carden submitted that the events giving rise to the estoppel or waiver arguments against Holmes did not amount to a contracting out. However, his submission is predicated squarely upon the existence of the 6 April agreement and the terms of Holmes' 23 August letter. The agreement was to meet for the purpose of resolving issues then outstanding between the parties, and to refer any unresolved issues to arbitration in accordance with clause 13.4 of the contract. The right to refer a dispute to arbitration arises expressly if either of the parties is dissatisfied with a decision by the engineer under clause 13.2.4 or if the engineer does not give a decision within the prescribed period.
- [33] The 6 April agreement extended the existing contractual right to refer to any unresolved issues following the parties' meeting. It did not, of course, oblige the parties to refer Holmes' final claim, which would not be issued for some months in the future, to arbitration. Holmes' 23 August letter proposed to take that step if Willis did not pay any or all of its final claim.
- [34] If Mr Carden is correct that the two documents amount to an agreement to refer Holmes final claim to arbitration, thereby estopping it from enforcing its statutory rights to claim payment, the agreement can only amount to a contractual provision to oust the statute's application. It would neither have relieved Willis from its statutory obligation to provide a payment schedule within the prescribed time nor barred Holmes from submitting its claim to adjudication. Mr Carden's argument, however expressed, relies upon an unanswered offer to refer a dispute for arbitral determination in accordance with an existing agreement. S12 subordinates the effect of an arbitration provision where a claim is made under the Act. As a result, the statute prevails notwithstanding an agreement to arbitrate.

(b) No Representation or Promise

- [35] Second, I am not satisfied that Holmes' 23 August letter constituted an unequivocal representation or promise that it did not require Willis to comply with its statutory obligation to provide a payment schedule.
- [36] Holmes' letter itself formed part of its final payment claim. It recited the 6 April 2005 agreement and subsequent events. It explained the final claim as representing the outstanding issues from Holmes' perspective, and

expressed the hope that Willis would be prepared to agree to and pay its claims. However, any "not paid by the due date for payment [shown the] claim" would be regarded as still in dispute; they would be referred to the arbitrator "in terms of [the] agreement". The letter concluded with Holmes' confirmation that the letter would not relieve either the engineer or Willis "... from their respective obligations under the contract in relation to the final account and our final payment claim".

- [37] The contract provided that, where the contractor intended the final payment claim to be a payment claim under the Act, it shall make a statement to that effect (12.4.1(e)). In compliance with this obligation Holmes' final payment claim, also dated 23 August, stated: "This is a Payment Claim under the Construction Contracts Act 2002". It required payment within 10 working days after provision of the engineer's provisional payment schedule (12.5.5), pending the issue of a final certificate (12.5.8). It specified that Holmes had no outstanding claim against Willis except as contained therein and except for any item which had been referred to arbitration.
- [38] In my judgment the letter and claim when read together extinguish any scope for arguing that Holmes' correspondence amounted to an estopping representation or statement. The letter reserved Holmes' rights by stating that its arbitration proposal was not to relieve Willis and the engineer from their obligations under the contract relating to the final payment claim. The contract required Holmes to state that the claim was made under the Act, thereby expressly incorporating the relevant statutory provisions. Holmes complied. Accordingly, upon receipt of the notice on or about 24 August, time began to run for Willis to comply with the strict time provisions for providing a payment schedule.

(c) No Detriment

- [39] Third, there is no evidence that Willis acted to its detriment in reliance upon Holmes' letter. In support Mr Carden referred to Mr Laywood's statement that: *"At that stage I expected that what would happen is that we would process the claim and take the appropriate time needed to do that comprehensively and then any outstanding issues would be referred to Mr Dean to resolve by arbitration. Had we known that Holmes expected to proceed with formal adjudication and to enforce rights under the Construction Contracts Act, we would have taken other steps. These would have included the issue of Willis' own notice of adjudication for its general damages claim (which at that stage was yet to be quantified but which I knew would be substantial). Willis would have considered its rights to call on the performance bond, and it would have commenced the arbitration process so that it could come to the prompt conclusion that the agreement called for."* [My emphasis]
- [40] However, for the reasons just given, Holmes' claim gave unequivocal notice of its intention to enforce its statutory rights. Furthermore, Willis failed to respond to Holmes' proposal to refer any disputed claims to arbitration. There was no answer to the contractor's letter until the engineer certified on 20 September that nothing was owing. It is appropriate to treat that document as Willis' response through its agent. The certificate contained this notation: *"This Payment Certificate is to be considered a Payment Schedule issued under ss 21 and 22 Construction Contracts Act. Final Payment Claim currently being reviewed under clause 12 of NZS3910 and no payment value has been determined at this time as part of that process."*
- [41] With respect, the engineer's statement was a nonsense. It attempted to clothe the certificate with an artificial legal status. I reject Mr Carden's submission that the document complied with Willis' statutory requirements (s 21(3)). It was meaningless. It apparently treated the sum of \$0.00 as Willis' 'scheduled amount' (s 21(2)(c)) that is the amount of the progress payment specified in the schedule that Willis proposes to pay to Holmes in response to the payment claim (s 19). But there is nothing on its face to relate this figure to Willis' claim for \$1,283,696. The calculations make no sense, being the net sum due after claiming a final account value of \$9,989,392 less payments received to date of \$8,705,696.
- [42] The certificate fails to indicate the manner in which Willis calculated the scheduled amount and its reasons for assessing a difference between the scheduled amount and the claimed amount (s 21(3)(a) and (b)). The document did not even acknowledge Holmes' claim or attempt to answer it. It did nothing to inform or appraise Holmes of the issues, or identify the nature or parameters of areas of difference. It simply did not engage the contractor's claim.
- [43] The real significance of the engineer's reference to ss 21 and 22 is its acknowledgement that Willis was then treating Holmes' claim as made within the statutory framework, and that was purporting to respond accordingly.
- [44] Mr Laywood says that Willis would have taken other steps if it had known of Holmes' intention to proceed with formal adjudication and enforcement of its statutory rights. He identified inclusion of Willis' own notice of adjudication for its general damages claim, consideration of its rights to call on the performance bond, and commencement of the arbitration process.
- [45] To deal with those points in reverse order, Willis took no steps to secure a reference to arbitration on disputed issues despite Holmes' proposal; it has still to take any steps in that respect. Willis was entitled to exercise its rights at any time to call on Holmes' performance bond; it took that step, in fact, in the adjudication proceeding. Willis could have referred its claim for general damages for adjudication if and whenever it wished, regardless of Holmes' letter or its subsequent reference to adjudication.
- [46] In this respect I note that Willis did not quantify its claim for general damages of \$1,020,469 for the contractor's delay in completion of the works until its recital in the engineer's further certificate issued on 22 November 2005. That document also purported to be a payment schedule (ss 21 and 22) in response to Holmes' final payment

claim made on 23 August, to set off a net sum of \$1,000,724 against Willis' final liability to Holmes. Again, apart from being months out of time, the certificate is not what it purports to be in law.

(d) Inequity

[47] Fourth and finally, I reject Mr Carden's submission that it would be inequitable to deny Willis declaratory relief effectively setting aside the determination. Mr Carden submitted that the adjudicator failed to deal with the issue of estoppel at all. With respect, this is hardly surprising, given that Willis itself failed to raise the issue before the adjudicator or, perhaps more importantly, to seek injunctive relief restraining him from taking any steps to determine Holmes' claim. Assuming it had a right to argue estoppel or waiver which might be sufficient to oust the adjudicator's jurisdiction, Willis sat on its legal rights and did not raise the issue until it applied to this Court for interim orders seeking to restrain Holmes from executing its judgment.

[48] Accordingly, I dismiss Willis' second or alternative cause of action seeking declaratory relief based upon arguments of estoppel or waiver.

(2) Error of Law

[49] Willis' first cause of action, but secondary in terms of Mr Carden's substantive argument, is that the adjudicator's determination was wrong as a result of four errors of law. I shall deal with each separately.

(a) Dispute

[50] First, Mr Carden submitted the adjudicator erred in finding that there was a dispute between the parties which could properly be the subject of an adjudication under the Act when at the times of Willis' payment certificate dated 20 September 2005 (issued through the engineer), notice of adjudication dated 28 October 2005 or adjudication claim dated 9 November 2005, the engineer had not issued either a defects liability certificate or the provisional final payment schedule (clause 12.5.1). He said the engineer had issued a statement of reasons for his inability to issue or otherwise deal with a final payment schedule. The payment claim had not been processed in terms of the contract so as to lead to a dispute between Holmes and Willis.

[51] Mr Carden raised this argument to establish an error of law; Mr Williams submitted, as I have earlier noted, that an error of this nature was not amenable to judicial review. On analysis, the argument is properly one of jurisdiction. The adjudicator had no power to determine Holmes' claim if there was no dispute. I shall proceed on that basis (ss 28(1) and 38(1)).

[52] The Act, rather unhelpfully, defines a dispute as "a dispute or difference that arises under a construction contract" (s 5). In the construction context, though, it normally arises where one party makes a claim for payment and the other fails to accept liability or refuses to make payment within the requisite period, with or without reasons. Each party holds an opposing viewpoint which continues unless and until resolution. Whether or not a dispute exists is of an intensely factual nature.

[53] Mr Carden repeated before me a submission he made to the adjudicator. He said that only \$102,977 of the final payment claim was in dispute. The engineer had not determined the other items claimed prior to commencement of the adjudication. He relied upon the fact that the engineer had been reviewing the various items claimed by Holmes since issuing his certificate on 20 September 2005. A dispute would only arise once the engineer ruled on the claim and Willis rejected it in clear language.

[54] With respect, I disagree. Mr Williams did not rely on this point but it seems that Holmes was entitled to judgment for the amount of its final claim before and without invoking the adjudication process. I construe the relevant provisions as entitling Holmes to apply directly to the High Court for summary judgment (ss 22- 24). All the contractor had to establish was that Willis had failed, first, to provide a payment schedule within the statutory period (s 23(1)) and, second, to pay the whole or any part of the claim on or before due date (s 23(4)). On my assessment, that date would have expired on or about 21 October at the latest. Satisfaction of this evidential threshold would have been simple and uncomplicated. Proof of the existence of a dispute was unnecessary to establish liability.

[55] However, Holmes elected to follow the path of adjudication, and establish the jurisdictional precondition of a dispute. Mr Laywood's evidence proves its existence beyond doubt. In the passage I have earlier recited he said that one of the steps Willis would have taken in response to Holmes' final claim on 23 August was to issue its own counterclaim amounting to \$1,020,469. The engineer's letter to Holmes on 22 November 2005 records that Willis had instructed him "to deduct the sum of \$1,020,469 from [the certified sum]". It constituted a counterclaim for Holmes' delay in completing the works.

[56] Plainly, on Mr Laywood's own admission, Willis did not intend to pay Holmes' final claim from the date of receipt. On 20 September the engineer wrote to advise that the contractor's claim was under review; that is, it was not then accepted. Mr Laywood confirms Willis' intention throughout to set off whatever sum was certified by the engineer against its own counterclaim for general damages. This state of affairs is unequivocal evidence that liability for the final payment was in dispute. Willis never intended to pay. The point is beyond argument.

[57] Mr Carden attempted to justify his submission by detailed reference to the engineer's obligations under the contract. However, I repeat that the statute is unequivocal in according absolute precedence to its own terms; it has "effect despite any provision to the contrary in any agreement or contract". The time given to an engineer to issue a defects liability certificate or provisional final payment schedule is irrelevant.

(b) Engineer's Payment Schedule

[58] Second, Mr Carden submitted that the determination was wrong in finding that the engineer's 20 September letter and/or the progress payment certificate accompanying it was not a payment schedule (ss 21 and 22). I have already dealt with this issue in the context of Willis' estoppel claim.

(c) Expiry Date

[59] Third, Mr Carden submitted that the adjudicator erred in finding that the time for Willis' provision of a payment schedule to Holmes under the statute as required by the contract had expired. He submitted that, on a proper interpretation of the contract, the engineer was only required to issue, first, a provisional final payment schedule "as soon as reasonably practicable" and, second, a final payment schedule more than one month after receipt of the final payment claim if statements of reasons and further explanatory statements were issued. Accordingly, the time for the payment schedule as provided in the contract had not elapsed either when Holmes gave notice of adjudication on 28 October 2005 or an adjudication claim on 9 November 2005.

[60] The adjudicator's findings on this issue are as follows:

36. Under [s 22], a payer becomes liable to pay the claimed amount on the due date for any payment claim if the payer does not provide a payment schedule to the payee within the time required by the contract, or, if the contract does not provide for the matter, 20 working days after the payment claim is served.

37. In the present case, clause 12.5 of the general conditions did provide for a specific time by which a payment schedule was to be provided by Willis Trust following a final claim by Holmes, and moreover, clause 12.5.4 provided a specific mechanism to apply in the particular circumstances of Holmes' final claim.

38. Under clause 12.5.4 ... the engineer was required to issue a 'provisional payment schedule' within one month of receipt of the final payment claim if he was not able to issue a Final Payment Schedule. In that stated circumstance, the further processes under clause 12.2.1 and 12.2.7 apply. Clearly if no time limit was placed on the obligation of Willis Trust to provide a payment schedule, payment in relation to the final claim could be delayed indefinitely, the mechanism for determining the date when the payment became due would be deemed inadequate and the default provisions of s 22(b)(ii) would apply. In short, unjustified and unconscionable delay on the part of a principal in reviewing and approving final claims is a thing of the past as the purpose of the Act would be emasculated by any contractual provision that sought to delay a contractor's entitlement to timely payments and speedy resolution of disputes arising under a construction contract.

[61] Mr Carden developed a detailed argument to support this proposition. However, I mean no disrespect to him in observing that the point is purely one of contractual interpretation. Mr Williams conceded that the contract provided a time by which Willis was to provide a payment schedule to Holmes; the engineer was bound to issue a provisional final payment schedule to Willis with a duplicate to Holmes '... as soon as practicable after receipt of ...' Willis' final payment claim and the issue of a defects liability certificate (clause 12.5.1). In the event that provision of this schedule was delayed by more than one month after the engineer's receipt, he was bound immediately to issue a statement or statements of his reasons why it could not be issued or otherwise dealt with in accordance with the contract. When making this explanatory statement, the engineer was obliged to issue a provisional progress payment schedule to Willis for all amounts due under the contract which can reasonably be certified then (clause 12.5.4).

[62] As noted, Holmes served its final payment claim on 23 August 2005. The engineer did not issue a final payment schedule within the next month. Accordingly, he was bound to issue a provisional progress payment schedule immediately. Again he defaulted. Neither the engineer nor Willis took any steps thereafter. Mr Williams submitted that, on a liberal construction, the final date for submission of a schedule expired on 7 October.

[63] Mr Carden went to careful lengths to justify the engineer's explanation of the reasons for his delay in issuing a final payment schedule in the terms set out in his 20 September letter. However, with respect, that is all beside the point. Once that one month delay occurred, the engineer was bound to issue a provisional progress payment schedule. That was his certificate issued on the same date which purported to comply with ss 21 and 22. It is, as I have said, unequivocal evidence of the engineer's recognition that the provisional progress payment schedule prepared on Willis' behalf had to comply with the statutory requirements. The status which he attributed to the document, whether provisional or final, was irrelevant. It had to satisfy the statutory provisions (s 21(2) and (3)). I have already held that it did not.

[64] Mr Carden submitted that the adjudicator confused requirements for progress and final payment claims. With respect, he did not. I repeat yet again that the Act applies; it expressly defines a progress payment as including a final payment under the contract. Mr Carden criticised the practice of contractors using the adjudication process to claim final payments. However, this practice is both legally correct and completely in accord with the purpose and spirit of the Act.

[65] Mr Carden is correct that by the time a final payment is claimed the contract has reached practical completion and final issues of liability remain to be determined, including as in this case extensions of time and counterclaims for damages for delay. However, the statute entitles the contractor to prompt settlement of its final payment claim in these circumstances. Other issues are to be determined in accordance with the agreed mechanisms for dispute resolution, either by mediation or arbitration. This regime is consistent with the statutory regime of interim measures designed to secure prompt payment and transfer financial risk from the contractor to the principal. Parliament would not have been unfamiliar with the practice favoured by some developers of using threats of set

offs or counterclaims, whether justified or not, to keep contractors indefinitely out of their money or to force them into accepting final payments in amounts substantially less than their contractual entitlements.

- [66] Mr Carden also complained about the unfairness of the payment claims procedure. He submitted that a contractor 'can take as long as it wishes to prepare a claim' under s 20. That is, with respect, incorrect. This contract obliged Holmes to submit a final account of all claims in relation to the contract to the engineer within two months after expiry of the period of defects liability or such further time as the engineer may reasonably allow (clause 12.4.1).
- [67] Mr Carden also relied upon the engineer's failure to issue a defects liability certificate; consequently, he said, one of the pre-conditions for commencement of time to run for Willis' provision of a final payment certificate had not occurred. With respect, this submission misconstrues the contract. The issue or otherwise of a defects liability certificate is irrelevant to statutory liability. Holmes was entitled to submit its final payment claim 'not later than two months after the expiry of the period of defects liability (clause 12.4.1)'. That period commenced on the date of practical completion, which the engineer certified for 9 June 2005, and expired three months later, on 9 September 2005. Holmes' right to submit its final account expired two months later, on 9 November 2005, but it was entitled to take that step earlier if it wished.
- [68] The issue of a defects liability certificate was relevant to the separate question of the engineer's obligation to issue a payment schedule (clause 12.5.1). The engineer was bound to issue a defects liability certificate on 9 September 2005 (clause 11.1.1 and 11.3.1(a)), providing Holmes had remedied any minor omissions or defects (clause 11.3.1(b)). Willis did not allege any failure to remedy minor omissions. Accordingly, Holmes was entitled as of right to a defects liability certificate on 9 September 2005. Willis cannot set up the engineer's default in complying with a mandatory duty as a basis for arguing that he was excused from his liability to issue a final payment schedule.
- [69] In any event, the issue or non issue of a certificate is irrelevant. What is relevant is the issue of the final schedule; if it was delayed for more than a month after receipt (irrespective of whether or not a certificate has been issued), the engineer had to issue his provisional payment schedule (clause 12.5.4). I repeat that he has failed to do so.

(d) Costs

- [70] Fourth, Mr Carden submitted that the adjudicator erred in making an order for costs. I can deal with this submission shortly. Holmes' legal and other professional fees incurred in the proceeding amounted to \$171,053.66 (inclusive of GST). The adjudicator ordered Willis to pay \$96,000 and Messrs Laywood and Rees jointly to pay \$24,000, a total of \$120,000.
- [71] Holmes claimed a substantial contribution towards its actual costs and expenses on the ground that it had incurred them to an unnecessary level because of Willis' conduct of its defence (para 66). The adjudicator recited his statutory power to determine and fix costs if he was satisfied that Willis had caused them '... to be incurred unnecessarily by ... allegations or objections ... that are without substantial merit' (s 56(1)(b)). He was aware that he had a limited jurisdiction to award costs which he should exercise judicially and not capriciously (paras 68-69). He was satisfied that Willis' allegations or objections were without substantial merit. He awarded costs accordingly (paras 70-73).
- [72] Mr Carden submitted that there was no evidence to support the adjudicator's finding. However, I am satisfied that there was an ample evidential basis for it. This view is confirmed by my own conclusions on the arguments advanced by Willis in support of this application for review.

(3) Personal Liability

- [73] Mr Carden submitted that the adjudicator had no jurisdiction to determine Holmes' claim against Messrs Laywood and Rees on the grounds that: the agreement between Holmes on the one hand and Messrs Laywood and Rees on the other dated 9 September 2004 is not a construction contract; that Holmes' final payment claim was not directed to Messrs Laywood and Rees; that the engineer's letter and accompanying progress payment certificate dated 20 September 2005 was on Willis' behalf, not for Messrs Laywood and Rees; that Willis' notice of adjudication dated 28 October 2005 wrongly names Messrs Laywood and Rees as respondents and does not include any direct allegation against them; and that Holmes' request to select an adjudicator wrongly refers to them as respondents.
- [74] Alternatively, Mr Carden submitted that, if the adjudicator correctly determined that Holmes on the one part and Messrs Laywood and Rees on the other were parties to a construction contract, any work omitted from the scope of the contract should be first deducted from the liability of Messrs Laywood and Rees thereafter. Finally, he said, if Messrs Laywood and Rees were liable, this liability is limited to \$250,881.
- [75] The contractual document between Holmes and Messrs Laywood and Rees was entered into on 9 September 2004 in these terms:
"TO *Holmes Construction & Development Ltd*
We, *Ian Laywood and Gary James Rees* in consideration of you at our request agreeing to split payment of the contract sum for the main building and rooftop apartments of *Augusta Apartments at Willis Street, Wellington* into:
(a) *Contract One (to be met by Willis Trust Ltd) a contract price of \$6,978,060; and*
(b) *Contract Two (to be met by us jointly) a contract price of \$250,881.*

HEREBY PERSONALLY GUARANTEE PAYMENT (and bind ourselves and our executors and assigns) of Contract Two above to be made to you during the period of fulfilment of Contract One. Upon clearance of the sum of \$250,881 paid on the personal cheque account of either Ian Laywood or Gary Rees intended in payment of Contract Two, Holmes Construction & Development Ltd will unconditionally and irrevocably release Ian Laywood and Gary Rees in respect of any further obligation or liability under this guarantee.

[76] The adjudicator recorded that it was common ground that Holmes executed the principal contract recording a price lower than the tender price to assist Willis with its funding arrangements; and that Messrs Laywood and Rees personally guaranteed payment of the difference of \$250,881 plus GST (para 47). He accepted Holmes' argument that the parties intended there would be two construction contracts; Contract One, which embodied the principal obligations of the parties and Contract Two which was the collateral contract entered into between Holmes and Messrs Laywood and Rees. He concluded that Messrs Laywood and Rees were jointly liable as contracting parties, and that the existence of a guarantee was irrelevant. Accordingly, he dismissed an argument for Messrs Laywood and Rees that the Act does not apply to a construction contract to the extent that it contains provisions whereby a party undertakes to guarantee payment of money, and that the adjudicator did not have jurisdiction accordingly (paras 48-53).

(a) Jurisdiction: Guarantee

[77] Mr Carden submitted that a contract of guarantee cannot be a 'commercial construction contract', which is defined (s 5) as: "... a contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract."

[78] With respect, this argument confuses the legal nature of Contract Two. It may have described the obligations assumed by Messrs Laywood and Rees as constituting a personal guarantee of payment of \$250,881. But a guarantee is a contract by A "to answer to another person [B] for the debt, default, or liability of a third person [B]" (s 2(1)(d) Contracts Enforcement Act 1956). Willis had not assumed indebtedness or liability to Holmes for this sum of \$250,881. So there was no third party liability for which Messrs Laywood and Rees could answer.

[79] The words "personally guarantee payment" were meaningless. Messrs Laywood and Rees were not guaranteeing Willis' liability. Instead, by their agreement to meet payment of the sum of \$250,881 jointly, they were assuming a direct liability to Holmes. They were principal parties to a commercial construction contract. The exclusionary terms relating to a guarantee (s 11(d)(ii)) do not apply. Accordingly, I am satisfied that the adjudicator properly assumed jurisdiction.

(b) Jurisdiction: Service

[80] Mr Carden's alternative argument was of a technical nature. It was not apparently raised before the adjudicator. He submitted that, because the basis for liability rests solely on the absence of a payment schedule to Holmes' claim, Messrs Laywood and Rees cannot be liable if the claim was not addressed to them. He said that the claim was addressed to Willis; and that Messrs Laywood and Rees were drawn into the process by Holmes' notice of adjudication and claim. Accordingly, the directors were compelled to respond. They were not the recipients of a payment claim for which they had to provide a payment schedule.

[81] There is no doubt that Holmes' payment claim was served on Mr Laywood; it was addressed to him personally. Furthermore, the adjudicator made a finding of fact that it was also served on Mr Rees (para 18). That finding is not amenable to review.

[82] Even if the adjudicator's finding was reviewable, I accept Mr Williams' submission that there is sufficient proof of service if the Court is satisfied the document has come to the attention of the relevant party (*West City Construction Ltd v Edney*, CIV-2005-404-1066, Auckland Registry, 1 July 2005, Venning J at para 35). Speaking on Mr Rees' behalf as well, Mr Laywood's affidavit advised that they participated personally in Willis' response dated 23 November 2005 to Holmes' adjudication claim dated 9 November 2005. In that notice Holmes identified the issues in dispute including whether or not "the respondent(s) are liable to pay the claimed amount to the claimant".

[83] Holmes' notice of adjudication dated 28 October 2005 referred specifically to service of its final payment claim on 23 August, and to its contention that none of the three respondents provided a payment schedule in response. Contract Two did not stipulate the time required for a payment schedule. Thus, Messrs Laywood and Rees had 20 working days for that purpose (s 22(b)(ii)). That date expired on 25 November 2005.

[84] Holmes' claim was submitted to the adjudicator on 28 November 2005. By then time had expired for Messrs Laywood and Rees to provide a payment schedule. However, they did not take any steps in the interim. They were in statutory default on and from 28 November. The arbitrator had jurisdiction to determine Holmes' claim against them on or after that date on the basis that each had been served and had failed to supply a payment schedule within the requisite period. Even if the adjudicator did not have jurisdiction, Holmes would have been entitled to enforce payment by claiming summary judgment on the basis that the sum of \$250,881 was by then a debt due. I have already given the reasons for that conclusion.

[85] This leaves only Mr Carden's subsidiary submissions. First, he said that Messrs Laywood and Rees' liability must be limited to the sum of \$250,881 specified in Contract Two because it does not provide for liability for GST or interest. Mr Carden did not apparently take this point before the adjudicator. The adjudicator in turn simply assumed liability for these amounts. Mr Williams did not address argument on the point on appeal. I can only assume that it has gone by default because of its relative financial insignificance.

[86] Mr Carden is correct. In the absence of an express provision the contract price of \$250,881 is assumed to be GST inclusive. Contract Two does not provide an obligation to pay interest. Accordingly, I make an order setting aside the adjudicator's determination of Messrs Laywood and Rees' liability for GST and interest.

[87] Second, Mr Carden submitted that Messrs Laywood and Rees' liability is reduced by payments of credits which have been made to Holmes. They are unable to quantify the amount. In the absence of quantification, the adjudicator was entitled to determine that they were liable for the full amount of \$250,881.

Charging Order

[88] Finally, Mr Carden submitted that the charging orders were invalid in the absence of reasons. He accepted the adjudicator's jurisdiction to issue a charging order "in respect of a construction site owned [by Holmes]" (s 29). He also accepted that the adjudicator was bound to approve the issue of a charging order in respect of the construction site, record his approval and include sufficient particulars to identify it (s 49(2)). He accepted that the course for approval had been followed. However, he submitted that the adjudicator failed to give reasons.

[89] I do not accept that the adjudicator was under a duty to give reasons where he was directed to make a charging order; the only reason he could give was the existence of a statutory duty. He said that Holmes' claim for a charging order was over adjoining land, not the construction site. I do not have any evidence to that effect but, in any event, such an error, if made, would be one of fact.

Conclusion

[90] For these reasons I dismiss Willis' application for an order setting aside the findings made in the adjudicator's determination dated 10 February 2006 of Willis' liability to Holmes. I also dismiss Messrs Laywood and Rees' application to set aside the findings against them except to make an order setting aside the adjudicator's findings that Messrs Laywood and Rees are liable to Holmes for GST and interest on the sum of \$250,881

[91] I order Willis to pay Holmes costs and disbursements (including airfares and accommodation) according to category 2B on both Willis' interim and substantive applications. There will be no order for costs relating to the separate application by Messrs Laywood and Rees.

David Carden for Plaintiffs instructed by Alexander Dorrington (Auckland) for Plaintiffs
Sherwyn Williams for Second Defendant instructed by Kensington Swan (Wellington) for Second Defendant