

# CASE IN BRIEF

## BODY CORPORATE 200012 V KEENE & ORS [2017] NZHC 2953

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The High Court has denied an attempt to use judicial review to strategically delay or avoid payment of an adjudication award under the 'pay now, argue later' policy behind the Construction Contracts Act 2002 ('CCA').

### Background

In 2013, Body Corporate 200012 ('BC12'), the Body Corporate for a large townhouse development in Auckland, entered into a construction contract with Naylor Love for the remediation of leaky building defects. Multiple disputes arose between the parties which resulted in two adjudications. Current disputes following the adjudications have been referred to arbitration.

In the first adjudication, various claims by Naylor Love were upheld totaling over \$3.2 million. Claims totaling a further \$588,000 were upheld in a second adjudication.

Pursuant to the CCA, an adjudicator's determination is binding on the parties, and any money awarded must be paid even if the dispute is to be determined finally in another forum. Despite this, BC12 continued to dispute its liability to pay the determined sums (pending the outcome of the arbitration) and made no payment of the amounts determined in the adjudications to Naylor Love.

As a result, Naylor Love successfully applied to enter the determination of the first adjudication as a judgment of the District Court for the purpose of enforcement against BC12. BC12 attempted to dodge the 'pay now, argue later' policy of the CCA by applying for judicial review of the two adjudication determinations, and appealing the decision to enter the first determination as a District Court judgment. BC12 was clear that its primary objective in applying for judicial review was to avoid paying Naylor Love, pending the outcome of the arbitration.



*An adjudication is, to an extent, a rough and ready means of getting an interim determination of contractual disputes in a construction contract setting.*

## Decision

The Court dismissed the application for judicial review and the appeal, holding that BC12's claims did not in fact go to the jurisdiction of the adjudicator's decisions, but rather related to contractual interpretation, which plainly fell outside the scope of judicial review.

The Court discussed judicial review as primarily concerned with examining the decision-making process, not the substance of a decision. In *Reese v Firth* [2011] NZCA 668, the Court of Appeal discussed the approach to judicial review of an adjudicator's determination under the CCA, stating: "the courts must be vigilant to ensure that judicial review of adjudicator's determinations does not cut across the scheme of the CCA and undermine its objectives".

The Court was cautious to intervene. To succeed in an application for judicial review, BC12 would have needed to show: a genuine excess of jurisdiction by the adjudicator; a serious breach of natural justice; or some apparent and significant error of law. BC12 had not succeeded on any of these three points. Accordingly, the Court refused to allow BC12 to undermine the CCA by using the judicial review process as a deliberate strategy to avoid the CCA's "pay now, argue later" policy.

The CCA provides other methods of dispute resolution for parties to utilise in challenging an adjudicator's determination, such as referring the merits of the dispute to mediation, arbitration, or litigation. So, while BC12 had attempted to frame its argument in terms of jurisdiction to bring it within the scope of judicial review, the Court found it just did not fit. Instead, the Court invited BC12 to "utilise the other methods of dispute resolution contemplated in the CCA."

The Court did not consider BC12 had shown any evidence to establish a breach of natural justice.

An adjudication is, to an extent, a rough and ready means of getting an interim determination of contractual disputes in a construction contract setting. The Court found that the adjudicator had the statutory jurisdiction to determine a dispute under the CCA, and that is what the adjudicator did. The Court held that whether the adjudicator was right would be determined at the arbitration.

If either party to an adjudication determination could simply commence another adjudication as many times as it liked in the hope of obtaining a preferred decision, the purpose of the CCA would be thwarted. BC12 could not overcome one of the express purposes of the CCA in providing for the "speedy resolution of disputes".

The Court's result confirmed that Naylor Love was able to enforce payment of the adjudication determinations against BC12 while awaiting the arbitration.

## Comment

The courts will be cautious to cut through the “pay now, argue later” purpose of the CCA which was introduced to facilitate the quick payment of disputed amounts in the construction industry. Parties to construction contracts should be aware that the adjudication process endorsed by the CCA is not intended to be a final determination of all issues (although more often than not parties will accept the determination of the adjudication without further rounds of arbitration or litigation).

A successful application for judicial review of an adjudicator’s determination will need to meet the threshold of showing a genuine excess of jurisdiction by the adjudicator, a serious breach of natural justice, or some apparent and significant error of law. Rather, those who are dissatisfied with an adjudication determination should pay the required amount and then utilise the other dispute resolution methods endorsed by the CCA, such as litigation, arbitration, or mediation.

## ABOUT THE AUTHOR



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Sarah is a litigation and Intellectual Property solicitor.

She graduated from the University of Otago with a Bachelor of Laws.

In 2016 she worked as a graduate law clerk at the Building Disputes Tribunal, and also in the same year she was admitted as a barrister and solicitor of the High Court of New Zealand.