

# Be clear about the contract

Builders should consider the consequences of arguing about the existence and terms of a construction contract. As a recent case shows, it can be a costly experience.

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**C**an a party challenge an adjudicator's jurisdiction in summary judgment proceedings brought to enforce the decision? Are damages awards enforceable under the debt recovery provisions of the Construction Contracts Act 2002? These were the issues concerning the High Court in *M Van Der Wal Builders & Contractors Ltd v Walker*.

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for a judicial review of his decision. Associate Judge Christiansen recorded that this was a novel issue as this case was the first where the Courts had been asked to determine whether a question about an adjudicator's jurisdiction was a matter that was 'genuinely arguable' for the purposes of answering a summary judgment.

## Was there a contract or not?

The builder, M Van Der Wal (MVDW), had entered into an agreement with the defendants for renovation work to their home in Parnell, Auckland. MVDW argued that this agreement was a construction contract under the Construction Contracts Act 2002. The defendants argued, however, that they had not formed a construction contract with MVDW. They had delayed the start of the project and then engaged another builder to carry out the work. MVDW took the defendants to adjudication.

The adjudicator found that there was a construction contract between the parties and awarded MVDW damages in the sum of \$85,466.83 plus \$10,000 for his fees. MVDW's losses were allegedly for project management fees to 1 June 2010, for project management fees down to the completion of the project and for a 10% margin that MVDW said it would have been able to charge on materials and subcontractors' costs.

## High Court sees it differently

The defendants refused to pay the damages awarded against them. MVDW then took steps to enforce the award in the District Court. The defendants successfully applied to transfer the proceeding to the High Court and, on transfer, MVDW applied for summary judgment – the procedure available to a plaintiff who argues that there is no defence to their claim. The defendants responded that they did have a defence – that the adjudicator's decision was invalid because there was no construction contract and the adjudicator had exceeded his statutory jurisdiction.

The adjudicator had found there was a construction contract on the basis of a letter between the parties dated 26 April 2010. This letter had set out the work in question, a basis for pricing, detailed a preliminary budget, dealt with insurance, provided that payments would be made on the 20th of the month, referred to the Master Builders form of contract to be signed by the parties and offered a Master Builders guarantee. The defendants argument was, in part, that there was no construction contract because they had advised MVDW about budget limitations that it had not delivered upon.

In the High Court, MVDW argued that the defendants could not raise their defence as part of a summary judgment application, and if they wished to challenge the adjudicator's decision, they should have applied

Associate Judge Christiansen accepted that there was a factual dispute about whether a contract had been formed between the parties and, therefore, the case was not 'the kind of case for a robust approach to be adopted by summary determination'. He found it was arguable that there had been no agreement on price and that the defendants had advised MVDW of the budget restrictions that it had exceeded in the preliminary budget.

He also accepted that the defendants were able to raise a defence that the adjudicator had no jurisdiction. He commented that, had the defendants' complaint been about a breach of natural justice in the adjudication proceedings, the appropriate course would have been judicial review.

However, the defendants were asserting that the adjudicator's decision was void. Associate Judge Christiansen said that to assert something is void is to assert it was made without jurisdiction and is not, therefore, a determination but rather a nullity and does not exist. He said judicial review is not the appropriate forum for dealing with issues of voidability.

In summary, the defendants had adopted the appropriate course. They could challenge the proceedings to enforce the adjudicator's decision on the grounds he was never empowered to make that decision.

## Damages not legally enforceable

The other issue in this case was whether awards for damages are enforceable under section 59 of the Construction Contracts Act. Section 59 sets out the consequences of a party not complying with an adjudicator's decision and states that the party who is owed an amount (Party A) determined at adjudication may recover from the party who is liable to make the payment (Party B), as a debt due to Party A in any Court the unpaid portion of the amount....

However, whether or not there is a debt due also depends on the nature of the adjudicator's decision. Under section 48 of the Act, where an amount of money is claimed in an adjudication proceeding, the adjudicator must either determine whether any party is liable to make a payment under the construction contract (section 48(1)(a)) or determine any dispute about the rights and obligations of the parties to the contract (section 48(1)(b)).

The High Court said it was clear that determinations under section 48(1)(a) are enforceable under section 59 of the Act as debts due but determinations under section 48(1)(b) are not.

In this case, MVDW's damages claim did not involve the recovery of a debt due under the alleged construction contract. The Associate Judge commented that the differentiation between liability to pay a debt due and damages was well established. MVDW's claim for damages was not enforceable by the section 59 procedure.

### **Preparation for proposed work not covered**

Finally, as an aside, Associate Judge Christiansen commented that it was not clear that MVDW's claims were subject to the Construction Contracts Act 2002 at all, being claims for project management fees. He said: 'I consider that the Act does not presently authorise claims for payment in connection with construction work preparation or consultancy work in connection with proposed work.'

MVDW's summary judgment was dismissed. If MVDW pursues its damages claim in Court, it will have to proceed to a further defended hearing, which will cover the same grounds dealt with in the adjudication proceeding.

### **Clear contracts essential**

This case emphasises the importance of builders ensuring that they enter into clear contractual arrangements with their clients. Otherwise, they may spend money they cannot recover. ■