



One Shot, Two Limbs: Adjudicating Money claims under the Construction Contracts Act 2002

The adjudication process established under the Construction Contracts Act 2002 (CCA) was a significant step towards achieving efficient and cost-effective dispute resolution in the construction industry. The purpose of the adjudication process is to fast-track the resolution of disputes between parties involved in construction contracts.

The topical High Court decision of *G K Shaw Ltd v Green* [2023] NZHC 605 is a good demonstration of the scope of issues that can be determined through the adjudication process, and a reminder that already determined issues cannot be re-litigated through subsequent adjudications.

Background

G K Shaw Limited, a civil contracting company, entered into a contract with CentrePort Limited for the replacement of wharf fenders at the Seaview Wharf in Petone, Wellington.

The pivotal event was an incident when G K Shaw's trawler crane was used beyond its operational limits, causing it to topple into the sea. The crane was being operated by an unsupervised trainee who was lucky to escape without serious injury. This prompted CentrePort to cancel the contract.

G K Shaw considered there was no legal basis for CentrePort to cancel the contract and that in doing so, CentrePort had repudiated the contract. GK Shaw commenced an adjudication process under section 48(1)(a) of the CCA, claiming that CenterPort was liable to make a payment "*under the contract*". G K Shaw sought approximately \$1 million in damages from CentrePort.

First adjudication

In the first adjudication, the adjudicator, Robert Fisher KC, concluded that he lacked jurisdiction under the CCA to grant the damages that G K Shaw sought. This was because section 48(1)(a) of the CCA is concerned with the performance of the terms of the contract. However, in this case, G K Shaw was seeking common law damages for the alleged repudiation, rather than a payment "*under the contract*".

Having made this finding, Mr Fisher KC nevertheless went on to consider the merits of G K Shaw's substantive claim and dismissed it in its entirety.

Second adjudication

Dissatisfied with this outcome, G K Shaw initiated a second adjudication. This time G K Shaw chose a different pathway and advanced its claim under s 48(1)(b) which deals with determination of the parties' rights and obligations under the contact. In other words, G K Shaw says that it was no longer

seeking the damages, but rather a determination that it was entitled to recover the damages as losses pursuant to its rights under the contract.

The second adjudicator, John Green, concluded that he lacked the jurisdiction to determine the claim on the basis of the principle of *res judicata*, i.e., the merits of the claim had already been determined in the first adjudication, thereby preventing him from re-examining them.

Judicial review

G K Shaw applied to the High Court for a judicial review of Mr Green's determination. G K Shaw argued that given that Mr Fisher KC determined in the first adjudication that he lacked jurisdiction under section 48(1)(a), any subsequent conclusions he had drawn concerning the merits of the claim were beyond his powers to do so and non-binding. Consequently, in the second adjudication, Mr Green incorrectly assumed that he was prohibited from determining the claim again under s 48(1)(b).

Although it was Mr Green's determination that was being judicially reviewed, the real question was whether Mr Fisher KC's determination on the merits of the claim in the first adjudication was valid and final.

High Court decision

The High Court found that the second adjudication was essentially G K Shaw attempting to reframe its claim for common law damages to a claim for payment "*under the contract*". However, the underlying substance of the claim remained the same.

The Court held that Mr Fisher KC had indeed made a binding determination in the first adjudication on the merits of G K Shaw's claim and that he was entitled to do so. Therefore, Mr Green correctly concluded that he did not have jurisdiction to re-examine the claim in the second adjudication.

The Court's decision centred on precisely what s 48 of the CCA requires of adjudicators. Section 48(1) stipulates that in an adjudication where a party seeks payment under a contract, the adjudicator must ascertain whether any party is liable or will be liable to make a payment under the contract (s 48(1)(a)), *and* address any disputes regarding the parties' rights and obligations under the contract (s 48(1)(b)). This dual consideration is compulsory. Therefore, whether CentrePort had wrongfully terminated the contract was an issue Mr Fisher KC not only had the jurisdiction to determine but was obligated to address under s 48(1)(b), despite his conclusion that he lacked jurisdiction to determine the s 48(1)(a) issue regarding payment.

Section 48(2) also allows adjudicators to make binding determinations on questions of rights and obligations even if no monetary claim is advanced. The ability to resolve such disputes is by itself a central aspect of an adjudicator's role.

Considering that the process outlined in section 48(1)(b) closely resembles the one in section 48(2), the Court considered that there was no justification for deeming a determination on rights and obligations under section 48(1)(b) as exceeding an adjudicator's authority, as long as it pertains to a disputed matter—even if it's revealed later that the jurisdiction to grant the relief under section 48(1)(a) was not present. In other words, G K Shaw's argument to bifurcate the two limbs of s 48(1) was not accepted.

On that basis, Mr Green's finding that he lacked jurisdiction to re-determine the claim in the second adjudication was correct. G K Shaw's application for judicial review was therefore dismissed.

Observations

The Court has made clear in this case that when a monetary claim is advanced in an adjudication, all of s 48(1) of the CCA is activated. An adjudicator is required to address both liability for payment under the contract as well as any disputes regarding the parties' contractual rights and obligations, regardless of how narrowly the claim is framed.

While the CCA does permit multiple adjudications in relation to the same contract, it does not permit the parties to rephrase or re-litigate previously determined disputes in a subsequent adjudication under different guises.

Our thanks to Claudia Cooper, John Tian and John Morrison for writing this article

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