

STATUTORY ADJUDICATION AND THE “SMASH AND GRAB” PHENOMENON

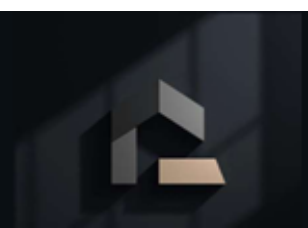
Adjudication, Enforcement and the New Zealand Context

By Garry North | 2026

1. The Unanswered Application

The commercial construction sector is governed by strict statutory payment machinery, where procedural defaults routinely override substantive merits. A quintessential manifestation of this dynamic occurs when a subcontractor issues a high-value payment claim, incorporating complex, heavily disputed items such as extension-of-time costs and unapproved variations, and the principal fails to issue a valid payment schedule within the period required by the construction contract, or, if the contract does not provide for the matter, within the statutory default period of 20 working days. This failure often stems from administrative oversight or the assumption that an inflated claim requires no formal rebuttal.

However, the legal consequence of this omission is severe and immediate. Upon expiry of the applicable period for providing a payment schedule, the payer loses the opportunity to schedule a lesser amount. Under s 22 of the CCA, the payer becomes liable to pay the claimed amount on the due date for payment; if the amount remains unpaid on that date, the payee may recover it as a debt under s 23. Once the debt is due, the payee may pursue debt recovery and, where the payer is a company, may serve a statutory demand under s 289 of the Companies Act 1993. The company ordinarily has 15 working days to comply with the demand and 10 working days to apply to have it set aside. Failure to comply may provide a basis for a subsequent liquidation application. At the enforcement stage, the courts will strictly disregard any substantive counterclaims raised by the principal, such as defective workmanship or culpable delay. Because the procedural failure to serve a schedule renders the underlying merits legally irrelevant for the purposes of immediate enforcement, the payee is empowered to successfully execute a "smash and grab" recovery.



2. Why this Topic Matters: Cash Flow vs. Commercial Reality

The commercial construction industry operates on a fragile financial architecture. Projects require large amounts of upfront capital, extensive and highly fragmented supply chains, and complex hierarchies comprising principals, head contractors, subcontractors, and suppliers. Historically, entities with dominant bargaining power routinely weaponised this leverage to delay or withhold payments. Tactics such as "pay-when-paid" clauses, protracted final account negotiations, or the withholding of funds based on spurious, unliquidated defect claims were systemic. By denying contractors the cash flow necessary to finance ongoing operations, these practices generated a wave of financial pressure that cascaded down the contracting chain, frequently resulting in the insolvency of lower-tier subcontractors and suppliers.

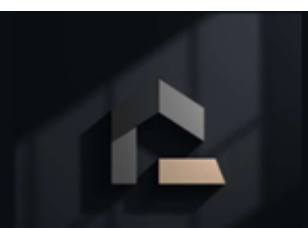
The recognition of this systemic market failure prompted a paradigm shift in construction law across the common law world. In the United Kingdom, Sir Michael Latham's 1994 review of procurement and contractual arrangements in the construction industry provided the principal impetus for statutory reform of construction payment and dispute resolution. This occurred against the broader backdrop of Lord Woolf's subsequent reforms addressing the cost, delay and complexity of civil litigation generally.¹ This mechanism, known as statutory adjudication, was specifically designed to ensure liquidity continued to flow during ongoing projects.

Lord Ackner during the House of Lords debates on the legislation that became the Housing Grants, Construction and Regeneration Act 1996 (HGCRA),² On 22 April 1996, Lord Ackner described adjudication as a quick, enforceable interim process and said it came under the rubric of "pay now, argue later."³ The core premise is that a rapidly appointed adjudicator issues a binding, interim decision on a payment dispute within a matter of weeks. The ordered sum must be paid immediately, preserving the lifeblood of the project, the cash flow, while preserving the parties' rights to finally determine the substantive merits of the dispute at a later date through arbitration or litigation.

¹ Sir Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry* (HMSO 1994)

² Housing Grants, Construction and Regeneration Act 1996 (United Kingdom).

³ HL Deb 22 April 1996, vol 571, cols 989–90 (Lord Ackner)



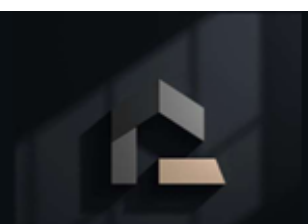
3. The "Smash and Grab" Definition

Despite its inherently opportunistic and somewhat violent connotations, the phrase "smash and grab" is an informal, industry-coined term originating in the United Kingdom that describes a highly effective, procedure driven legal strategy. In practical terms, it occurs when a payee leverages a payer's administrative failure, such as missing a strict deadline to formally respond to an invoice, to demand immediate payment of the full amount claimed, bypassing any negotiation over the actual merits of the amount due.

In a legal context, a "smash and grab" action is the assertion of a statutory entitlement derived exclusively from the procedural mechanisms of security of payment legislation. Under regimes such as the United Kingdom's Housing Grants, Construction and Regeneration Act 1996 (HGCRA) or New Zealand's Construction Contracts Act 2002 (CCA), the strategy is triggered when a payer fails to issue a valid, timely responsive document (a "pay less notice" in the UK, or a "payment schedule" in New Zealand).⁴

An important distinction is necessary in the New Zealand context. The expression 'smash and grab adjudication' derives primarily from United Kingdom practice, but the CCA separates its statutory payment regime from adjudication. A payer's failure to provide a valid payment schedule can create liability under ss 22–23 without any adjudication taking place. Adjudication is a separate dispute-resolution mechanism that may subsequently be invoked by either party. Accordingly, in New Zealand the 'smash and grab' phenomenon is more accurately understood as arising principally from the statutory payment machinery, with adjudication providing an additional but distinct enforcement and dispute-resolution route.

⁴ Construction Contracts Act 2002 (NZ).



4. The Statutory Machinery in NZ

The smash and grab phenomenon is a creature of statute, rooted in specific legislative mechanisms designed to protect cash flow.

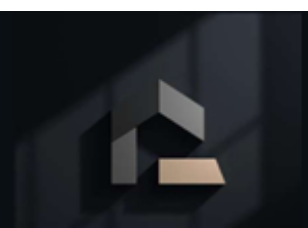
In New Zealand, the Construction Contracts Act 2002 (CCA) distills the payment cycle into a binary process:

1. **The Payment Claim (Section 20):** The payee serves a written claim identifying the contract, the work, the period, the exact amount, and the calculation method, accompanied by a mandatory written notice in the prescribed form outlining the response process and consequences
2. **The Payment Schedule (Section 21):** The payer must respond within the contractual timeframe (or statutory default of 20 working days). If proposing to pay less, the schedule must state the "scheduled amount" and detail the calculation and explicit reasons for any deductions or withholdings.
3. **The "Debt Due" Crystallisation (Section 23):** If a valid payment schedule is not served within the applicable period, the payer becomes liable under s 22 to pay the claimed amount on the relevant due date. If the claimed amount remains unpaid on that date, s 23 permits the payee to recover the unpaid amount as a debt due.

5. Wielding the Statutory Debt

Once the statutory requirements have been satisfied and the claimed amount has become recoverable as a debt, an unpaid contractor obtains significant enforcement leverage. Rather than first resolving the substantive merits of an underlying dispute, for example, allegations concerning defective workmanship, the contractor may commence debt recovery proceedings and, where the applicable procedural requirements are met, seek summary judgment. Where the payer is a company, the contractor may also serve a statutory demand under s 289 of the Companies Act 1993.⁵ In addition, following the statutory notice procedure, s24A of the CCA permits suspension if the amount remains unpaid for five working days after notice. A lawful suspension does not constitute a contractual breach, and the contractor is protected against liability for resulting loss or damage and is entitled to an extension of time, subject to

⁵ Companies Act 1993 (NZ)



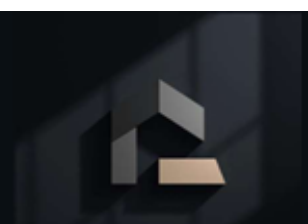
the qualifications contained in the Act.

Contractors may also refer the dispute to adjudication, although adjudication is not a prerequisite to recovery of a debt arising under s 23. Under s 46, an adjudicator ordinarily has 20 working days following expiry of the respondent's response period to determine the dispute, extendable to 30 working days where further time is reasonably required, or for any further period agreed by the parties.

6. Common Mistakes and Misconceptions

- 1) **Relying on "Technical Quibbles":** Payers often mistakenly believe they can invalidate a statutory payment claim based on minor formatting errors or the inclusion of previously disputed amounts. The courts, prioritising cash flow, consistently reject hyper-pedantic or technocratic defenses as illustrated in the *George Developments Ltd v Canam Construction Ltd* case.⁶
- 2) **Assuming Silence is a Defense:** Ignoring a payment claim because it is considered substantially inflated or otherwise incorrect can have severe consequences. Failure to provide a valid payment schedule within the applicable period can trigger statutory liability to pay the claimed amount notwithstanding an underlying dispute concerning its substantive correctness. It does not finally determine the parties' underlying contractual rights, the statutory philosophy remains 'pay now, argue later'.
- 3) **Trying to Set-Off at Enforcement:** Payers frequently attempt to block summary judgment or statutory demands by raising unliquidated counterclaims (e.g., delay damages). Section 79 of the CCA generally prevents the court from giving effect to a counterclaim, set-off or cross-demand in proceedings to recover debts under ss 23, 24 or 59. The provision contains a limited exception for a set-off of a liquidated amount where judgment has already been entered for that amount or where there is no genuine dispute concerning it.

⁶ *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA).



7. Case Law and Jurisdictional Analysis

The evolution of smash and grab jurisprudence highlights a global judicial balancing act between enforcing strict compliance and maintaining commercial sanity.

7.1 The United Kingdom: The Birthplace of the Tactic

Under the UK's Housing Grants, Construction and Regeneration Act 1996 (HGCRA), the failure to issue a Payment Notice or a Pay Less Notice triggers the default.

1. The Era of Absolute Default (*ISG Construction Ltd v Seevic College [2014]*):

The TCC initially ruled that failing to serve notices meant the employer "deemed" to agree with the valuation, stripping the adjudicator of jurisdiction to run a competing "true value" assessment for that cycle.⁷

2. The Pivot to Sequential Justice (*S&T (UK) Ltd v Grove Developments Ltd [2018]*):

The Court of Appeal restored commercial sense, ruling payers *can* commence a "true value" adjudication, but established a strict sequencing rule: the payer is strictly prohibited from doing so until they have completely paid the smash and grab "notified sum" first.⁸

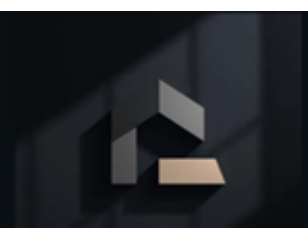
7.2 The APAC Region: Temporary Finality

1. Singapore (SOPA):

Singapore courts aggressively enforce the "temporary finality" of adjudication, but must balance this against insolvency protections when contractors threaten liquidation. Under *Diamond Glass Enterprise v Zhong Kai Construction SGCA 61*, a debtor company can secure a stay of winding-up proceedings by raising a justiciable cross-claim under a relaxed *prima facie* standard. To ensure this does not undermine SOPA's "pay now, argue later" mandate, the Court of Appeal established that such stays should be conditioned on the debtor paying the disputed sum into

⁷ *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC)

⁸ *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448.



court as security, securing the cash flow without forcing a premature liquidation.⁹

2. Australia (Security of Payment Acts):

Under the "East Coast" model, the statutory payment claim serves as the trigger for powerful "smash and grab" enforcement, but its leverage is strictly bounded by two High Court decisions. On the offensive front, *Probuild Constructions v Shade Systems*¹⁰ serves as the engine of the regime: by confirming that an adjudicator's non-jurisdictional errors of law cannot be quashed, the High Court cemented a "pay now, argue later" reality where rapid, legally imperfect decisions must be immediately paid. Defensively, however, *Southern Han 2016*¹¹ provides the ultimate veto for principals, the High Court ruled that the existence of a valid "reference date" is an absolute jurisdictional prerequisite. Without it, a payment claim is a legal nullity, giving principals a powerful shield to derail a smash and grab at the threshold.

7.3 New Zealand: Refining the Boundaries of the CCA

1. Rejection of Technical Quibbles (*George Developments Ltd v Canam Construction Ltd [2006]*):¹²

The Court of Appeal established that technical formatting issues, the inclusion of past valuation periods, or the addition of contractual extension of time (EOT) costs will not invalidate a statutory payment claim, prioritising interim cash flow. However, the statutory requirements remain substantive requirements rather than mere formalities. In *Ellis Build 2008 Ltd v NZ Chemical Care & Storage Ltd*,¹³ where multiple contracts existed between the parties, the High Court identified a question as to whether the payment claims contained sufficient information to identify the relevant construction contract as required by s 20(2)(b). Accordingly, *George Developments* should not be understood as excusing non-compliance with essential statutory requirements.

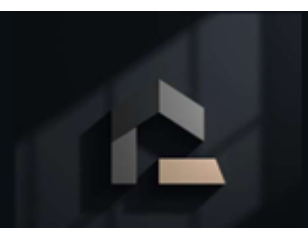
⁹ *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] SGCA 61

¹⁰ *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, [2018] HCA 4.

¹¹ *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd & Ors* (High Court of Australia, Case No. S199/2016)

¹² *George Developments Ltd v Canam Construction Ltd* 1 NZLR 177 (CA)

¹³ *Ellis Build 2008 Ltd v NZ Chemical Care & Storage Ltd* [2013] NZHC 3204.



2. **Enforcement Power of Adjudication (*Laywood v Holmes Construction [2009]*):**

In *Laywood v Holmes Construction Wellington Ltd*,¹⁴ The Court of Appeal confirmed the strength of the CCA's enforcement regime in the context of bankruptcy proceedings. Section 79 prevents a court, in proceedings for recovery of debts arising under ss 23, 24 or 59, from giving effect to counterclaims, set-offs or cross-demands, subject to the Act's limited exception for certain liquidated set-offs. Although *Laywood* concerned bankruptcy enforcement against individuals rather than corporate liquidation, its interpretation of s 79 has significant implications for insolvency-based enforcement of CCA debts.

3. **Sufficiency of Reasons (*Construction Advantage Ltd v Eljayej Holdings Ltd [2025]*):**

To prevent default liability, a payer's payment schedule does not require exhaustive line-by-line calculations; the High Court confirmed a schedule can validly indicate its reasons for deductions by clearly referencing prior, dated correspondence that both parties understand.¹⁵

4. **Timing is Absolute (*Chillex Services Ltd v Best Air Conditioning Ltd [2025]*):**

While CCA timelines are strictly enforced, creditors must not act prematurely. The High Court set aside a statutory demand because the contractor issued it before the contractual payment due date had arrived; the court confirmed that a payer providing their payment schedule ahead of the deadline does not accelerate the actual contractual payment date.¹⁶

8. **Practical Guidance: Surviving the Regime**

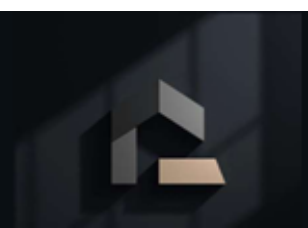
To navigate the unforgiving mechanics of statutory adjudication, industry participants must elevate contract administration from a back-office function to a frontline commercial defense.

1. **Eradicate Administrative Complacency:** Principals must diarise response deadlines the moment a payment claim is received. Under the statutory framework, silence is not a defense; it is a legally binding concession of liability.

¹⁴ *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243

¹⁵ *Construction Advantage Ltd v Eljayej Holdings Ltd* [2025] NZHC 1749

¹⁶ *Chillex Services Ltd v Best Air Conditioning Ltd* [2025] NZHC 1729



2. **Issue Protective Schedules:** If a valuation is disputed, incomplete, or deemed artificially inflated, the payer must still issue a payment schedule within the statutory timeframe. The scheduled amount may be zero, but the document must explicitly detail the reasons for withholding. Incorporating past correspondence is permissible but must be executed with absolute clarity to avoid ambiguity as in *Construction Advantage Ltd v Eljayej Holdings Ltd*
3. **Plead the Case Correctly:** For contractors utilising the adjudication precursor, a "smash and grab" must be explicitly pleaded as a procedural default. An adjudicator cannot unilaterally enforce a missing schedule if the parties actually referred to a substantive "true value" dispute; doing so breaches natural justice and renders the determination vulnerable to judicial review as an adjudicator must determine based on the arguments presented as the High Court of New Zealand confirmed in *Anderson v Swindells*.¹⁷

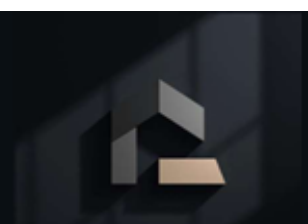
9. Insolvency and Stays of Execution

The most profound commercial risk of the smash and grab strategy is the intersection of rapid statutory payment with corporate insolvency. The fear for any principal is being forced to pay a vastly inflated interim claim on a technicality, only for the payee to immediately enter liquidation, permanently destroying any chance of recovering the funds in a later "true value" dispute.

Because the Construction Contracts Act mandates a "pay now, argue later" approach, New Zealand courts set an exceptionally high threshold for staying a judgment. However, under Rule 17.29 of the High Court Rules 2016, the High Court retains inherent jurisdiction to grant a stay of enforcement if a "substantial miscarriage of justice" is likely to result. For instance, in *Hellaby Resource Services Ltd v Body Corporate 197281* NZHC 554,¹⁸ The Court granted this rare stay against a \$2.8 million default debt. A purported assignment of the debt by TBS to Hellaby had previously been held ineffective because the construction contract required the Body Corporate's consent. TBS was nevertheless joined to the proceedings and pursued recovery in circumstances where the Court considered that enforcement would effectively benefit Hellaby while TBS itself had become a shell company. Given the Body Corporate's substantial defects counterclaim and the risk that payment would frustrate any effective recovery if that

¹⁷ *Craig Anderson and Vicki Volkova v Edward Swindells & Anor* NZHC 1803

¹⁸ *Hellaby Resource Services Ltd v Body Corporate 197281* [2021] NZHC 554



counterclaim ultimately succeeded, the Court considered a stay justified in the exceptional circumstances.

Furthermore, recent legislative reforms have altered the broader risk matrix. Following high-profile collapses, the Construction Contracts (Retention Money) Amendment Act 2023 mandates that retentions are automatically held on trust and strictly ring-fenced. As confirmed in *Burt v Grant* [2025], statutory trusts continue to protect subcontractors post-liquidation, extending not only to direct retentions subsequently recovered from project principals but also to the settlement proceeds of liquidator-led lawsuits against directors for failing to keep those retentions on trust.¹⁹

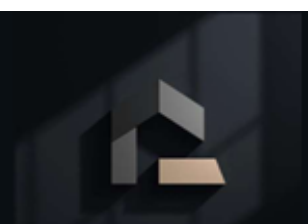
While head contractors can still aggressively pursue rapid cash flow via smash and grab tactics, they can no longer legally commingle lower-tier retentions to fund their own survival. The broader contractual environment is also evolving. NZS 3910:2023, for example, introduces a distinct Final Account procedure intended to promote earlier reconciliation of the final Contract Price. Although this development should not be attributed solely to 'smash and grab' enforcement, a clearer final-account process may reduce the scope for unresolved valuation disputes to first emerge through the final statutory payment cycle.

10. Conclusion

The "smash and grab" adjudication is a harsh, unyielding commercial reality. By prioritising strict procedural compliance over substantive valuation, statutory regimes have fundamentally shifted the balance of power. Where a valid payment claim has been served and the payer fails to provide a compliant payment schedule within the applicable period, the CCA deliberately prioritises interim cash flow over immediate resolution of the underlying valuation dispute. Once the relevant payment becomes due, the payer may therefore be required to pay first and pursue the substantive dispute later.

For the New Zealand construction industry, the resulting "debt due" mechanism is an incredibly powerful, highly leveraged tool. While the courts will intervene to prevent manifest injustice, such as jurisdictional overreach or the irreversible dissipation of assets by shell companies, the overarching mandate remains intact. A failure to issue a valid payment schedule can expose the payer to expedited debt-recovery proceedings, restricted rights of set-off, statutory-demand pressure and, where the statutory prerequisites are satisfied, suspension of construction work.

¹⁹ *Burt v Grant* [2025] NZHC 2486.



Footnotes & References

1. Sir Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry* (HMSO 1994)
2. Housing Grants, Construction and Regeneration Act 1996 (United Kingdom). HL Deb 22 April 1996, vol 571, cols 989–90 (Lord Ackner)
3. HL Deb 22 April 1996, vol 571, cols 989–90 (Lord Ackner)
4. Construction Contracts Act 2002 (NZ).
5. Companies Act 1993 (NZ)
6. *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 (CA).
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12. *George Developments Ltd v Canam Construction Ltd* 1 NZLR 177 (CA)
13. *Ellis Build 2008 Ltd v NZ Chemical Care & Storage Ltd* [2013] NZHC 3204
14. *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243
15. *Construction Advantage Ltd v Eljayej Holdings Ltd* [2025] NZHC 1749
16. *Chillex Services Ltd v Best Air Conditioning Ltd* [2025] NZHC 1729
17. *Anderson v Swindells* [2018] NZHC 1803, [2018] NZAR 1375
18. *Hellaby Resource Services Ltd v Body Corporate 197281* [2021] NZHC 554
19. *Burt v Grant* [2025] NZHC 2486.