A CRITICAL EXAMINATION
OF
BUILDING CONTRACTS
IN
NEW ZEALAND

An investigation into the types of building contracts employed; their formation and administration; and into the incidence, nature and resolution of disputes resulting from their usage; in the commercial and residential sectors of the construction industry in New Zealand

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

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ABSTRACT

Toward the end of 1999 and during the early part of 2000, the commercial construction sector in the Auckland area of New Zealand was affected as a result of liquidations of a number of major commercial construction companies.

The aim of the research is to investigate the employment of building contracts, their administration, and into the incidence, nature and resolution of disputes executed during the calendar years of 1999 and 2000. This research was undertaken by surveying 100 commercial and 60 residential projects undertaken in the Auckland region of New Zealand to determine if the problems being experienced by the commercial contractors who were liquidated was incidental and limited to the commercial sector. Projects surveyed ranged in value between NZ$10,000 and NZ$700,000 for residential projects and between NZ$150,000 and NZ$99,000,000 for commercial projects.

The literature review identifies, analyses and discusses:

(i) To what extent are ‘standard’ forms of building contracts used by the construction industry including who was responsible for the drafting of those contracts?
(ii) What provision was made in these building contracts for the resolution of disputes?
(iii) Who was responsible for the independent administration of those building contracts?
(iv) What was the incidence of disputes that resulted as a consequence of the usage of these building contracts and what was the nature of the disputes and how were they resolved? and
(v) Would the construction industry in New Zealand benefit from legislation that would require that an independent third party be engaged for the administration of the building contract?

Gaps in the literature of all areas of the research were identified.

The following hypothesis was promoted:

The incidence of disputes is reduced in building contracts that are administered by an independent third party for both commercial and residential sectors of the construction industry in New Zealand.

A statistical analysis of the data collected was used to test the hypothesis as well as to determine whether the appointment of a third party to administer a contract between the client and contractor was of direct benefit and assisted in the avoidance or resolution of disputes. The results provided support for the hypothesis in both the commercial and residential sectors of the construction industry. Additionally, there was also qualitative endorsement for the propositions. The surveys provided evidence about the attitude adopted by those involved in the particular sectors to the independent administration of building contracts. 79% of the building contracts surveyed in the commercial projects were independently administered compared to 42% in the residential sector.

The data was also used to provide positive test results for a proposition known as the ‘principle of remotivity’ which states that: ‘the further the architect (or designer) is from the independent administration of a building contract during its execution, the more likely it is that disputes will arise’.

The research confirmed that the culture of the construction industry in New Zealand; the legislation used to control the industry; and the decisions of local judiciaries in construction related matters are different to those adopted in Australia and the United
Kingdom. These variations are not recognised by persons connected to and detached from the construction industry. The dissertation concludes by making 19 (nineteen) suggestions and recommendations.

The research was limited to projects undertaken in Auckland, New Zealand and replication of the study would provide a broader understanding of this area of inquiry and further data to qualify the ‘principle of remotivity’.
ACKNOWLEDGEMENTS

There are so many who have helped both directly and indirectly in assisting with this research that it is difficult to know where to start. My sincere thanks and appreciation are extended to:

- The participants from the numerous commercial construction companies who researched their records and gave graciously of their time during the interviews; for the management and staff of the Registered Master Builders Association Head Office in Wellington and the members who completed the questionnaire.

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- To my wife Linda and to our children (and their spouses) Neil (Anna), Anita (Paul) and Greg (Sheree) for their love, patience and understanding.

- Finally, I dedicate this work to my grandchildren Katelyn Ella, Jordan David, Nicole Maree and Ryan Jack. May I be the inspiration to them that my late parents Tom and Ellen Gatley, were to me.
Declaration

I certify that except where due acknowledgement has been made, the work is that of the author alone, the work has not been submitted previously, in whole or in part, to qualify for any other academic award; the content of this thesis is the result of work which has been carried out since the official commencement date of the approved research program; and any editorial work, paid or unpaid, carried out by a third party is acknowledged.

Signed

David Gatley

May 2004

ABSTRACT

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### GLOSSARY OF TERMS AND ABBREVIATIONS

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<th>Full Name</th>
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<td>AAA</td>
<td>American Arbitration Association</td>
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</tr>
<tr>
<td>ACA</td>
<td>Association of Consultant Architects (USA)</td>
<td></td>
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<tr>
<td>ACENZ</td>
<td>Association of Consulting Engineers of New Zealand</td>
<td></td>
</tr>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
<td></td>
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<td>AERB</td>
<td>Architects Education and Registration Board</td>
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<td>DRB</td>
<td>Dispute Review Boards (Australia)</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>HGRA</td>
<td>The Housing Grants and Regeneration Act 1996 (United Kingdom)</td>
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<td>IPENZ</td>
<td>Association of Consulting Engineers New Zealand</td>
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<td>JCT</td>
<td>Joint Contracts Tribunal (United Kingdom)</td>
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<td>NZIA</td>
<td>New Zealand Institute of Architects</td>
<td></td>
</tr>
<tr>
<td>NZIQS</td>
<td>New Zealand Institute of Quantity Surveyors</td>
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<tr>
<td>PPC</td>
<td>Project Planning Contract (United Kingdom)</td>
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<tr>
<td>RIBA</td>
<td>Royal Institute of British Architects</td>
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<td>RMIT</td>
<td>Royal Melbourne Institute of Technology</td>
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CHAPTER 1

INTRODUCTION

Toward the end of 1999 and during the early part of 2000 the commercial sector of the construction industry in Auckland, New Zealand was affected by a series of receiverships/liquidations of major construction companies. A preliminary estimate by the appointed receiver/liquidator of one such company was that over NZ$17.4m was owed to just over 500 of the estimated 1000 creditors. The report revealed that, prior to being placed in receivership, this company was engaged in a number of disputes with various clients, subcontractors, suppliers and consultants relating to the various contracts that were being executed. Price Waterhouse Coopers (2001) estimated that the amount owing was approximately NZ$28.5m.

There is anecdotal evidence that these contracts for these projects were ‘specific’ contracts drawn up by solicitors acting for the developer clients and that the contracts were not independently administered. However, it is known that the collapse of these companies prompted the New Zealand Government to introduce the Construction Contracts Act 2002. There are provisions in the legislation which specifically exclude the residential sector. Additionally, consultants are totally excluded from the legislation.

Whether this legislation would have helped to avoid, or assist the resolution of, the disputes that resulted from the receiverships/liquidations that occurred in 1999 and 2000 is currently unclear. The research therefore, aims to formulate an opinion as to...
whether the legislation would, had it been available during the period 1999 and 2000, have been effective in avoiding the effects of the construction industry company collapses referred to.

Prior to outlining appropriate research questions and a hypothesis for this thesis, a brief history of the evolution of dispute resolution procedures and the development of premises constituting professional negligence up to present times should be addressed.

1.1 Historical background

The Old Testament of the Bible contains text (1 Kings 3 17:28) dating from the period 970 BC to 931 BC during the reign of King Solomon which contains a decision which is, arguably, the earliest and influential judgment made by an ‘independent third party’. Whilst not a construction industry conflict it illustrates the need for a party unassociated to the disputants to be involved in the settlement of any altercation. With respect to the construction industry, the earliest regulations governing the adjudication of structural failures date from the time of the sixth king of Babylonia (1792 BC to 50 BC) and are known as the Code of Hammurabi. (Levy et. al.: 1994)

These regulations fall into the category Greek philosopher Aristotle in 340 BC called ‘natural’ law or law derived from custom or precedent. Such rules of custom were the basis for the first Roman law, as set down in the Twelve Tables in 450 BC. Because of the extent of the Roman Empire, Roman law for several centuries was the
rule in much of the Western world except for England. The Code Napoleon, developed in 1804 under the leadership of the French emperor, was derived from and represented a modernised version of Roman law. Because of the wide-ranging imperial conquests of Napoleon, his Code became widely accepted throughout continental Europe and in the colonial territories of European countries. Separated from the rest of Europe by the English Channel, a barrier that helped to maintain its identity, England developed its own approach to the law. The Magna Carta, written in 1215, established the foundation of English constitutional liberty. Since that time common law evolved based on precedent developed through decisions in prior cases. (Levy et al.: 1994). The prevailing position on the law of tort of negligence is described comprehensively in later sections. An example of an earlier action can be found in the 1868 judgment and ruling of the Court of Exchequer Chamber delivered by Blackburn J in the case of Rylands v. Fletcher 1 which decided that:

‘The person who for his own purpose brings on his own land and collects and keeps anything likely to be mischievous, if it escapes must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. And upon authority we think is established to be the law whether the thing so brought be beasts or water or filth or stenches’.

The judgment was confirmed on appeal by Lord Cairns and Lord Cranforth 2. This case exemplifies where an action under tort (or negligence) can be taken against a person or persons where there is no contractual relationship. Since the deliverance of this decision, there have been instances where successful actions have been taken under the tort of negligence even where there has also been an established and confirmed contractual relationship.

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1 Rylands v. Fletcher (1868) LR 1 Ex 265 at 279-280, [1861-73] All ER Rep 1 at 7E.
Kennedy-Grant (1999) describes the tort of negligence as:

‘A form of strict liability that is not able to be defined in a series of rules. Liability in negligence is not dependent upon the establishment of particular facts. It is the result of the Court holding, in a particular case, that it is just and reasonable to impose on one party to the proceeding a duty of care to another and finding that the first party has been in breach of that duty and that the second party has suffered consequence and foreseeable loss as a result. Negligence did not exist as a general tort until 1932 following the case of Donoghue and Stevenson’.

In more recent times in New Zealand, there have been cases that relate specifically to the tortious liability of professional persons and these are examined more fully in the following chapter. The cases of Rowlands v Collow and Body Corporate No. 114424 v. Glossop Chan Partnership Architects Limited are referred to and the decisions are pivotal in the context of this research. While there are also other cases mentioned in which the legal principles of contract and tort are further exemplified, many cases do not suit the purpose of this research. The investigation has revealed that many cases and much of the available literature do not directly relate to contracts which are not independently administered. Although it can be established that disputes have always been conspicuous in the construction industry in New Zealand detailed research has not been undertaken to determine the magnitude of the problem.

1.2 Research questions

The aim of this research is to establish whether during the period of 1999 and 2000 the construction industry collapses and the resultant disputes were isolated incidences or symptomatic of the commercial sector of the construction industry.

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5 Body Corporate No. 114424 v. Glossop Chan Partnership Architects Limited (1997) C.P. 612/93
Contemporaneous research questions were also asked to determine whether the residential sector of the construction industry was similarly effected. Several research questions have therefore, been developed to address and consider the following:

1. To what extent are ‘standard’ and other forms of building contracts used by the construction industry in the Auckland region of New Zealand?
2. Who drew up these contracts?
3. What provision was made in these building contracts for the resolution of disputes?
4. Who was responsible for the independent administration of these building contracts?
5. What was the incidence of disputes that resulted as a consequence of the usage of these building contracts and what was the nature of the disputes and how were they resolved? and
6. Would the construction industry in New Zealand benefit from legislation that would require that an independent third party be engaged for the administration of the building contract?

There is anecdotal evidence to suggest that the engagement of professional persons to ‘independently administer building contracts’ is decreasing and that independent third parties viz., architects, engineers, and etc., may be willingly, although perhaps unwittingly, relinquishing the supervision of contracts because of the limitless liability that can be extended to any act of negligence on their part.

The literature review and its analysis will consider and discuss this synopsis. It is not the intention of this research to consider the ‘psychological’ reasons why one party to a building contract, who having had a difference of opinion with the other party over some matter regarding the building contract, wishes to raise the level of this disagreement to that of a formal dispute. This has been extensively researched by Eileenberg (1999). Furthermore, this dissertation (ibid. 1999) identifies matters in dispute and the nature of disputes and the research did not categorise the types of
building contracts that promoted these disputes nor discuss whether the contracts were administered by an independent third party.

Fenn (1999) also considered the ‘aetiology of construction disputes’ and in doing so, concluded that from the data collected, 2.5% of construction contracts end in arbitration and 3.4% in litigation. In acceding that only a small sample was used to base his assertions, there is a recommendation by Fenn (ibid.: 1999) that further research be undertaken.

1.3 Research hypothesis

There is no law in New Zealand requiring those undertaking construction works to appoint an independent third party to administer the contract during its execution. Neither are there any requirements for the design or construction to be undertaken by licensed or registered persons as in the case in several Australian states.

Under the New Zealand building consent process, once a project has been completed, a suitably independent qualified person is required to inspect the property and to issue a Code Compliance Certificate to attest that the works have been undertaken in accordance with the approved building consent drawings and the Building Act 1991. While this independently qualified person has the authority to request that remedial or other work be done to satisfy the Territorial Authorities requirements he (or she) has no authority under the contract between the Employer and the Contractor and
therefore, cannot issue determinations under the contract. Therefore, a research hypothesis has been developed:

The incidence of disputes is reduced in building contracts that are administered by an independent third party administrator for both commercial and residential sectors of the construction industry in New Zealand.

1.4 Research methodology

The research process will follow the model proposed during the 1980’s by the Science and Engineering Research Council in the United Kingdom; as advocated by Fellows and Liu (1997) and as illustrated in figure 1.1. This research will survey issues raised for both commercial and residential building projects undertaken during 1999 and 2000, which coincides with the period when the business collapses referred to earlier, occurred. Concise details of the research design are outlined in chapter 5.

Figure 1.1: Research process (Fellows and Liu: 1997)
1.5 Contribution to knowledge

Most literature that discusses building contracts and their disputes is written from the standpoint which assumes that building contracts are, in fact, administered by an independent third party. Chapters 2 and 3 look at seminal works written on the primary assumption that this is the case in New Zealand whereas the anecdotal evidence suggests that (particularly with residential projects) this is not the case. This research will contribute to the body of knowledge by quantifying:

1. The incidence of disputes (specifically from a New Zealand perspective) in both the commercial and residential sectors of the construction industry; and

2. By providing research data which will determine whether the appointment of an ‘independent third party’ to administer these building contracts would have assisted in the avoidance or resolution of any disputes that may have occurred.

The New Zealand construction industry, when compared to Australia and the United Kingdom, appears to be less regulated. This could be a factor in a number of building contract disputes and the literature review and subsequent research aims to determine if there is any substance to this proposition. An analysis of over sixty arbitrations and negotiated agreements conducted by the researcher in New Zealand and overseas (in this topic area) since 1997 shows that in all but one case there was no ‘independent third party administrator’ of the building contract. It could be argued that for most of these contracts, disputes could have been avoided had a third party been appointed. Investigation has not revealed any previous research that covers the specific questions addressed in this thesis.
In addition to an absence of literature on this area of research, there is also tangible difficulty in quantifying the incidence of disputes that the building industry is subjected to. The reasons for this are explained in detail in chapter 5.

As stated earlier, the research focuses on the calendar years 1999 and 2000. Statistics are deployed to demonstrate how significant a part the construction industry plays in the economy of New Zealand, particularly in the residential sector. There are conflicting views about the size of the [construction] sector and its importance to the market. Kenley (2001) comments that: ‘according to currently published statistics and popular belief, our sector is 3.3% of GDP reduced from 5% in 1985. A United Nations study identifies construction alone as being 11.8% of GDP and a New Zealand Statistics analysis of all industries indicates construction across all sectors accounts for 14% of GDP.’ The importance of the construction industry to the New Zealand economy cannot be understated and therefore, the avoidance of disputes is of major importance effecting the efficiency and profitability of the construction industry sector.

This research provides a significant contribution to the advancement of knowledge of the construction industry by elucidating the nature of any disputes that occurred during the execution of building contracts in New Zealand. The research is ‘original’ in so far as extensive investigation has shown that no previous studies of this kind have been previously embarked upon. The distinction in this thesis of the incidence of disputes between the categories commercial and residential has not previously been considered.
1.6 Structure of this thesis

Chapter 1 has briefly prefaced the nature of the topic being researched. The subsequent chapters will specifically focus on the following:

Chapters 2 and 3 consider aspects of building contract administration undertaken in New Zealand with reference to Australia and the United Kingdom. Mention is also made to a lesser extent and where appropriate, to literature from Canada and the United States. The relationship of the topics selected for review in chapters 2 and 3 are illustrated in figure 1.2. This chart indicates the dispute resolution procedures available depending upon whether the contract is independently administered or not.

The issues discussed in Chapter 2 are:

1. The legislation affecting the construction industry in New Zealand with comparisons made with the legislation of Commonwealth countries.
2. The building contracts, including ‘partnering’ agreements currently available and used by the construction industry in New Zealand.
3. The provisions contained within those contracts for the resolution of disputes and a comparison of those provisions with the acknowledged dispute resolution processes available both in New Zealand and overseas;

Chapter 3 discusses the administration of building contracts in New Zealand with particular regard to:

1. The law of tort of negligence and the evolution of case law in the context of the principal areas of the research;
2. The role of the architect as the ‘supervisor’ and as the independent administrator of contracts; and
3. The changing role of the architect as ‘supervisor’.
4. The post-graduate education and training of architects.

Chapter 4 poses a series of research questions and promotes a research hypothesis for both the commercial and residential sectors of the industry.
Figure 1.2: The relationship between topics reviewed in Chapters 2 and 3
Chapter 5 describes the research strategy adopted and the manner in which the data will be collected. It will provide a rationale for the methodology; describe the questionnaires developed and deployed; discuss the ethical considerations particularly with regard to ‘confidentiality’ issues; describe the enactment of the research; and confirm the statistical methodology to be adopted for the analysis of the data received.

Chapter 6 presents results of the survey data; analyses and discusses the data received; considers the implications of this data and uses them to provide some answers to the research questions posed and tests the research hypothesis.

Chapter 7 summarises the conclusions and discusses of the findings in chapter 5 and offers suggestions to assist the construction industry to move optimistically forward. Recommendations for future research are made including the suggestion that the ‘principle of remotivity’ is further researched. This chapter also contains the methodology and procedure future researchers could deploy in undertaking a replication of this research, both in New Zealand and overseas.

The final section of this thesis contains the references, legal authorities; legislation referred to during the formulation of this thesis; and the bibliography.

A CD-ROM is included which contains a detailed breakdown of the charts and tables referred to in chapter 6; the appendices; the Excel spreadsheet with details of the all
data received; and a full transcript of the *Rowlands v Collow* and *Body Corporate No. 114424 v Glossop Chan Partnership Architects Limited* cases.

### 1.7 Format of thesis

The format of this thesis and the referencing system is in accordance with the RMIT document ‘Higher Degrees by Research’ (March 2002) and the ‘Style Guide’ published by AusInfo (2001). Footnotes have been used for legal authorities, legislation and in other areas in order to facilitate the reading of this document.

Having set the parameters and structure for this thesis, it is now appropriate that a review of the literature on the topic area of this research be undertaken.

## CHAPTER 2

### BUILDING CONTRACTS

The issues discussed in this chapter are as follows:

4. The legislation affecting the construction industry in New Zealand with comparisons made with the legislation of Commonwealth countries.
5. The building contracts, including ‘partnering’ agreements currently available and used by the construction industry in New Zealand.
6. The provisions contained within those contracts for the resolution of disputes and a comparison of those provisions with the acknowledged dispute resolution processes available both in New Zealand and overseas.

### 2.1 Legislation and the construction industry

The review considers the major pieces of legislation affecting the construction industry in New Zealand and in various Commonwealth countries which are specific to this research and concludes with an examination of other pertinent legislation that has an effect on the construction industry in New Zealand. It is the author’s opinion that, in the New Zealand context, construction industry related legislation is not comprehensive and much of the material, therefore, applies to both ‘construction-
related’ and ‘professional-related’ issues. This section deals predominantly with the former. A later section deals more specifically with professional issues.

New Zealand has a number of ‘standard’ forms of building contracts but not any supporting legislation requiring that these contracts (or any contracts) be ‘formally’ executed by registered or licensed persons. Only agreements for the sale of land are covered by legislation requiring them to be executed in writing. It is for this reason that there is a tenuous link, at best, between ‘legislation’ and ‘building contracts’ as illustrated in figure 1.2.

New Zealand has legislation which are performance based codes to determine the standards of building which are required to be achieved but do not dictate ‘how’ such standards are to be achieved. New Zealand does not require that its builders to be formally trained or ‘registered’ (or ‘licensed’) as is the case in several Australian states. There are laws that directly relate to contracts but there is no requirement, however, that any form of contract shall be used for building works. Additionally, there is no legislation in New Zealand that requires ‘registered’ (or licensed’) persons to carry out design and drafting services or that any building contract has to be administered by an independent third party. There is therefore, the absence of provisions for the resolution of disputes and as a consequence, disputes are often only resolved by resorting to litigation. Alternative dispute resolution processes are generally only being adopted if both parties agree.

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6 Property Law Act 1952
7 Building Act 1991
8 Frustrated Contracts Act 1944
9 Illegal Contracts Act 1970
This research intends to acquire data that will hopefully reveal the extent to which this occurs and whether disputes are more prevalent as a consequence. Whether or not a ‘standard’ form of building contract (with ADR provisions) has been executed (as well as in cases where even the most simple of contracts exists, *e.g.* ‘oral’ contracts), legislation \(^{10}\) allows, under s 28, a party to unilaterally refer any building dispute to adjudication.

Parties are not permitted to ‘opt out’ of this process. By comparison to New Zealand, the United Kingdom \(^{11}\) and Victoria, Australia \(^{12}\) have a wide range of legislation that specifically governs the activities of the construction industry. This United Kingdom legislation requires that, unless one of the parties is a residential occupier, that *a contract be executed in writing*. [emphasis added]. (Ndekurgi *et al.*: 2000)

In Australia, the Building Control Commission was formed to oversee the regulation and administration of building control \(^{13}\) with responsibility to ensure that legislative amendments create an environment that sustains cost efficient, flexible and globally competitive reforms. The State of Victoria in Australia \(^{14}\) produced its own descriptive legislation covering domestic construction and requires that all major

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\(^{10}\) *Construction Contracts Act 2002*

\(^{11}\) *The Housing Grants, Construction and Regeneration Act 1996* (United Kingdom)

\(^{12}\) *Building Act 1993* (Victoria). The legislation covers:

- a) The registration of building practitioners with compulsory insurance;
- b) An option to obtain building approvals from a private building surveyor;
- c) Ten-year liability cap to issue legal proceedings for defects and the appointment of liability to negligent parties as determined by the Courts; and
- d) The enhancement of the building dispute resolution system.
- e) The registration of building practitioners with compulsory insurance;
- f) An option to obtain building approvals from a private building surveyor;
- g) Ten-year liability cap to issue legal proceedings for defects and the appointment of liability to negligent parties as determined by the Courts; and
- h) The enhancement of the building dispute resolution system.

\(^{13}\) *The Building Act 1993* (Victoria)

\(^{14}\) *The Domestic Building Contracts (Amendment) Act 1996* (Victoria)
domestic building work (defined as being in excess of AUD$5,000) be executed under a formal written contract and be constructed by a registered (or licensed) builder. Bick (1997) comments that: ‘the distinguishing feature of the Victorian legislation is not merely its terms but also the holistic approach that the government has adopted to the solution of industry problems. For that reason, the Victorian legislation still provides the model for others to follow’.

In Queensland, Australia the amount after which a licensed builder must execute the work is currently set at AUD$3,300 and restrictions also apply where, if not a registered architect, persons must be licensed with a Building Services Authority to carry out design or drafting services.

In 2002, the Royal Australian Institute of Architects issued a Practice Note (AN. 10.01.109) advising that in most states and territories there is no restriction upon who may design and document buildings, but only architects may use the title ‘architect’. (RAIA: 2002). The State of New South Wales in Australia also has similar and specific legislation covering the operations of the construction industry. Therefore, it can be seen that there appears to be ‘targeted’ legislation in both the United Kingdom and Australia that is intended to directly support the construction industry in those countries. The review of legislation determined that there are a plethora of

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15 Building Services Authority Act 1999 (Queensland, Australia).
16 Professional Standards Act 1994 (New South Wales, Australia) The aims of the legislation are to:
   a) Enable the creation of schemes to limit the civil liability of professionals;
   b) To facilitate the improvement of occupational standards of professionals;
   c) To protect consumers of professionals’ services; and
   d) To constitute the Professional Standards Council to supervise the preparation and application of schemes and to assist in the improvement of occupation standards and consumer protection.
rules and regulations covering a wide range of activities that have both a direct and indirect on the construction industry in New Zealand.

However, it is questionable whether this legislation is comprehensive and is aimed directly at the construction industry. This view has substance when a comparison to overseas legislation is made.

Some of the legislation and the resultant court cases in New Zealand have also tended, in recent times, to be almost contradictory where it was held by the Court that the plaintiff could not succeed against either the first defendant (architect) or the second defendant (builder) because the claim had been filed more than 10 years after the building work it related to had been completed. New Zealand legislation requires that civil proceedings relating to any building work may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based but the provisions of the code seem to be inconsistent when compared to judicial decisions.

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17 Johnson and Johnson v Pitts. Unreported. High Court, Whangarei. Master Anne Gambrill. CP10/01.
18 Building Act 1991: Clause B2.3: ‘Performance’ states that from the time a code compliance certificate is issued, building elements shall with only normal maintenance continue to satisfy the performances of this code for the lesser of the specified intended life of the building, if any, or:
   (a) For the structure, including building elements such as floors and walls which provide structural stability; the life of the building being not less than 50 years.
   (b) For services to which access is difficult, and for hidden fixings of the external envelope and attached structures of a building: the life of the building being not less than 50 years.
   (c) For other fixings of the building envelope and attached structures, the building envelope, lining supports and other building elements having moderate ease of access but which are difficult to replace: 15 years.
   (d) For linings, renewable protective coatings, fittings and other building elements to which there is ready access: 5 years.
The Privy Council \(^{20}\) also considered this proposition \(^{21}\) where a successful action was brought 18 years after the negligent act occurred and a similar decision was also recorded in *Chase v de Groot* \(^{22}\) where a successful action was also brought several years after a negligent act became *evident* [emphasis added].

Further, the Courts also are tending to discount exclusion clauses in contracts where a party may wish to add a waiver that would enable them to deny any claim for negligence and there is a proposition that a party cannot ‘contract out’ of negligence. Other legislation, \(^{23}\) also has an impact on whether a claim can be ‘time-barred’ or not and its application is dependent upon the contractual relationship of the parties.

Kennedy-Grant (1999) believes that: ‘liability may be excluded or limited by a clause in the contract and there is no rule of law prohibiting the inclusion of such a term in a contract or restricting its effect except as to fraud and where the Consumer Guarantee Act \(^{24}\) applies. It is conceded that this is the case under a *contractual* relationship. This however, would not occur where there is an informal or oral contract in place \(^{25}\). New Zealand has only limited legislation covering the work of ‘professionals’ or any other persons connected with the construction industry although there are two pieces of legislation \(^{26},^{27}\) which are intended to protect *all* consumers and not just construction industry consumers. Solicitors have resorted and cited these Acts in cases where there have been alleged cases of negligence.

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\(^{21}\) *Johnson and Johnson v Pitts*. Unreported. High Court. Whangarei. Master Anne Gambrill. CP10/01.

\(^{22}\) *Chase v de Groot* (1994) 1 NZLR 613.

\(^{23}\) *Limitation Act 1950*

\(^{24}\) *Consumer Guarantees Act 1993*


\(^{26}\) *Fair Trading Act 1986*

\(^{27}\) *Consumer Guarantees Act 1993*
Chapter 2: Building Contracts

Such situations have been catered for in New South Wales where legislation\textsuperscript{28} has been enacted to ‘protect consumers of professionals’ services’. Investigations have revealed that there are in excess of 95 other pieces of legislation (Refer to ‘References’) which have a direct impact upon the construction industry in New Zealand.

While there seems to be an abundance of legislation that should afford protection to the industry and the public, this is not the case as the list is neither comprehensive nor integrated.

In conclusion, there appears to be insufficient targeted legislation that establishes good working relationships between all participants and that most of the legislation has tended to be enacted as a reaction to adverse occurrences.

2.2 Building contracts in New Zealand

There are several ‘standard’ forms of building contracts\textsuperscript{29} available in New Zealand and the extent to which any of these contracts are used is unknown. Figure 2.1

\textsuperscript{28} Professional Standards Act 1994 (New South Wales, Australia)

\textsuperscript{29} Principal ‘standard’ forms of building contracts in New Zealand:

5. New Zealand Standard NZS 3915: 2000: Conditions of Contract for Building and Civil Engineering Contracts (where no person is appointed to act as Engineer to the contract).
illustrates the dispute processes available when NZIA SCC1 (2000) and NZS 3910 (1998) are used and presupposes these contracts were executed with the administration being undertaken by an independent third party. The chart also shows the process generally available when the project is not executed using a ‘standard’ form of building contract and therefore, unlikely to have been administered by an independent third party.

Editions of NZIA SCC1 (2000), NZS 3910 (1998) and the Registered Master Builders’ (1988) contract have been available in New Zealand for some time and the other contracts referred to are more recent.

To date there are no known industry adopted ‘standard’ forms of building contract in New Zealand for either ‘partnering’ or ‘management procurement’ projects and initial research has indicated that contracts for any such projects are drawn up specifically on a per project basis.

In Australia, building contracts often utilise ‘standard’ forms of contract modified by the use of special conditions where the longer the general conditions are the more it is likely that they will omit something. (Laan: 2000). The advice proffered by the professional body representing architects in New Zealand (NZIA: 2002) is that ‘standard’ forms of building contracts should not be altered and the author supports this view.

The ‘disputes resolution’ section of NZIA SCC1 (2000) contract requires that, if the architect administrating the contract cannot either negotiate a settlement either informally or by determination, then any dispute should be referred to mediation. In the event that mediation is unsuccessful, then the parties are required, under their contractual agreement, to refer the matter to arbitration. The NZIA (2000) edition includes for a mediation process (prior to arbitration) and a requirement that in the event that the parties cannot agree on an arbitrator that they request that the President of the Arbitrators’ and Mediators’ Institute of New Zealand make an appointment.

Comment was made by contractors interviewed during the pilot study undertaken by the author in 2000 that, when this change was initially introduced, architects and other affiliated professionals were quite supportive of a mediation process being included but whether this support remains is uncertain. There is a degree of uncertainty as to whether it is still supported as the parties discern some finality of decision being provided which does not necessarily always occur with mediation. This research aims to provide data that will be able to test this notion.

The pilot study undertaken in 2000 revealed that the NZIA SCC1 (2000) contract is ‘too biased in favour of the contractor and that too many of the risks are placed with the employer’. This contract is protected by copyright of the New Zealand Institute of Architects and can only be used by a NZIA member architect who is involved in administering the Contract Works [emphasis added] and it must not be copied. The survey intends to provide some indications of its usage.
A project manager, who is not a registered architect and a member of the N.Z. Institute of Architects, and who is involved as the principal consultant to administer the building contract should not use this contract. There is often uncertainty when contract documentation is being produced whether the architect will be engaged to administer the contract and therefore, it is ostensibly perhaps not the contract of first choice. These comments also apply to the NZIA: Small Works (2000) contract which is not recommended for use on contracts with a value of over NZ$100,000. The provisions for the resolution of disputes contained within this contract are that if the parties themselves cannot resolve the dispute in ‘good faith’ then they are to attempt mediation, and if that is not successful, to refer the matter to arbitration.

The NZIA NBC-SW2 (1999) contract was developed by the N.Z. Institute of Architects for use where the principal (the person who wants the building work done) enters into a contract with a contractor, (the person who is going to do the work) without any contractually recognised involvement of an architect in the administration and control of the contract. The NBC-SW2 (1999) contract is available for use by the public and therefore, is generally used on projects where an independent third party is not engaged to administer the contract.

The NZS 3910 (1998) contract was developed at the same time as the First Edition of NZIA SCC1 (1998) and the provisions contained for the resolution of disputes follows the same format with respect to the informal and determination settlement processes. This contract also included a mediation process as a precursor to
arbitration. In addition there is also a provision, not contained within NZIA SCC1 (2000), where the parties can call for an ‘expert opinion’. This contract, being a New Zealand ‘Standard’ is available for use by the general public and assumes that the contract will be administered by an independent third party. While it refers to the administration being undertaken by ‘the engineer’, there is no legal restriction to anyone using this title in New Zealand, and therefore, no impediment to anyone adopting and to administering this contract.

The NZS 3915 (2000) ‘standard’ form of contract has been developed in answer to a need expressed by the Registered Master Builders Federation of New Zealand for a New Zealand ‘standard’ contract where the client (principal) administers the contract directly. The Federation has previously produced its own form of contract to cater for this need but recognised the advantage of having a document that had been through the standards development process. (NZS 3915: 2000). The dispute resolution process adopted under this contract permits either party to refer any dispute to an ‘expert’ for an opinion and if either party is dissatisfied with the ‘experts’ decision, the matter can then be referred to mediation, and if not settled, to arbitration. The absence of an independent third party administrator of the contract requires at least one party to be proactive in activating the dispute resolution process and therefore, to be knowledgeable of the procedures. It is the author's opinion that this seldom occurs.

At the time of writing, the New Zealand Standards Association has published draft amendments to both NZS 3910 and NZS 3915 contracts which acknowledges the
adjudication process (as promoted by the Construction Contracts Act 2002) as an accepted method of dispute resolution. It is expected that the adjudication process will run ‘in parallel’ to the other dispute resolution processes provided for and therefore, provide further confusion.

The organisation that publishes the Registered Master Builders (1997) contract is a voluntary, self-governing body that does not have any formal recognition at local or national government level. It nevertheless, is a body which represents the interests of a significant number of builders in New Zealand. The dispute resolution clause in this contract first appeared in 1989 and the method proposed has not changed since that time. The contract does not provide for any alternative forms of dispute resolution such as negotiation and mediation and states that all disputes or differences are to be referred to arbitration. The research intends to survey the usage of this contract. The Registered Master Builders’ contract (1997) does not allow for any independent third party administration of the contract. Gaafer (1997) states that: ‘therefore, it is to be not unexpected that, with some form of standard contracts, that some risks are allocated in such a way which might not optimise the benefits to the parties involved which, in turn, could be generating more disputes’. It could be argued that this is the case with this contract and there is anecdotal evidence to suggest that its usage tends to promote a higher incidence of disputes. This research may provide some evidence to determine if this is the case or not. The introductory notes to the NZIOB (2000) contain a statement that a need for an accepted precedent design and build conditions of contract was identified. Part 21 of the contract identifies the processes to be followed in the event that a dispute arises and the

The pilot study undertaken in 2000 determined that there is some form of ‘partnering’ being promoted in the commercial sector of the construction industry in New Zealand and that this tends to occur subsequent to a relationship having been established on an earlier project. Often the earlier contract is supplemented with a ‘partnering’ agreement and subsequent contracts are then modified via an ‘exchange of letters’. Investigations have revealed that there is no ‘standard’ or publicly available ‘partnering’ agreement available in New Zealand and no empirical evidence has been found to support that ‘partnering’ agreements occur in the residential sector of the industry in New Zealand. This research surveys these occurrences.

Chapter 1 asserts that there is a dearth of documentation covering the topic of the administration of contracts where an independent third party has not been appointed to administer the contract. The antithesis applies to ‘partnering’ where there is an abundance of literature with the vast majority emanating from overseas. The works of several authors, who are generally supportive of the practice, were consulted. (Refer: Fellows (1997), Laan (2000), Bremen (2000), Abrahams et al. (1998), Steadman (2001), Ashworth (1999), Brooker (1997), Bessey (2001), Burton (1990), Eilenberg (1999) and Walker et al. (2000).
The agreements obtained during the pilot study research indicate that, for the most part, ‘partnering’ can best be described as a declaration of mutual trust and while such agreements may assist in ‘conflict management’ that they do not eliminate disputes. There is anecdotal evidence that the opposite may be the case. Such agreements have been tested in the Courts in Australia but here have not been any reported cases in New Zealand. Members of the legal fraternity write much of the literature emanating from Australia on ‘partnering’. Abraham et al. (ibid. 1998) are of the opinion that the traditional method of tendering is ‘adversarial’ and if this assertion is correct then the reason as to why should this process be any different should be addressed in order to ascertain the reasons why the introduction of alternative forms of building contracts has become necessary.

In the United Kingdom, there is an opinion that most people involved in the construction industry recognise the need to move away from the confrontational relationships that cause disputes, problems, delays and ultimately expense. Research into building projects in the United Kingdom found that only the ‘most expensive’ of projects studied were executed by ‘project alliance’ methods. (Ashworth: 1999). Bresner et al. (2000) However, the vast majority of projects undertaken in New Zealand would be relatively of a smaller scope.

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30 Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd. Full Court of the Supreme Court of Western Australia. Unreported. 14 April 2000. The judgement stated that:

‘where a dispute arose under a ‘partnering’ agreement, it was stated that the benefits of a successful alliance can be significant for both principals and contractors. Those potential benefits do not come without a price. The downside of the alliance method of project delivery is that there is often a high degree of uncertainty as to precisely what the parties’ obligations are under the alliance agreement. In this case, the alliance contract, acknowledged as being obligations of good faith, failed’. (Bremen: 2000).
In the United Kingdom, ACA contract (2000) ‘provides the foundation for the project planning process’ and under clause 27 has a ‘non-adversarial problem resolution’ section with an initial adjudication process, which if not conclusive, allows for the dispute to be resolved by arbitration.

Steadman (2001) comments that: ‘it is not impossible to support the general objectives of ‘partnering’ although there are a multitude of ways in which the documents legal and partnering sit uncomfortably together’. In New Zealand, ‘true partnering’ is a revolution in a way one does business. It cannot be just an overlay of a traditional contract. In all the enthusiasm not a lot of thought seems to have been given to the legal nature of ‘partnering’. It is important to know whether ‘partnering’ constitutes a partnership, joint venture or some other contract carrying fiduciary obligation. (Durbin: 1998).

An analysis of the effect of ‘partnering’ agreements from the literature suggests that that the use of ‘partnering’ does not necessarily foster a ‘non-adversarial’ environment. For example, in the United Kingdom, contractors are more likely to confine the use of Alternative Dispute Resolution (ADR) to small financial disputes and that arbitration and litigation are more likely to be preferred on larger disputes. (Brooker: 1997). There are opinions in the New Zealand construction industry that would suggest ‘partnering’ is one new method or ‘invention’ devised principally for the ‘resolution of disputes’. However, it could also be argued that if the construction industry in New Zealand had satisfactory and widely accepted and employed ‘standard’ forms of building contracts (which incorporate accepted ADR processes)
then the need for specifically drawn up and therefore, expensive ‘partnering’ agreements could be dispensed with. It is difficult to comprehend what has significantly changed within the industry in recent years, particularly with respect to smaller commercial and many residential projects that would necessitate the introduction of such agreements.

An analysis of the literature has shown that there has been little written on the New Zealand ‘standard’ forms of building contracts but that much has been written advocating the use of ‘partnering’ agreements. While it is recognised that the nature and culture of the construction industry is different in New Zealand from many of those countries who have adopted ‘partnering’, New Zealand research on the acceptance and implementation of ‘partnering’ has not been undertaken. The research intends to provide some data about the extent to which ‘standard’, ‘partnering’ or other forms of building contracts were used in the commercial and residential sectors of the construction industry in New Zealand during the calendar years 1999 and 2000.

The next section reviews the dispute resolution processes available in New Zealand and contrasts these with accepted procedures elsewhere.

2.3 Dispute resolution

As mentioned chapter 1, disputes have occurred since the advent of time and the assistance of an ‘independent third party’ to assist in their resolution is not new. The construction industry in New Zealand is not a ‘dispute free’ environment and there is
anecdotal evidence to suggest that the number of construction related disputes resolved by alternatives to litigation has increased in recent years. (Kennedy-Grant: pers.comm: 2002). Whether this view concurs with the United Kingdom experience is pure conjecture. (Brooker *et al.*: 1997)

In New Zealand, the late 1970s and 1980s witnessed changes to the dispute resolution processes that are included in the ‘standard’ form of building contracts. Although litigation has always been a solution available to disputants, the late 1970s saw the increased usage of arbitration as an alternative method of dispute resolution (ADR). The inclusion of the arbitration process during this period in many of the ‘standard’ forms of building contracts will attest to this. In the 1980s the introduction of ‘mediation’ was also evident. The mid to late 1990s also witnessed the promotion of other methods of dispute resolution (*e.g.* mediation) in New Zealand and more recently, the adjudication process has been introduced. Because there is no data to quantify the extent of usage of the ‘standard’ forms of building contracts for construction projects in New Zealand it is also unclear what alternative dispute resolution or other processes are used to resolve disputes. Neither is it known what contracts (and ADR processes) were used on the projects undertaken by the contractors who were involved in the collapses referred to in chapter 1.

There are two contracts 31 being principally used and accepted by the New Zealand construction industry. Both of these contracts contain similar provisions for the resolution of disputes although NZS 3910 makes provision for an ‘expert opinion’ to

be requested, should both parties agree, prior to embarking upon the more formal processes of mediation and arbitration.

Figure 2.1 illustrates the dispute resolution process advocated by these contracts and contrasts them with a taxonomy of terms generally accepted by both the construction industry and the legal profession in New Zealand. Those terms are also generally synonymous throughout the worldwide construction industry although there are some national differences. Figure 2.1 also correlates the procedures endorsed by the contracts, particularly NZIA SCC1 (2000) and NZS 3910 (1998), with the various accepted terminology. The first and second stages of the dispute resolution procedures promoted by these ‘standard’ forms of contracts provide for an informal process followed by a determination process to be undertaken by the administrator of the project. If these processes are unsuccessful, the third stage is a mediation process which is to be undertaken by a nominated mediator. Mediated decisions are not final or binding upon the parties. Therefore, if mediation is unsuccessful, the dispute can then proceed to be resolved by arbitration. Litigation is not referred to in these building contracts. The adoption of the alternative dispute resolution (ADR) procedures assumes that there is a ‘standard’ form of building contract in place that allows for their espousal. The pilot study undertaken in 2000 indicated that the usage of alternative dispute resolution (ADR) methods, as opposed to litigation, is usually not pursued once a dispute arises if the parties do not already have a prior agreement in place. Often one party will obstruct attempts to resolve the dispute amicably. In this event, litigation is often the only avenue available to the aggrieved party. Litigation in New Zealand is generally accepted as being slow process to the point of
being tedious, relatively expensive, and a cumbersome method of resolving disputes and not suited, for the most part, to resolving construction industry disputes. The various methods of dispute resolution available to the construction industry in New Zealand and as shown in figure 2.1 are:

1. Negotiation
2. Adjudication
3. Mediation
4. Mediation/Arbitration
5. Arbitration
6. Litigation

While legal classification of many of these processes is generally consistent with overseas methods, there are some differences. For example, ‘conciliation’ does not appear in any of the ‘standard’ forms of building contracts in New Zealand.

2.3.1 Negotiation

In Australia, negotiation is described as being where parties approach each other for discussions to find a mutually acceptable outcome for the dispute. Negotiations may, or may not, involve partisans supporting each of the parties. (Watts: 1998). Prior to the ‘boom’ in the 1980s, the preferred method of dispute resolution was by direct negotiation, followed by arbitration and then litigation. (Laan: 2000).

In England and Wales, it could be said that negotiation does not come easily to most Englishmen, where there is no culture of haggling; prices quoted are not normally negotiable. The process of negotiation is not readily accepted. (Fenn et al. 1998).
1. INFORMAL
   - NZIA SCC1 Sec K Rule 93
   - NZS 3910 Sec 13 Rule 13.2

2. DETERMINATION
   - NZIA SCC1 Sec K Rule 94.1
   - NZS 3910 Sec 13 Rule 13.2.4

3. MEDIATION
   - NZIA SCC1 Sec K Rule 94.2
   - NZS 3910 Sec 13 Rule 13.3

4. ARBITRATION
   - NZIA SCC1 Sec K Rule 94.3
   - NZS 3910 Sec 13 Rule 13.4

DISPUTE RESOLUTION PROCESSES
TAXONOMY OF TERMS
IN NZIA SCC1 & NZS 3910
(Refer to Appendix B)

Figure 2.1: Dispute resolution processes
In New Zealand, during the pilot study in 2000, a major contractor advised that one contract they had been party to included a four-stage negotiation process for the resolution of disputes. The process involved personnel at different levels of the management hierarchy of both the contractor and the consultant/employer. These persons were charged with the task of endeavouring to resolve the dispute. If the personnel at the first (and junior) level of the management failed to negotiate a resolution, the matter was dealt with at the next level, and so on up to the chief executive level. This method proved to be successful as the senior management believed that if a junior manager could not consistently negotiate in this area then they were unlikely to be good negotiators at a more senior level. (Gatley: 2000). This form of dispute resolution methodology is similar to that promoted in the ‘standard’ form of New Zealand building contracts and is largely synonymous with the informal and determination processes referred to in those contracts. (Refer NZIA SCC1:2000 and NZS 3910: 1998).

2.3.2 Adjudication

The New Zealand Government has recently introduced legislation \(^{32}\) that includes an adjudication process as the preferred and adopted means of dispute resolution. Any party to a building contract can avail themselves of the ‘adjudication’ process provided for in this Act, should a dispute arise. This can occur whether they have a formal contract which allows for dispute resolution processes or not. Parties cannot opt out of this provision.

\(^{32}\) Construction Contracts Act 2002
While overseas, adjudication has existed as an established practice for some time (Refer Bentley: 1992 and McGaw: 1991) there is no evidence, anecdotal or otherwise, to suggest that ‘adjudication’ procedures have been previously adopted in New Zealand. Certainly, no such provisions have been expressly included in any of the ‘standard’ forms of building contracts used in New Zealand. Adjudication is a process described as being where a third neutral party gives a decision that must be acted upon by the parties. Additionally, it is seen as being ‘a quick and dirty process in that the appointee is entirely free of all constraints and procedures normally associated with the appointment as an arbitrator’. (Black: 2000). In England, their legislation 33 allows adjudicators to take whatever actions and make such investigations, as they and they alone deem necessary, to come to a decision. It sets out the procedures and minimum standards which will apply if the contract between the parties does not fully comply with the Act or if the contract does not reflect fully the rights of a party, e.g. in payment terms, then the terms laid out in the Scheme apply. (Kennedy: 2000). Little guidance on the intended method of conducting the adjudication process although benchmarks for time scales are laid down. Adjudication is clearly distinguished from arbitration in that adjudication must become the key to settling disputes in the construction industry. Its use is certainly on the increase and it is set to become the most dominant form of dispute resolution within the industry. A short, sharp victory can save many hours of time, and thousands of pounds in legal bills and other costs. (Hall: 2000).

33 *The Housing Grants, Construction and Regeneration Act 1996* (United Kingdom)
In 1996, prior to the introduction in the United Kingdom of this legislation the Technology and Construction Court in London issued 1090 claims, whereas only 325 were issued in 2000. On the face of it, that looks like a reduction of two-thirds. However, by 28 April 2001, at least 3300 adjudicators had been appointed. This actual figure is probably higher as certain nominating bodies had not provided figures and some adjudicators will have been appointed by agreement. So the number of disputes requiring resolution by adjudication alone is three times the number of claims issued in London in 1996 and all of this suggests that the ‘Construction Act’ is creating disputes that otherwise would have not occurred. (Bessey: 2001).

In Canada, an adjudicator can be hired at the outset of the contract or when the dispute arises and the adjudicator’s recommendations are acted upon with the proviso of appeal to binding arbitration where one of the parties continues to dispute the decision. At this time Canadian ‘standard’ forms of building contracts do not include the adjudicator in the contract, as has been the case in the UK Civil Engineering Contract Documents. (Beifuss: 1998).

Kennedy et al. (2002) have been monitoring the adjudication process in the United Kingdom since September 1999 and have found that main contractors and their domestic subcontractors are still the main protagonists, followed by main contractors and their clients. Referrals by domestic [i.e. ‘residential’] subcontractors are falling and referrals by main contractors, clients and subcontractors are rising. The clear

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34 The Housing Grants, Construction and Regeneration Act 1996 (United Kingdom)
intention of the Latham Report (1994) and the subsequent 1996 Act \(^{35}\) was to redress the imbalance of power suffered by *domestic subcontractors*. [emphasis added].

The conclusion is that it would appear that other contracting parties, initially slow to accept adjudication as a means of resolving disputes (as the extensive case law would suggest) now see it as a powerful and effective weapon, and indicates that the domestic (or ‘residential’) sector has been a predominant beneficiary of the adjudication process provided for within the United Kingdom legislation.

The Australian states of New South Wales, \(^{36}\) Queensland, \(^{37}\) and Victoria \(^{38}\) have also introduced legislation that incorporate an adjudication process which is modeled on the United Kingdom regulation \(^{39}\) and allows for consultants to be included in the process.

The introduction of legislation \(^{40}\) in New Zealand followed the recommendations of the Law Commission (Study Paper 3) in November 1999 and passed through the parliamentary process under urgency after company collapses referred to in chapter 1. The legislation is ostensibly modeled on both United Kingdom and New South Wales legislation and provides an adjudication process. However, although parties to residential building contracts in New Zealand can avail themselves of the adjudication process, they have been excluded from some of the *enforcement*

\(^{35}\) *The Housing Grants, Construction and Regeneration Act 1996* (United Kingdom)
\(^{36}\) *Building Industry Security of Payments Act 1999* (New South Wales)
\(^{37}\) *Queensland Building Services Authority Amendment Bill 1999*
\(^{38}\) *The Building and Construction Industry Security of Payments Act 2002* (Victoria, Australia)
\(^{39}\) *The Housing Grants, Construction and Regeneration Act 1996* (United Kingdom).
\(^{40}\) *Construction Contracts Act 2002*
provisions under this legislation. It is understood that the authors of both NZIA SCC1 (2000) and NZS 3910 (1998) do not intend to amend the dispute resolution provisions in these contracts to allow for an adjudication process their intention being that the process can run alongside the current methods adopted. It is this authors’ opinion is that this will add even further confusion, to what is already perceived by many in the construction industry in New Zealand, as being a complicated process and in instances where contracts are not administered by an independent third party, the inclusion of an additional process will lead to further perplexity.

2.3.3 Mediation

Mediation is a process where an third person attempts to assists the parties to a dispute to resolve their differences. (Watts: 1998 and Laan: 2000). Under this process the mediator attempts to determine if there is a point where the parties can acquiesce to an agreed settlement. If not, and depending upon the contractual arrangements, the parties take their dispute to another form of resolution. There are commentators (McKay: 1998) who believe that mediation (in the construction industry) has been having a wonderful run. Almost unheard of 20 years ago, except in the industrial field, it has extended its popularity into a wide range of areas from domestic to major commercial disputes, and it has had a high success rate. It has become a standard method of dispute resolution provided for in contracts, with arbitration or litigation remaining available as the ultimate backstop.
In the United States of America, recent surveys sponsored by the American Bar Association’s Forum on the Construction Industry and other groups indicate that mediation is the most popular and familiar of settlement-orientated alternatives among contractors. (Stipanowich: 1997). By contrast, the dispute resolution provisions contained within C21 and PC-1 ‘standard’ forms of contracts in New South Wales, Australia do not provide any reference to mediation. This is in direct contrast with earlier contracts issued by New South Wales Government agencies between the time of Gyles’ Royal Commission and the issue of C21. (Laan: 2000). In 1997, McKay convened the panel which formulated the updating of NZS 3910 (1987) which included for the first time, a mediation process. (This contract now has an updated 1998 edition). The amendments to NZIA SCC1 (1996) were initiated at about the same time. Since these forms of building contract were introduced, it has been suggested that alternative (and non-standard) forms of building contracts have been developed for a variety of reasons including the dissatisfaction with the ‘dispute resolution’ and in particular, the mediation processes, now contained within these contracts. If this is the stance being adopted by the construction industry in New Zealand it is obviously contrary to that being adopted in the United States of America and as described earlier by Stipanowich (ibid.: 1997).

The construction industry professions in New Zealand were seemingly supportive of the review undertaken by McKay in 1997 as is evidenced by the inclusion of the mediation process in the ‘standard’ forms of building contracts. The research intends to survey the level of adoption of the mediation process. The pilot study indicated that the introduction of a mediation process has not been effective in expediting the
speedy resolution of disputes and, in fact, causes much frustration. The process is not ‘final and binding’ and it was suggested by those surveyed during the pilot study that it is considered by some as being nothing more than a precursor to arbitration with the parties using the mediation process to establish what is the other parties’ case. McKay (1998) in a later statement tends to agree with this assertion, and contradicts his earlier comment (ibid.: 1998) by stating that mediation also has it has its critics as it is perceived that a settlement arrived at by mediation is ‘second rate justice’ and like any negotiated settlement is a form of coercive plea bargaining which owes more to imbalance of power than to fairness. The effect of ADR is that justice is suppressed in favour of peace, while public interest values are subordinated to private settlements which deprive the courts of their power to give authoritative rulings for the benefit of society as a whole. (Fiss:1984)

Powell (1998) believes that three-quarters of New Zealanders would prefer to solve a dispute through mediation or arbitration, rather than going to Court and lawyers are aware of this preference. Yet, this is not occurring. The three reasons lawyers are reluctant to try mediation before proceeding with Court action appear to be a singular belief in the judicial process; fear of cost disincentives; and perceived lack of kudos and prestige. McKay (1998); Fiss (1984) and Powell (1998) argue the point from the perspective that a ‘formal’ contract has been executed that allows for alternative dispute resolution (ADR). Also that there has been an independent third party appointed under the terms of that contract to administer the contract and to resolve any differences (without the need for the intervention from, what can be described as, ‘outsiders’). Should an independent third party been appointed, then it can only be
assumed that the parties did not enjoy the ‘impartiality’ that such a person is expected to display. It was suggested during the pilot study that this is apparently not often achieved. The value of its inclusion in the ‘standard’ forms of building contracts is therefore, questionable and this research hopes to determine the extent of usage and the success of the process.

2.3.4 Conciliation

At this point it is appropriate to mention the ‘conciliation’ process of dispute resolution. Conciliation is characterised as the process when the administrator of the contract attempts to amicably settle a point in dispute. In New Zealand, this term is often synonymous with ‘mediation’ and in the wider context in New Zealand, there is no clear perception of what conciliation is. (Trapski:1997) The literature review and the examination of the principle ‘standard’ forms of building contract used in the construction industry in New Zealand do not refer to a conciliation process. In England conciliation is a well-recognised form of dispute resolution but that there is also widespread confusion over the terms. Conciliation is recognised as being distinct from mediation and within the alternative dispute resolution (ADR) community would be thought of as lying at the adjudicative end of the mediation/conciliation continuum. (Fenn et al.: 1998). Whereas in Australia, although conciliation is very similar to mediation, the third party neutral does not always meet together with the parties. The conciliators role is also broader than in mediation as it includes advising the parties on the likely outcome of the dispute if it were resolved in an alternative form. A conciliator is selected via agreement or appointment. Several organisations have lists of conciliators and some also have
procedural notes and draft agreements for conciliation. A conciliator has no immunity from action for actions of negligence. In light of Brabazon J’s (1997) comments, the function of expressing opinions, as to the likely outcome of a dispute if it were to be arbitrated or litigated, places the conciliator at risk of suit for negligence. (Watts:1998). Conciliators may have an advisory role to help the parties to a dispute, with the assistance of a neutral third party (the conciliator) identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. In many respects it is similar to mediation. (Eilenberg: 2002). In Canada, conciliation is used primarily in the labour negotiation process and usually precedes a strike. It is not normally used in the construction industry. It is suggested that retired judges have a tendency to practice conciliation when they are engaged as mediators. (Beifuss:1998)

In New Zealand, there are no statistics available that would quantify the extent to which conciliation is used, if at all, in the construction industry. The authors’ experience suggests that it is not used and this research will attempt to identify if conciliation processes are adopted.

2.3.5 Mediation/Arbitration

There should also be mention at this juncture of the mediation/arbitration process. In England, it is a process that has been much debated in recent times and although the idea is attracting interest there remains some fundamental matters of principle, which may affect the validity of a binding award for such a tribunal. These include the argument that such an award would be against the rules of natural justice in that a
party to the process is unaware of what is being said in one of the private caucusing sessions and is therefore unable to reply. There is little evidence of the adoption of this method of dispute resolution but no doubt the debate is likely to continue for some time. (Fenn et al.:1998). In New Zealand, this method of dispute resolution is being adopted by some alternative dispute resolution (ADR) practitioners. The method is fraught with danger and should be treated with a great deal of caution. (Firth: pers.comm: 2000). A recent New Zealand case exemplifies where a conflict of interest situation can arise when the same person undertakes the role of mediator and arbitrator. In the USA, in the event that a mediation does not result in a settlement, under no circumstances would a mediator be permitted to serve as the arbitrator of the same dispute. (Stipanowich: 1996). Personal experience has tended to confirm this position. Although the usage of any ADR procedure that will assist in the efficient resolution of disputes should be applauded, the use of a conjoint mediation/arbitration process seems to be in conflict with the rules of the arbitration process, if they are strictly observed. This process is being used in New Zealand under the guise of ‘facilitated arbitration’ where the appointed arbitrator allows the parties (often through their lawyers) ‘flexibility’ in the process to permit a possible determination of the dispute by the parties. This is undertaken without the arbitrators’ intervention and the need for a hearing. Unfortunately, this often allows the dominant party (or his lawyer) to stall proceedings and thus diminishes the benefits of the arbitration process. It is not uncommon for a period of up to two years to elapse before a dispute is settled when using this method which is contrary to the stated intentions of alternative dispute resolution (ADR). It is the authors’ view that to

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41 Carter Holt Harvey Forests Ltd. v Sunnex Logging Ltd., CA 272/00. 7 June 2001.
accept the appointment as an arbitrator after participating as a mediator places the practitioner in an invidious position where he/she will undoubtedly have a conflict of interest.

### 2.3.6 Arbitration

Arbitration is a recognised legal process, undertaken in New Zealand in accordance with the Arbitration Act 1996 and since late 1970s the practice has perceptibly, become the preferred method of dispute resolution in the construction industry in New Zealand. Bevan *et al.* (2001) describe it as providing a mechanism, taking into account the possibilities open to the parties, which avoid the publicity, cost and inconvenience of a Court hearing. This process was, it seems, generally accepted by all sectors of the construction industry and when compared to litigation, arbitration was accepted as a relatively inexpensive and efficient method of resolving disputes. (Kennedy-Grant:1999). In Australia, the process is controlled by the Commercial Arbitration Act with each State having enacted their own legislation. The proceedings are private and the award is not formally published. (Watts: 1998). The philosophy of the uniform legislation was to recognise and respect party autonomy in choosing a tribunal and procedure suitable for the resolution of their dispute and to reduce judicial intervention into arbitration. This is also the generally adopted position in New Zealand. The level of appointment being made by the Institute of Arbitrators’ and Mediator’s in Australia has fallen in recent years to approximately 20 per year, compared to 300 in 1989. (Astor *et al.*: 1992 and Watts: 1998). The trend in Australia toward increased numbers of commercial claims and disputes during the 1980s in turn lead to an increase in dispute resolution proceedings. The
reason being that arbitration was perceived as being less costly than litigation and the parties had the ability to select a person whose experience and knowledge of the context of the dispute made his or her decision worthy of respect by the disputants. (Laan: 2000 and Griffin: 1995).

The pilot study undertaken in 2000 tends to suggest that in New Zealand the number of inquiries directed through the New Zealand Institute of Arbitrators’ and Mediators’ are not representative of the total number of disputes instigated. Their statistics do not include mediations and arbitrations which have been conducted following the direct contact with members nor does it include those conducted by other interested groups such as solicitors, architects, engineers, etc. (Gatley: 2000). As a consequence there are no statistics available in New Zealand to quantify the number of disputes referred to arbitration or in fact, to any other form of alternative dispute resolution. The ‘confidential’ nature of the practice of arbitration (which is referred to in detail in chapter 4) also prevents the accumulation of statistics. It should also be noted that, in the NZIA SCC1 (2000) and NZS 3910 (1998) ‘standard’ forms of building contracts, it is intended that the arbitration process is expected to provide a final and binding decision. There are only limited circumstances under legislation 42 that allows a party to apply to the High Court to have the decision contained within the award of the arbitrator to be remitted or overturned. To advance the dispute to ‘litigation’ should generally not be an option if the processes in the ‘standard’ forms of building contracts have been followed.

42 Arbitration Act 1996
2.3.7 Litigation

At this point, a review of the literature on the topic of litigation should be made. While not recognised as an ‘alternative’ form of dispute resolution it is nevertheless remains an important mode for the resolution of building contract disputes in the construction industry in New Zealand. It is for this reason that there is only a flimsy link between the alternative dispute resolution processes and litigation, as illustrated in figure 1.2. This phenomenon was explained in the previous section. By contrast, where parties have not entered into a ‘standard’ form of building contract that incorporates processes for the resolution of disputes (or in the event that an ‘oral’ contract has been formed), then often the only option available to disputants, is litigation. In New Zealand, the process as to where a party wishing to litigate may do so is in either the High Court, whatever the amount in issue, or in the District Court, if the amount is within the District Courts’ jurisdiction limit of $200,000, or in the Disputes Tribunal for disputes up to $7,500 (or $12,000 with the approval of both parties).

When other factors are taken in to consideration (such as the cost of legal representation for District Court and High Court cases and the indeterminable time that many disputes can take to get before the Court), it may explain why authors of the ‘standard’ forms of building contracts in New Zealand have included and preferred the alternative dispute resolution processes in preference to litigation. The next chapter proceeds to review the literature available on the topic of the administration of building contracts and also makes reference to the post-graduate education and training of architects.
CHAPTER 3

THE ADMINISTRATION OF BUILDING CONTRACTS

The issues discussed in this chapter are as the administration of building contracts in New Zealand with particular regard to:

1. The law of tort of negligence and the evolution of case law in the context of the principal areas of the research;
2. The role of the architect as the ‘supervisor’ and as the independent administrator of contracts; and
3. The changing role of the architect as ‘supervisor’.
4. The post-graduate education and training of architects.

Prior to considering the role of the architect (or designer) and their role in the independent administration of contracts, it is necessary to consider and discuss the evolvement of the law of tort of negligence and of how judgments in Court cases in New Zealand have impacted on the area of this research.

In particular reference will be made to the *Rowlands v. Collow* 43 and to a lesser extent, the *Body Corporate 114424 v Glossop Chan Partnership Architects Limited* 44 cases and the significance that these decisions have made in the context of this research.

3.1 The evolution of the of tort of negligence and the effect on the administration of building contracts

The allocation of risk between the contracting parties apparently is a major factor in the selection of an appropriate construction contract.

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44 *Body Corporate 114424 v Glossop Chan Partnership Architects Limited* C.P. 612/93
Suggestions were made when undertaking the pilot study that the ‘standard’ forms of building contract in New Zealand tend to favour one party over the other and conversely, that ‘partnering’ agreements are supposed to be fair and equitable to both contracting parties. In so far as the role of the professional in their capacity as an independent third party administrator is concerned, the question of risk with respect to tortious liability has increasingly become a factor. The result has been an increasing number of professionals are avoiding the ‘contract administration’ function as a direct consequence of the number of claims being made against professional persons for ‘negligence’. But what is negligence and how does it impact on this research?

The extent to which professionals in the construction industry in New Zealand are being exposed to claims for negligence appears to be increasing with the Courts exposing those who have not exercised ‘the duty of care’ expected of them. Negligence differs from other torts (such as trespass and nuisance) in that it is not able to be defined in a series of rules. Liability in negligence is not dependent upon the establishment of particular facts. It is the result of a Court holding, in a particular case, that it is just and reasonable to impose on one party to the proceeding a duty of care to another and finding that the first party has been in breach of that duty and that the second party has suffered consequent and foreseeable loss as a result. Negligence also differs from other torts referred to in that, in that in the case of negligence New Zealand jurisprudence, has developed its own particular character. (Kennedy-Grant:1999 and Bevan et. al.: 2001).
A further difference between New Zealand law and that of England and Wales, Canada and Australia is that in New Zealand actions for personal injuries are precluded by the provisions of legislation 45 although recently challenged in the Court of Appeal 46. There are two ways in which the contractual context is, or may be, relevant to the determination of whether a tortious duty of care should be imposed:

1. It may be agreed as a matter of principle that there can be no liability in tort if there is liability in contract in respect of the same acts or omissions; or
2. As the contractual context of a proposed duty is one of the factors to be taken into account in determining whether such a duty should be imposed and, if so, what its scope should be.

(Kennedy-Grant: 1999)

The Court of Appeal judgment in the Turton v Kerslake & Partners 47 case states that negligence is not simply being wrong. It is failing to use the skill and care to be expected from a reasonable engineer. (Cashin: 2001). The negligence of professionals with particular regard to the supervision of building projects is discussed later. The law of the tort of negligence has evolved over the years and New Zealand has developed its own attitude that, as the Privy Council has recently observed, is at variance with other Commonwealth jurisdictions. Comments to this effect were made in a recent decision 48 which followed the significant decisions made earlier in 1868 49 and 1992 50.

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45 Accident Rehabilitation and Compensation Insurance Act 1992
49 Rylands v Fletcher (1868) LR 1 Ex 265 at 279-280, [1861-73] All ER Rep 1 at 7E.
In the period after *Rylands v. Fletcher* \(^{51}\) in 1868 and prior to 1992, the generally accepted view in New Zealand \(^{52}\) was that the duty which the architect owes to his client in exercising reasonable skill and care, arises out of contract, not tort. The leading New Zealand decision on this point, and to that time was contained in an earlier decision \(^{53}\).

In England, however, this proposition was under attack in a case \(^{54}\) where Denning MR in dealing with an alleged negligent misstatement said, *inter alia*, that in the case of a professional man (in this case an architect) the duty to use reasonable care arises not only in contract but is also imposed by the law apart from contract and is therefore actionable in tort. (Smellie: 1979). In 1977, the Court of Appeal in England applied this statement in a further case \(^{55}\) and therefore, the decision contained in the 1978 case \(^{56}\) was expressly doubted. In New Zealand, a movement in the same direction became apparent, although not so clearly established where \(^{57}\) Beattie J as a matter of general principle held a structural engineer liable in tort to a building owner for a faulty design. In that case there was no contractual relationship between the parties. On appeal apparently without having the *Esso Petroleum* \(^{58}\) case referred to it, the Court left the matter open and therefore to some extent, unresolved.

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\(^{51}\) *Rylands v. Fletcher* (1868) LR1 Ex 265 at 279-280, [1861-73] All ER Rep 1 at 7E.

\(^{52}\) *Bagot v. Stevens Scanlan & Co.Ltd.* (1964) 3 All ER 577; (1964) 3 WLR 1162.


\(^{54}\) *Esso Petroleum Co. Ltd.v. Mardon.* (1976) 2 All ER 5.

\(^{55}\) *Batty v. Metropolitan Property Realisations Ltd.* (1978) 2 WLR 500; (1978) 2 All ER 445.

\(^{56}\) *Bagot v. Stevens Scanlan & Co.Ltd.* (1964) 3 All ER 577; (1964) 3 WLR 1162.

\(^{57}\) *Bevan Investments Ltd.v. Blackhall and Struthers.* (1973) 2 NZLR 45 at pp 79, 80 and 81.

\(^{58}\) *Esso Petroleum Co. Ltd.v. Mardon.* (1976) 2 All ER 5.
The correctness of this view has since been rejected by the High Court in Australia\textsuperscript{59} and by the Supreme Court in Canada\textsuperscript{60}, and the House of Lords in the United Kingdom\textsuperscript{62}. The cases of Bryan \textit{v} Maloney and of Perre \textit{v} Apand in the High Court in Australia highlight the different approaches now being taken by the Commonwealth Courts. The law of negligence in the building and construction industry now ventures down different paths in Australia, Canada, United Kingdom and New Zealand. This is because of the varying methods of building controls and legislation. The law was clarified in New Zealand in a more recent case\textsuperscript{63}, and again in the a 1996 case\textsuperscript{64}. In this latter case, a ‘full bench’ of all five Court of Appeal Judges each gave individual judgments. It was held that a territorial authority was liable for latent defects caused or contributed to by careless acts or omissions of building inspectors.

An appeal by the Invercargill City Council to the Privy Council was unsuccessful. (Cornish: 1998). The Privy Council therefore, approved of the New Zealand Court of Appeal’s departure from English law and endorsed the trend for New Zealand building law to develop and saw the adaptation to the differing circumstances of the countries in which it has taken root, as not being a weakness, but one of its great strengths. The particular branch of the law of negligence with which the present


\textsuperscript{60} Perre \textit{v} Apand (1999) 198 CLR 180.

\textsuperscript{61} BG Checo International Ltd. \textit{v} British Columbia Hydro and Power Authority. (1993) 99 dlr (4\textsuperscript{th}) 577.


\textsuperscript{63} Chase \textit{v} de Groot. (1994) 1 NZLR 613.

\textsuperscript{64} Invercargill City Council \textit{v} Hamlin. [1996] 1 NZLR 513.
appeal is concerned is especially unsuited for the imposition of a single monolithic solution. (Lloyd LJ in *Invercargill City Council v. Hamlin*: 1996).

Despite the changing attitudes of the Courts to liability in the tort of negligence for breach of duty of care, a distinction still remains in New Zealand to claims against persons sued in a professional capacity – such as architects or engineers. The law in New Zealand has changed since the Court of Appeal decision in 1973 65 where liability for tort was denied between the parties involving professional services. The New Zealand position currently is that a professional person can be liable concurrently in contract and tort to the client and may also be liable in tort to third parties to whom a duty of care also exists.

This was confirmed in 1992 in the case of *Rowlands v Collow* 66 where the High Court allowed a successful claim in tort and the case of *Fletcher Development and Construction Co Ltd v McLaren Maycroft* was not followed. The main distinction between claims in contract and in tort seems to be the different limitation period for bringing action. In contract the statutory period of six years from the date when the cause of action arose commences to run when the breach of contract occurs. In tort it commences when the damage occurred or when the damage was perceived or should have been perceived. The latter period is always later than the former and thus the potential risk is longer. (Cornish: 1998).

The position\(^67\) in New Zealand is that in the end assessment of damages, there is a question of fact and that there is no such thing as a rule, as to the legal measure of damages, applicable to all cases. The ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances. (Cooke: 1993).

In 1978, Sir Robin Cooke believed that the law about remoteness of damage in contract and tort is in a strangely unsettled state and that this appears to be still the position in 1998. (Cornish: 1998). The contention here is that the situation still is very volatile and uncertain and while agreeing generally with these comments, there is a suggestion that it is over-simplifying the position of tortious liability for professionals particularly where a contractual relationship has not been fully established. Therefore, for most professionals in New Zealand, the current status exists where if professionals are engaged in a custom outside of the ‘normal’ manner, it would tend to render them more liable to be sued under tort than under contract. The Court of Appeal of New Zealand has revisited the matter on a number of occasions since 1982 and the decision has since been departed from on two occasions the most significant of these being in 1992 in the decision of Thomas J in the case of *Rowlands v. Collow*.\(^68\) This case, which has significant relevance to the purpose of this research, has established a base from which it can stated with a degree of certainty, that a professional person has a duty of care to the community at large and that his (or her) liability may exist:


(i) in contract;
(ii) in contract and tort concurrently; and
(iii) in tort alone where there is no contractual relationship.

There is a view that there cannot be concurrent liability in tort and in contract but there is only one reported decision viz., *Rowlands v Collow* \(^69\) where a professional representative was held liable to the employer in respect of negligence in which the professional representative has performed his or her professional obligations. If the Court of Appeal (or, so long as it is the final Court of Appeal for New Zealand, the Privy Council) finally holds that there is no conceptual bar to concurrent liability in tort and contract, then other decisions \(^70\) will become relevant in the New Zealand context. (Kennedy-Grant: 1999). The potential ramifications of these decisions have been very much under-stated by the professions in New Zealand.

There is only anecdotal evidence to support the proposition that the effect of the *Rowlands v. Collow* decision, in particular, was such that many architects, and in fact many other professional persons in the New Zealand construction industry, decided to actively desist in the independent administration of building contracts.

Kennedy-Grant (1999) in the preface to his book states that he has endeavoured to state the law as at 31 December 1998. Investigation in to subsequent New Zealand cases and ratification by Tomas Kennedy-Grant, a former Master of the High Court

\(^70\) *Kensington Area Health Authority v. Wettern Composites* (1984) 31 BLR 57
*Dutton v. Jalapen Pty. Ltd.*, 10 BCL 338
*Wessex Regional Authority v. HLM Design Ltd.* (1994) 10 Const LJ 165
in Auckland, New Zealand has confirmed that the case has neither been appealed nor challenged.

Therefore, the extent to which the *Rowlands v. Collow* case has been relied upon by the Courts is unknown. District Court cases are not reported and not all High Court cases are reported. *Rowlands v Collow* was referred to other Court of Appeal cases (71 and 72) and in the High Court case of *Body Corporate No. 114424 v Glossop Chan Partnership Architects Ltd.* 73. This latter case provides a decision that could be seen as being at variance with that of *Rowlands v Collow*.

In the *Glossop Chan* case the architect was engaged to undertake ‘partial’ administration of the contract but this was not deemed to be an issue by the Courts when a claim of negligence was heard against them. In both Court of Appeal cases referred to, the decision of *Rowlands v Collow* was not followed but the comments of the Court, in what were both majority and not unanimous decisions, suggest that the situation of tortious liability is not resolved, that it is still evolving and very much volatile. It can be however, accepted that the *Rowlands v Collow* case has set a precedent even though at the time the decision was considered by colleagues to be ‘questionable’.

71 *Bloxham v Robinson* [1996] 2 NZLR 664
73 *Body Corporate No. 114424 v Glossop Chan Partnership Architects Ltd.* High Court, Auckland CP 612/93, 3 February 1998, Potter J.
Chapter 5: Research Design

The *Rowlands v. Collow* 74 case was heard in the High Court in Wellington during June 1990 and a full transcript of this case is contained within the CD-ROM. The headnote to the report of the proceedings states *inter alia* that Collow, an engineer, was approached to design and prepare plans for the construction of a driveway and agreed to do so but the parties *did not enter into a written contract*. [emphasis added].

After completion, the local authority declined to approve the driveway as it was excessively steep. The plaintiffs sought to advance their claims against the engineer both in contract and in tort, alleging negligence in relation to both his design of the driveway and *the adequacy of his supervision* [emphasis added] of its construction.

The defendant argued that his contractual obligation was to design the driveway and that he had not entered into any contractual obligation to supervise the work. As a consequence, he argued that he could not be liable for faulty supervision. The report of the proceedings contain a statement that Collow was adamant that it was not any part of the contract that he would supervise the construction of the driveway and that the owners were left to do that and further, that here was no correspondence between the parties such as a letter of engagement or commissioning letter and that his perception is confirmed by the fact that that no firm arrangement relating to his remuneration was ever settled to supervise the works.

The judgment confirms the concerns being expressed by many in the professions that the judiciary’s opinion of the level of service required to be provided by designers is

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different to that being offered by the professionals and perceived by their clients. There is no doubt that the owners relied completely on Mr. Collow in his professional capacity as an engineer to ensure that the tasks and work which he had undertaken would be carried out properly to an acceptable professional standard. The owners looked to Mr. Collow as their ‘clerk of works’.

They did not stipulate that he was to be responsible for supervising the construction in so many words but they certainly believed that he was responsible and that he accepted the responsibility for ensuring the construction would proceed in accordance with the approved plans. As between themselves the neighbours had agreed in writing to share the cost of ‘the supervision’. They were in no position to supervise the works themselves. They did not have the knowledge or expertise as they expected that specialist assistance to come from Mr. Collow. (Thomas J: 1992)

The conclusion is that even the most ‘casual’ of observation of any work designed by a professional (whether a contract for this part of the project was entered into between the consultant and the client and also, whether it was ‘supervised’ or not), is obviously deemed by the Courts to be taken as if the person were engaged in the total administration and supervision of the works. Notwithstanding that many clients in the residential field are naïve and, as alluded to in the introductory chapter, are prepared to do much of the work themselves, (it is the authors’ experience, which tends to support the proposition), that there have been many instances where clients have not enlisted the assistance of a ‘clerk of works’ or any other supervisor. To have done so would have been very prudent. (Thomas J: 1992).
The first interest to be secured where an owner employs a professional adviser is a design which is skilful, effective to achieve his purpose within any financial limitation he may impose or make known, and comprehensive, in the sense that no necessary or foreseeable work is omitted. (Thomas J: 1992 citing Duncan Wallace: 1970).

In another case such an arrangement went wrong. The project manager’s appointment contained an obligation to monitor the performance of other consultants. (Button et.al.: 2001) This was held to include an obligation to report to the client on any deficiencies which that monitoring ought to have revealed. Even if not explicitly stated, the Court indicated that this obligation is likely to be implied. Any allegation of negligence against a consultant is often therefore accompanied by parallel allegation against a project manager of a failure properly to monitor and report. Button (ibid.: 2001) also reported on another case where the duties normally undertaken by the sub-consultant, in this case the checking of insurance for the project, was not done and the project manager was held liable.

The point which is disconcerting in both of these cases is that the causes of action could quite probably have been avoidable had the architect (or designer) undertaken the project(s) as principal consultant and been engaged under the ‘normal’ conditions of engagement to independently administer the contract. As the Rowlands v Collow case exemplifies, the architect (or designer) always carries the responsibilities

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75 Chesham Properties Ltd v Bucknall Austin Management Services Ltd (1996)
normally attributed to him (or her) and seemingly cannot indemnify themselves against claims for negligence even if the negligent act has been committed by others, such as the project manager.

The *Rowlands v Collow* decision also paved the way for the Courts in New Zealand to award damages for ‘mental distress’ which means that the ‘financial powers’ of the Courts have become almost unlimited. A more recent case was heard in the New Zealand Court of Appeal during 1998 and comparisons were being made between the generous approaches to United States and New Zealand Courts towards exemplary damages. In this decision the Court of Appeal has restricted the application of punitive damages in New Zealand and as New Zealand plaintiffs look to alternative forms of ‘compensation’, exemplary awards have been sought more frequently, and in a wider range of torts. This trend may continue, but the Court of Appeal has signaled a principled approach to the application of punitive awards. (Phillips Fox:1998).

Earlier reference was made to the case of *Invercargill City Council v. Hamlin*. which was originally heard by the Court of Appeal in November 1995. The matter was referred to the Privy Council in 1995. The appeal concerned the negligence and breach of duty of care of a Local Authority Building Inspector where the council’s building inspector approved the foundations of the plaintiff’s house some 18 years before the commencement of the proceeding.

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While not related to the negligence of the designer, the decision contained implications that effect the whole of the construction industry. The appeal by the Local Authority was subsequently dismissed. Although New Zealand has inherited English common law, it did not follow that New Zealand would develop identically. The Court of Appeal should not be deflected from developing New Zealand common law merely because the House of Lords had not regarded an identical development as appropriate in England. Further, Parliament had not changed the common law in enacting the Building Act 1991, which by ss 90 and 91 clearly envisaged such claims against local authorities. Accordingly, the Court of Appeal was consciously to depart from English case law on the grounds that conditions in New Zealand were different.

The action alleged latent building defect negligently approved and the loss was not physical damage to the house or foundations but economic loss, namely the diminution in the market value of the house.

It followed that no loss occurred and (since it was a necessary element of the claim) no cause of action arose until the defect was discovered or was so obvious that any reasonable house owner would have called in an expert to make investigations that, properly carried out, would have revealed the local authority’s breach of duty. Accordingly, the claim was not ‘time-barred’ and the appeal would be dismissed.

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The decisions made in this case contrast with a more recent case \(^{80}\) where the court found that the plaintiffs could not succeed against either the first defendant (architect) or the second defendant as the claim had been filed more than 10 years after building work it related to had been completed.

There have been other cases \(^{81}\) where the Courts have delivered judgments, which have obviously been duly considered on their individual merit, as the Privy Council recommended in the *Invercargill City Council v. Hamlin* \(^{82}\) case. Nevertheless, the variety, and perhaps inconsistency, of some of these decisions leaves an observer wondering if there can ever be an *established* rule for determining cases where a duty of care has been breached (or not) as the case may be. The author is of the opinion that the ‘standardisation’ of building contracts and the engagement of an independent third person to administer building contracts would be singularly instrumental in helping to lead to uniformity of decisions in this area of case law. A consequence of this approach would lead to a more consistent body of rules being formed.

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\(^{80}\) *Johnson and Johnson v Pitts.* Unreported. High Court, Whangarei. Master Anne Gambrill. CP10/01.

\(^{81}\) *Bevan Investments Ltd v Blackhall and Strathers* [1973] 2 NZLR 45.

*Birch v Palmerston North City Council* (High Court, Wellington CP 116/92, 22 July 1998, Heron, J).


*Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA).


*Dancorp Developers Ltd. v Auckland City Council* [1991] 3 NZLR 337.

*Delta Projects Ltd. v North Shore City Council* [1996] 3 NZLR 446.

*Gabolinsky v Hamilton City Council* [1975] 1 NZLR 150.


*Mowlem v Young.* (High Court, Tauranga. AP 35/93, 20 September 1994, Roberston J).


*Smaill v Buller District Council* [1998] 1 NZLR 190.

*Stiellar v Porirua City Council* [1986] 1 NZLR 84 (CA).

*Young v Tomlinson* [1979] 2 NZLR 441.

3.2 The role of the architect as ‘administrator’ and ‘supervisor’

Since 1970 there have been unusually rapid and important changes in the law effecting construction contracts. Perhaps the single most widespread and damaging misunderstanding of the background of construction projects by judiciaries and others (often assisted by misleading ‘cosmetic’ language and descriptions in the contracts themselves) related to the alleged ‘captain of the ship’ role and superior expertise of the owner’s architect/engineer in supervision or construction methods.

With the advent of a potential liability of owner’s architect/engineer to contractors in tort under the *Hedley Byrne* 83 principle, the extremely important and welcome English Court of Appeal decision 84 which made it clear that within the general ‘contract setting’ of a construction project there was no room for any such duty to safeguard the contractor from economic loss. This decision was then followed by the British Columbia Court of Appeal (Canada) decision 85 in 1991 where an engineer’s duty to safeguard the contractor’s economic interests was similarly rejected on a preliminary point of law. Due to the obscurity of its facts and its being decided on a preliminary point of law, it is difficult to know what practical conclusions engineers or architects or their advisers should draw from it in what has been, apparently, some area of design preparation of the contract documents by a firm of engineers on behalf of the owner prior to tender. (Duncan Wallace: 1995). A number of cases have concluded that an architect is not expected to be constantly at the works and to supervise the works and to supervise every detail, yet it is not sufficient for him to

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84 *Pacific Associates Ltd v Baxter* [1990] 1 QB 993
85 *Edgeworth Construction Ltd v F.Lea & Associates* [1991] 4 WWR 251
pay occasional visits and to get defects, which he may then observe, rectified. His duty seems to be to devote such an amount of supervision as will enable him to give an honest certificate that the work has, or has not, been done in accordance with the terms of the contract.

It has been held that in considering an allegation of negligence made against an architect it should be borne in mind that the builder is on site continuously, whereas the architect is not. None the less it may be negligence on the part of the architect to fail to be on site during some important phase of the works. Further, although he may depute some parts of his duty to subordinates, such as a clerk of works, an inspector or a draughtsman, he does not thereby avoid his own responsibility by saying negligence was theirs. Failure by an architect or engineer to discover at the time when the work was done that its quality or the materials used therefore were not as good as provided for in the contract, might involve the employer in a loss, where the employer’s rights as against the contractor are limited to having defects made good within a stated period. The loss to the employer, due to negligence in such a case, will often be the difference between the amount for which the builder or contractor is actually liable and the total cost of the repairs, or the whole cost of rectifying the defects. (Smellie: 1979). The commentary by Smellie (ibid.: 1979) was written before the 1992 case of *Rowlands v Collow* case but provides a preface...

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86 *Jameson v Simon* (1899) 1 F (Ct of Sess) 1211. Note, however, *Cotton v Wallis* [1955] 3 All ER 373, CA
88 *Florida Hotels Pty Ltd v Mayo*, 113 CLR 588.
89 *Leicester Guardians v Trollope*, (1911) 75 JP 197; *Graham v Commrs of Works* (1902) Builder, 15 November applied in *Minister of Works and Planning v Henderson* [1947] KB 91; distinguished in *Gillingham v Minister of Health*, [1932] 1 Ch 86.
91 *Bevan Investement Ltd v Blackhall & Struthers*, (1973) 2 NZLR 45 at pp 79, 80 and 81.
to the events that have occurred later. When referring to an engineer’s system of supervision the judgment of Richmond J, in a 1973 New Zealand case 92, held that the developer had to prove either that the consulting engineers had not conformed to the current practices of the engineering profession, or independently of any such current practice that, common sense dictated the use of certain methods which the consultants had not used.

In not providing such proof that methods used complied with the current practice of the profession, the Court retained its freedom to hold its view that the practice adopted falls below the standard of care required by the law. In 1992 the Court of Appeal in Ontario, Canada 93 held that an engineer was liable in tort to dredging contractors for failing to make inquiries the tender stage. This case seems to have lost touch with all the realities of the engineer/contractor relationship and with a century of owner/contractor case law under the inclusive price principle, as well as imposing a serious and impractical conflict of interest on the owner’s engineer. Coupled with two earlier difficult economic loss cases in 1979 (then in the context of supervision and temporary works, where engineers had been held to owe an economic loss duty contractors) 94 and in spite of other conflicting decisions in the Supreme Court of Canada, the law in Canada in this area now seems confused. To have imposed generalised economic loss duties owned by owners’ architects/engineers to contractors in tort which other jurisdictions would be wise not to follow. The New Zealand cases also illustrate a willingness of the Courts to ignore ‘exclusion or

93 Auto-Concrete Curb Ltd v South National River Conservation Authority [1992] 89 DLR (4th) 394
limitation’ clauses in contracts where in a 1994 case \(^{95}\) the subsequent owner of a property was awarded damages against the builder of the property some years after it was originally (and negligently) built. The subsequent claim was not due to the negligent act.

While the Courts are taking one approach to the role of the professional in the administration and/or supervision of contracts, the professions are seemingly taking another. The *Rowlands v Collow* case states that Collow, the engineer, undertook to *administer* the contract and later, that Collow failed to *supervise* the contract. This statement is nebulous in that in that the judiciary seem to be unable to discern the difference between the ‘administration of the contract’ and the ‘supervision of the contract’. There is more than a subtle difference between these functions.

The RIBA ‘Handbook of Practice Management’ (RIBA: 1991) specifically states that ‘architects do not supervise’. [emphasis added]. The professional bodies in New Zealand have over recent years also tended to discourage the use of the term ‘supervision’ where it can be misconstrued that the supervisor will be responsible for continued observation, and therefore, responsibility of the works during their progress. What is now used by the institutions in describing this section of the professional persons’ engagement is the term ‘contract administration’.

A later section in this chapter details the different methods of engagement contemplated by the Royal Institute of British Architects in a document named the

\(^{95}\) *Chase v. de Groot* (1994) 1 NZLR 613
‘Architect’s Outline Plan of Work’ (RIBA: 2000). This publication is widely accepted and used in New Zealand by the architectural profession when undertaking and agreeing commissions.

Contract administration is the final stage involving the architect in obtaining and reporting on tenders, negotiating a contract, preparing contract documents for signing, *carrying out the general administration of the contract, visiting the site as necessary to inspect the quality and progress of the work*, [emphasis added] the general checking of claims and issuing of payment certificates, and provision of up to eight copies of supplementary documents as required. (NZIA: 1984).

Where engaged to provide the basic service, including contract administration, the architect will carry out inspections of the works only at such intervals as the architect considers necessary to become generally familiar with the progress of the works, to attend site meetings with the contractor, to clarify matters arising from the interpretation of the documents, and to be satisfied that the works are being carried out in general accordance with the contract documents. (NZIA: 1984). This document was amended in 1993, in 1996 and again in 2000. None of the documents provide a definition of ‘contract administration’ as comprehensive as in the earlier 1984 document. The inference that the architect can offer a ‘limited’ service is problematic and is contradictory to the view expressed in the *Rowlands v Collow* 96 decision where, it would appear, that a professional person, whether contracted to or not, *cannot* opt out of the administration of the contract.

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Dacombe (2001) does not support the view of the Courts and believes that options are available and advises architects to be aware of ‘draconian terms of engagement’ and the difference between ‘inspection versus detailed inspection’ and ‘observation versus supervision’. It appears that the decisions of the New Zealand Courts do not support this standpoint. A substantial number of claim notifications were recorded this year compared with the two previous years, and there appears to be an increasing number of pernicious claims, *i.e.* claims which have been carefully constructed to implicate the architectural practice and the architect principals. Increasingly architects are being joined as third parties to litigation when the plaintiff sues a builder. (NZACS: 2001).

An earlier section of this chapter referred to recently enacted legislation where consultants (*viz.* architects, engineers, quantity surveyors, etc.) have been excluded totally from provisions of a new Act. 97 This omission followed submissions to the Parliamentary Select Committee requesting preclusion from the legislation by the N.Z. Institute of Architects (NZIA) and the Association of Consulting Engineers (ACENZ). By contrast, the N.Z. Institute of Quantity Surveyors (NZIQS) supported that consultants be included in all provisions of the legislation.

It is difficult to reconcile the position of the NZIA with that of the NZACS who report that the number of claims against architects for alleged professional negligence has increased from 93 in 1999 to 134 in 2001. (NZACS: 2001). The

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97 *Construction Contracts Act 2002*
author does not dispute the details contained within this report and therefore, the conclusion to be inferred is that the inclusion of architects (and other consultants) under the umbrella of the new legislation would have seemingly made sense. The pilot study undertaken in 2000, and subsequent research (Stephens: 2002) has revealed instances where consultants are joined in disputes with contractors and therefore, their inclusion would perhaps assist in the avoidance and/or resolution of disputes. The situation has possibly been exacerbated by the recent issue of a Practice Note (P.3.106) published by the New Zealand Institute of Architects (NZIA: 2002) that contains a pro forma Letter of Engagement. Section 3 of this letter states that ‘site involvement’ may be undertaken utilising either of the following alternatives:

(i) **No Site Involvement**
As you have commissioned us to prepare documents only sufficient to obtain a building consent, this does not include observing the contractor carrying out or completing the project. Consequently, we will not be liable to you (in contract, tort or otherwise) for any claim, damage, liability, loss, or expense incurred by you arising in any way in relation to the contractor not carrying out and/or completing the contract works described in the construction contract, or as required by you; or

(ii) **Limited Site Involvement**
As you have commissioned us to prepare documents only sufficient to obtain a building consent, and attend the site when requested to clarify construction details and to check the quality of finish, we will not be observing the contractor carrying out or completing the contract. Consequently, we will not be liable to you (in contract, tort or otherwise) for any claim, damage, liability, loss, or expense incurred by you arising in any way in relation to the contractor not carrying out and/or completing the contract works described in the construction contract, or as required by you.

The guidance provided by this practice note needs to considered in the light of earlier comments in this section particularly as Uff (2002) believes that Institutions do not

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98 *Construction Contracts Act 2002*
enjoy any degree of immunity or legal protection and cannot regard their role as being limited to giving advice and encouragement.

Their role must encompass some degree of monitoring and they should not wait for the Courts to define that role for them. Kennedy-Grant (1999) provides a conflicting view to that of Uff (ibid.: 2002) and tends to support the position of the NZIA (ibid.: 2002) in that liability may be excluded or limited by a clause in the contract. There is no rule of law prohibiting the exclusion of such a term in a contract or restricting its effect but the effect of an exclusion or limitation clause is to be determined by the application of the same rules of construction as are used in the construction of any term of a contract. It is unclear whether the Courts support the exclusion or waiver from one being expected to exercise a duty of care. The statements made by Kennedy-Grant (1999), Dacombe (2001) and the NZIA (ibid.: 2002) strongly suggests that an architect can ‘contract out’ of certain obligations in his contract with their client.

But what is the situation if there is no contract in place as it was alleged in the Rowlands v. Collow case? Could the architect be more likely to have a claim for negligence being proved against him (or her), if they have not been contracted to undertake the administration of a contract between the client and a builder than they would had they had been contracted to undertake such work? Duncan Wallace’s (1995) comment referred to earlier substantiates this assertion and similarly, Kennedy-Grant (1999) also bases his text on the assumption that the powers and
duties of the employer’s professional representative in relation to the construction contract comprise:

- a) administration of the contract;
- b) supervision of the performance of the contract by the contractor; and
- c) certification.

There are contradictions in what seems to be expected by the professions; the public and the Courts when considering claims for negligence as is evidenced by the divergence of opinion in the way all parties interpret the role of ‘professionals’ and the law following the *Rowlands v Collow*[^99]. Hughes *et al.* (2001 quoting May: 1995) provide the definition[^100] of an ‘architect’ as the one person who possesses, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him (i) to originate, (ii) to design and plan, (iii) to arrange for and supervise the erection of such buildings [emphasis added] or other works calling for skill in design and planning as he might in the course of his business reasonably be asked to carry out or in respect of which he offers his services as a specialist and concludes that: ‘there is complete uncertainty as to the roles of the various participants of a construction project’.

If this applies to those directly and continually involved with the industry then a larger problem of identification must exist with others who only casually come into contact with consultants. A typical example would be residential clients in New Zealand.

[^100]: *R v Architects’ Registration Tribunal*, ex p Jagger [1945] 2 All ER 131
In Australia, the term ‘superintendent’, (a term not used in New Zealand for some years), has been retained. Horan (2000) describes the person undertaking this *quasi-judicial* role as an unusual creature who is paid by its master, must do its master’s bidding, and yet at other times, is required to act independently of its master, and, possibly contrary to its masters wishes. But who should undertake this role? Laan (2000) believes that builders and subcontractors are generally incapable or unwilling to administer contracts with the prescribed provisions of the contracts. Contracts as drawn, are too complex, difficult to understand by the average contract administrator, and ‘booby trapped’ to advantage principals. Contract administration by builders is a significant problem.

Twyford (1998) discusses how a quantity surveyor may perform such duties and comments that the architect will normally be the prime consultant at the design stage but that at the conclusion of this stage, promotes that the quantity surveyor would take over the role of ‘superintendent’. But in doing so, the designer would be retained, as a sub-consultant, during the contract administration and construction phase of a project to interpret the documentation.

There is an assertion that the most significant of all advantages enjoyed by quantity surveyors in this regard is the fact that he or she did not design the building and comes to the project without any potential conflicts of interest. It is the author’s opinion that if the quantity surveyor (or any other professional person) is engaged solely by the client then there will always be a perception of ‘bias’ by that person towards the client.
Further, Humphries et al. (1997) researched the importance of the services that a project manager would be expected to provide and found that ‘acting as superintendent’ [emphasis added] to be in 26th place (out of 30).

With the constant threat of negligence suits; the limited importance that architects and other professional persons in New Zealand place on ‘contract administration’ and if Humphries (ibid.:1997) assertions are correct, that clients place on the ‘superintendence of contracts’ together with the ‘creeping commission’ referred to by the RIBA (1991) it is perhaps not surprising then to find some compelling reasons why architects, engineers and other professional persons would tend to ‘opt out’ of the supervision of building contracts, if at all possible.

There is a view that architects should always try to negotiate the full range of services, even though the client’s agreement is needed before proceeding to each successive stage. The ‘creeping commission’ (where it turns out what is actually being undertaken is far in excess of what was originally agreed) is a common hazard. Similarly, the ‘partial’ service can often have pitfalls. (RIBA: 1991). Although this statement was made in 1991 (and prior to the Rowlands v Collow case) the RIBA document is commonly used and referred to by New Zealand architects.

In Australia, the level of design fees required to provide a proper service has declined by approximately 21% over the past 12 to 15 years and that from a contractor’s perspective, the deficiencies in design and documentation being provided by consultants have been steadily increasing over the same period. Clients and
developers have contributed to the problems by applying pressure for the reduction of design fees to minimise costs. This has led to inefficiencies in the construction process and increases in overall project costs. Once clients and developers fully understand the value and quality of design and documentation, it is hoped they would then ensure that project design briefs are clear, concise, and consistent, and that sufficient time and fees are available to allow designers to do their job properly. The benefits would be more projects being completed on time, within budget and with a reduced likelihood of legal action caused by contractual disputes. (Tilley: 2001).

Laan (2000) also observes that:

‘in Australia the matter of poor documentation affecting both relationships between the parties to the building contract and the end product is not new. The traditional manner of remunerating architects was a percentage of the cost of the building. The scale was normally set by the Institute of Architects or similar professional body. The problem with the percentage scale of fees was that the architects fees rose with the cost of the building leading to clients concluding that there was no incentive for the architect to control the cost of the building by designing within a fixed budget. During the 1980s the industry moved away from percentage and schedule of hourly rates fees for architects and instead required architects and consultants to tender lump sum fees for the production of documentation for projects. This in itself appeared to be quite a rational and reasonable move however; it overlooked the fact that very few clients are capable or have the necessary in-house resources to accurately estimate the extent of their input. The inevitable result of this situation has often been architects offering to document the work based on reasonable expectations of the clients’ ability to clearly articulate its requirements only to find that the lump sum price offered was insufficient to provide a level of documentation required. This in turn led to the architect under-documenting parts of the work or passing responsibility for providing a part of the detailed documentation on to the builder who then becomes reliant on the suppliers and subcontractors dealing with the undocumented part of the work to provide the necessary documentation, thereby fragmenting the responsibility for coordinating between the various elements of the building’.

Tilley (ibid.: 2001); Laan (ibid.: 2000); and Pilton (1996) observe that in Australia, the engagement of professional persons is undertaken by way of a ‘dutch auction’ for
the architectural fees with the end result being that the end product has suffered. Cuff (1991) also considered the same situation in the United States of America.

It is the author’s opinion that this also tends to occur in New Zealand. Architects in New Zealand are covered by a ‘registration’ regime encapsulated in legislation but there are no restrictions under this Act (or any other legislation) that prevents ‘architectural designers’ (or in fact any other person) from undertaking the design and documentation of building projects. This situation is vastly different than that which exists currently in several states of Australia as referred to earlier.

Architects and engineers were, up to a few years ago, regarded with awe and respect based on their professional status inasmuch as they had achieved academic recognition in their discipline and were reimbursed on a predetermined fee basis prescribed by the collective body representing the practitioners of that discipline. But this superior state of affairs was progressively eroded in New Zealand during the 1980s when developers of all types pervaded the marketplace and the competitive spirit of the free market permeated the exchange of money for service. (Connor: 1999). By allowing themselves to be seduced into the tender mode, these consultants to the building industry have resorted to the inevitable cutting of corners, design by inference, and an abdication of design development so that their costs may be contained within their budget envelope. This position is recognised by and concerns the company who provide the professional indemnity insurance for many of New Zealand’s architects. (NZACS: 2001)

Architects Act 1963
So where is all this to lead?

The professions who will provide construction design services have abdicated their professional role and greatly diluted their design responsibilities. The builders remain confused and suspicious as to their role in response to this changed circumstance. It seems to me that the consultants either abandon responding to invitations to tender on the level of their fees and resume their former professional role of providing complete and coordinated design, or they simply become the conceiver of design principles and outline, leaving the builders to wholly design, develop and coordinate from concept drawings, each party getting paid for what they do and having clear responsibility for this. If the present poor standard of design documentation continues, the status and credibility of the consultant design professions will further deteriorate and owners will continue to suffer increase costs, extended programmes and the uncertainty and dislocation of disputes – and the reputation of our industry will suffer further.

Connor (1999) believes that there is an urgent case here for the representative bodies of the consultants and the builders to get together and to clarify and agree just who does what, when and how achieving definitions and duties that would allow consultants and builders alike to play a more productive and responsible role, to the benefit of our industry and our clients.
If Connor’s (ibid.: 1999) and NZACS (ibid: 2001) observations as to what has occurred with the ‘deterioration of documentation’ is correct perhaps it is the builders who should discuss the matter with the clients as well as with the ‘project managers’ who are increasingly taking on the role (albeit apparently not from comments received during the pilot study, the responsibility) of the principal consultant. This viewpoint also supports the assertion that the continued engagement of the designer through the construction phase would also be beneficial.

The involvement of Australian owners in the procurement process tends to totally ignore the role of the designer in the process and while the world should not evolve around him, or her and the relevance of the part played in the procurement process (by the developer/client) should neither disregarded or underestimated. (Lenard et al.: 1997). The client is capable of delivering a fully functional brief at the outset before design concept stage and avoiding subsequent variations and that the documentation and its site investigation is sufficiently advanced to allow the head contractor to price and assume all risks on a lump sum contract basis. (Gyles: 1992).

A key inference from these statements is that time and cost budgets would be adversely affected by clients not delivering a fully functional brief at the outset and requiring a head contractor to accept the risk of inadequately defined parameters. (Laan: 2000). Some clients involve lawyers at the ‘front end’ of construction contracts. This is usually a result of clients attempting to safeguard their interests by transferring all the risks to the contractor and that: unfortunately, there has been a decline in the standards exacerbated by a lack of independent supervision. Clerks of
Works have virtually disappeared and architects and engineers have mostly downgraded their role from ‘supervision’ to ‘observation’ \textit{in response to lower fees available}. [emphasis added]. (Hansen: 2000)

Mead \textit{et al:} (1999) have summarised the various causes of action that can be leveled against a superintendent in its role of certifier in an article entitled: ‘Liability of the superintendent for wrongfully certifying’ and refers to a multitude of cases \footnote{Astley \& Ors v Austrust Limited High Court of Australia. 4 March 1999.} and actions that have been reported in Australia in recent years. This is perhaps yet another reason why professionals are tending to evade the role of independent administrator, where possible. The issue of concurrent liability (in contract and in tort) will have significant practical implications for all professional and service providers and the drafting of their retainers and contracts for service. The decision will also be of interest to the insurers of the affected groups. (McVeigh \textit{et al.}: 1999).

Design professionals face an increasing number of claims arising out of their performance of their work and one of the obligations of the design professional is likely to be to ensure that the quality of the work being carried out complies with that required by the contract. The standard of inspection depends on the work being performed and the terms of the contract under which the design professional is engaged. In any event, the design professional should be expected to conduct such supervision and inspection as is necessary to ensure compliance with the contract.
While the standard of care depends on the circumstances of the construction work, there is authority to suggest that there are some stages of construction which always require careful inspection, particularly where that work is later concealed by further work. (Kearney: 1999).

It could be argued that architects (or designers) are being kept away from the construction phase of building projects by either clients (or their advisors). There is anecdotal evidence to suggest that this is may be the case in New Zealand. In Australia it was reported\(^{103}\) that the project manager, who was described as a ‘para-professional’ was deemed to have been negligent when an acoustics design, for which he was responsible, was found to be defective. (Clayton Utz: 1998).

There is no clear and accepted definition of a project manager’s role. Nevertheless, since the evolution of the project manager in the 1980s, project management has become a readily acceptable all-inclusive form of project delivery, where proprietors are encouraged to utilise one organisation for all their design and building requirements and that under a project management system of delivery, the architect or other consultants are often answerable to the project manager, who is responsible for their coordination. The project manager also has responsibility for recommending consultants and consultancy agreements to the proprietor. Hence, in *Palermo Nominees*, when the defendant, project manager brought a third party claim against the architect, the judge found that the architect was accountable to the project manager for all matters under the terms of its appointment. The architect had no

\(^{103}\) *Palermo Nominees Pty Ltd v Broad Construction Services Pty Ltd.* [1996] Unreported, Supreme Court of Western Australia, CIV 2439.
further contractual obligation than to bring to the attention of the project manager the need for securing expert advice, and this obligation was discharged. It was a practical and commercial decision made by the project manager to not seek approval from the plaintiffs to direct the third party to secure expert acoustic advice. This decision, in hindsight, was unwise. Accordingly, project managers would do well to err on the side of caution when it comes to deciding whether or not and to what extent expert evaluation is required. In addition, project managers should not take heed to the proposals and opinions of those who have no particular expertise or competence in the area which they are assessing. (Parker J: 1996 in *Palermo Nominees Ltd. v Broad Construction Services Pty. Ltd.*).

This summation seems to suggest that project managers are immune from the scope of responsibility that other ‘professional persons’ find themselves in. In a South Australian case the client asserted that the architect was responsible to supervise the contractor’s works while the architect argued that their role was to administer the contract rather than to supervise the works. The Court rejected the client’s claim on the basis that the normal function of an architect is to administer building contracts but an architect (*per se*) is not a builder. It used to be said that in the course of administering the building agreement, the architects supervised construction. But in recent years architects have tended to blanche at this description of their role and have been at pains to describe their function as that of making periodic inspections on the basis that supervision is the concern of the builder. (Rivlin: 1998).

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104 *Australian Education Union (formerly Sait Inc) v Grieve*, [1998] Unreported. Supreme Court of South Australia.
This opinion concurs with the earlier views expressed that this is what the profession, at large, perceive their role to be. The decision emphasises the importance of clients to negotiate with the architect at the time of the contract as to the precise nature of the supervisory duties. Unless the duties are clearly understood then the architect supervisory function may be strictly limited to the administration of the contract rather than to supervise the building works. (Rivlin: 1998).

When one considers the *Rowlands v Collow* decision where the Court in New Zealand did not differentiate between the role of ‘administration’ and ‘supervision’, then one is left wondering if professionals can safely assume that they cannot be involved with either role, whatever the distinction.

This Australian decision is completely contrary to the reported New Zealand decision in *Rowlands v. Collow*. Even though no fee was charged, the New Zealand professional was deemed to be totally responsible and liable under the rule of tortious liability.

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105 *Australian Education Union (formerly Sait Inc) v Grieve*, [1998] Unreported. Supreme Court of South Australia.
There have been several other recently reported cases in the Commonwealth with varying results where tortious liabililty suits have been heard. Such cases only provide conclusive evidence of the volatility that this topic seems to evoke. Collins (1997) contends that here will always be alternatives to the tried and true conventional methods of engagement suggested and adopted. But could it be that these changes are being solely motivated by the need to change for the sake of change?

The next section proceeds to look at how the role of the architect as the ‘supervisor’ is changing.

3.3 The changing role of the architect as ‘supervisor’

From the perspective of clients, builders and those engaged in the building process the role of the architect as the ‘supervisor’ of the project has changed in recent times

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but whether the Courts in New Zealand acknowledge this revolution is uncertain. The documentation provided by the professional bodies in New Zealand for their members also acknowledges that a shift in attitude has taken place. Recent practice notes are acceding that an architect may not necessarily be engaged for what traditionally was known as a ‘full service’. Under the lump sum traditional method, architects predominantly act as the lead consultant, primarily being responsible for developing the brief, managing and controlling the design process, and acting as a supervisor for the client during construction. Therefore, this may require more fees than the restricted role that is undertaken by an architect when a non-traditional method is adopted, that is, simply acting as a designer. (Love et al.: 1998).

In recent years there has been increasing pressure to lower professional fees and costs, with serious implications for the profession and the industry. A ‘lowest first cost’ mentality pervades among building owners. Less attention has been paid to project detailing, and more pressure has been exerted to place design responsibility on contracting entities. Fee limitations are also forcing design professionals to reduce the level of job site administration on behalf of the owner, both overtly and covertly, and to cut costs in other ways that adversely affect job quality. At the same time, design professionals have been subjected to increased potential liability for prediction of construction costs, design and contract administration – a liability disproportionate to the fee received for services. Moreover, third party actions are coming to the fore. At any given time, one third of practising architects are involved in litigation. A primary response has been exculpatory contract language. A less
quantifiable but no less tangible effect is the chilling of creativity and innovation. (Stipanowich: 1998).

This reduction in fees, as a consequence using what can be best described as ‘non-traditional methods’ has perhaps led to the some of the previously mentioned problems being experienced.

The seminal document the 'Architect's Handbook of Practice Management' (RIBA: 1984, 1991, 1996, 1998 & 2000) is used by the architectural profession throughout the Commonwealth (including New Zealand) and assists to categorise the scope of work that architects are engaged to undertake. The 'Outline Plan of Work' components are contained within the 5th edition. (RIBA: 1991. Refer Appendix C) and while this document will be referred to it is an earlier 1984 version of this document which contains appurtenant 'flow charts' not shown in the more recent document. Additionally, the 1984 document also provides more comprehensive definitions of the various stages of a project. The description and charts for the 'traditional method of procurement' have not changed while the charts explaining the roles and relationships of the various parties in both 'design-build’ and ‘management contracting' have been deleted from more recent editions. The RIBA ‘Plan of Work’ document, particularly clause E.3.3, has become widely accepted as an operational model throughout the construction industry and professional institutions have developed compatible services and fees structures in line with it. The document is based on the premise that architect was responsible for leading the design team.
(RIBA: 1991). The relevant stages \(^{107}\) of the ‘Plan of Work’ (RIBA: 1991) appropriate to this thesis are stages J, K and L for the ‘traditional method of procurement’. (Refer Appendix C: figure C.1.2 in figure E.3.1). The remaining sections A to H inclusive and stage M (Refer Appendix C: figure C.1.1 in figure E3.1) are considered to be outside the scope of this research. Further, the ‘Architect’s Handbook of Practice Management’ states, inter alia, that ‘it represents a logical sequence of actions to ensure that sound and timely decisions can be made’. [emphasis added]. (RIBA: 1991 clause D3.3.2).

The NZIA documents specifically refer to the above and, in the context of this research, are described as being the ‘carrying out the general administration of the contract, visiting the site as necessary to inspect the quality and progress of the work’ and ‘carry out inspections of the works only at such intervals as the architect considers necessary to become generally familiar with the progress of the work’. [emphasis added]. (NZIA: 1984).

\(^{107}\) RIBA ‘Plan of Work’ stages (1991):

Stage J: Project Planning

(i) Contract Documents are prepared;
(ii) Information is issued to the Contractor;
(iii) The site inspectorate is briefed; and
(iv) The site is made available for possession.

a) Stage K: Operations on Site

(i) The contract is administered and visits made to the site to inspect progress and quality;
(ii) Contract obligations are discharged; and
(iii) Financial monitoring and regular reporting to the client is maintained.

b) Stage L: Completion

(i) The completed project is handed over;
(ii) Defects are dealt with;
(iii) The final account is prepared and agreed; and
(iv) Final completion is certified.
Perhaps one of the most challenging tasks involved in managing a project is creating and managing effective communication channels between participants that regulate and to optimise the flow of information during project stages. The dangers of failing to perform a thorough briefing process and conflicts can also surface during the design stage. This can include not only conflict between the participants involved in design, but also conflict involving operators, users, and construction firms. (Gardiner et al.: 1995). This confirms the necessity for the designer to be involved in all stages of the construction process and is confirmed by the analysis of the ‘flow charts’. (Refer Appendix C: figure C.1.2).

The progression between stages J, K and L (which is the subject area of this research) for the ‘traditional procurement’ method is ‘linear’ and follows a logical sequence (Refer Appendix C: figure C.1.2). This is in direct contrast to the other two methods described viz., ‘design-build procurement’ and ‘management procurement’ where these stages appear to be very much out of sequence and in fact, unsystematically arranged. Stages J, K and L do not appear in the same sections of work. Perhaps it is not surprising that the architect could be confused as to who he (or she) is responsible to.

Wilkinson et al. (2003) also provide confirmation of the method of appointing under a ‘traditional model’ includes the design and management [emphasis added] of the project and provide a statement that: ‘an architect is a professional who usually possesses a broad base of skills from feasibility to contract management’.
Very seldom is the comprehensive planning of the projects determined at the outset and it is the authors’ experience that often the process tends to evolve as the project progresses. This evolution can often lead to confusion between all of the parties involved. At the inception the project lead consultant should ascertain how the client wishes to deal with various project management matters that are not shown in the ‘Plan of Work’. It is assumed that a consultant will visit the site:

(i) For, or in connection with, the administration of the contract; and  
(ii) To monitor that the construction of the consultant’s design is generally in accordance with the contract. (RIBA: 2000).

Again it is the author’s experience that often this is not the case. Many clients, and this includes commercial clients, can often be classified as either ‘naïve’ when it comes to the administration of a building contract and many additionally possess a ‘do-it-yourself’ attitude, as described in the introductory chapter. The situation is further aggravated when the professional body representing architects in New Zealand publishes documents that endorse and support the architect being engaged for ‘partial’ services. (Laan: 2000). Often the architect is appointed and preliminary designs initiated without the clients delivering a fully functional brief at the outset due to political expediency. (ibid: 2000).

In the case of one of the largest commercial projects undertaken in New Zealand in 1999, the consultants (with the exception of the structural engineer) were novated to the main contractor after the design phases had been completed. The clients have acknowledge that, with the novation, they lost the control of the architects, and in doing so, lost someone who they believed could control, on their behalf, the
contractor (Aitken: pers.comm: 1999) and demonstrates that even the largest of clients can also be manipulative and when commencing a project, are either not willing or able to direct the consultant on how they wish the construction phase of the project to be undertaken. This, in practice, tends to occur with the passage of time and at the behest of the client.

In New Zealand, there are two recommended ‘conditions of engagement’ documents for the procurement of architectural services and the documents contain detailed summaries of individual services to be negotiated and agreed by the parties; and provide for the cost the various stages to be nominated. However, neither provides any explanation of what each party can expect; nor what is to be provided by each party in the event of a ‘non-traditional’ form of procurement; nor do they contain definitions of the various stages. Section B5 states that if the ‘agreed service’ does not include *Contract Observation*, the architect does not have to answer questions, or visit the *Site after the Architect has performed the Agreed Services*. The document (NZIA: 2000) provides the following definitions:

(i) **Contract Observation** means: the Agreed Services listed as *Contract Observation* in Addendum B, stage 7.01.[emphasis added].

(ii) **Site** means the land, buildings and other places made available by the client to the contractor where the Contract Works are to be carried out.

The traditional practice in the construction industry of appointing the principal designer as team leader has been challenged with the main criticisms on the traditional practice being his, or her, lack of managerial ability and his, or her, failure

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   a) NZIA Agreement for Architect Services-Long Form: AAS2: 3rd edition: 2000; and
to control the financial aspects of the project. The traditional approach has remained essentially unchanged for more than a century as the principal means of design management. (Coutts: 1997). In challenging this hypothesis, it could be argued that the lack of managerial ability and financial control could also be leveled at some architects, but to include all is a generalisation. The traditional approach has not changed for over a century. (ibid: 1997). The traditional process is only now being challenged and only experience will show if the ‘new’ processes being introduced will prove to be better, less contentious and lead to less disputes. However, it must be emphasised that the Courts in New Zealand have neither acknowledged or recognised this change particularly when determining claims against professional persons for alleged negligence during the independent administration of building contracts.

Prior studies by Wood (1990) and McQuitty (1992) also identify similar strategies suggested by Coutts (1997). Could it be again that the change for the sake of change has been the driver for these changes? A study into ‘post contract award design changes’ revealed that the main findings is that, even for very successful construction projects, the costs associated with post contract in design (drawings and specifications) were 5% to 8%. Frequent reasons cited are: designer’s omission in tender documents; coordination defects in tender documents; forced upon project from shop drawing coordination; employer has changed his requirements; and new information on existing site conditions. (Cox et al.: 1999).
It could be argued that some of these could be directly the responsibility of the architect but their study does not identify the nature of the architect’s engagement. Had the engagement been limited; or ‘partial’; or as a secondary consultant, as occurs when another professional person is appointed as the principal consultant, then it could be also be debated that perhaps the extra costs may, or may not, be as a result of the architect’s acts or omissions.

The works of Al-Derham (1999); Cheung (1997) and Dulaimi et al. (1997) were consulted and all support the view that the role of the architect who, when undertaking the role of independent administrator of the contract, is required and expected legally (and morally) to act in a quasi-judicial capacity a view endorsed by the House of Lords in 1974. Perhaps this position has never been successfully explained to contractors nor to their clients. It is the authors’ experience that contracts ‘administered impartially’ and ‘without fear or favour’ have always been successful.

It is generally accepted that building procurement has become more complex. There are few architectural practices in the United Kingdom that have attempted to simplify the process by using construction management techniques. (Emmitt: 1997). It could be argued that the adoption of such techniques could exacerbate the situation thus making the process more complex than it needs to be. The traditional methods of procurement for both professional services and for building contracts have proved to be a simple process in the past. The problem facing the architectural profession is

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that so many architects have abrogated responsibility for management and building quality to their (non-designed trained) competitors, that it would be difficult to regain lost ground. (Emmitt ibid.: 1997). Have architects in New Zealand abrogated responsibility or have the recession in fees and the threat of litigation been the reasons for their perceived reduced involvement in the independent administration of contracts? In the light of the case law and literature referred to, it would seem that the undertaking of the ‘administration of the contract’ stage should certainly be contemplated by the architect. The conclusion that one must come to, if the legal precedents referred to in this thesis are accepted as being correct, is that the architect should insist that they be contracted to carry out the ‘contract administration’ of the project. The consequences of not doing so leaves them open to claims for ‘tortious liability’ in the event that something goes wrong. With the volatile nature of the judgments being delivered in New Zealand, no guarantee of impunity can be assured.

3.4 The post-graduate education and training of architects

The pilot study undertaken for this research suggested that the involvement of architects in the independent administration of building contracts was declining. If the survey undertaken for this thesis indicates that this appears to be the case, it is appropriate to review the literature that covers the post-graduate education and training of architects (and designers) which is intended to prepare graduates for the independent administration of building contracts.

If architects (and designers) are being excluded from the role of independent administrator of building contracts the reasons for this are unclear and further inquiry is required. It is possible that a cause may be found within this topic. Should this
appear to be the case appropriate recommendations will be made and the intention at this juncture is to provide a brief overview of the post-graduate training of architects as it pertains to New Zealand.

Training up to becoming qualified was criticised by several as being limited by the experience and attitudes of senior architects resulting in ‘gaping holes’ compared to working needs. It is recommended that students should be at the least introduced to accountancy, contracts, and job and practice management, when at Schools of Architecture. (Finnegan et al.: 1992). The education of architects prepares them to assist clients at all stages of a building project and to coordinate all the elements of the design and construction process and that despite the clarity of the responsibilities on the appointment of an architect (Refer RIBA: 1991), the majority of effort on teaching within the architectural education system is expended upon the process which the majority of architects in practice will never get the opportunity to effect on any major project; composition of the visual elements of design. Other areas of the architectural process are considered secondary to this area and any form of management teaching which may be presented is frequently relegated to the position of being an add-on to the final year of the course, at a time when the final design project is viewed by teachers and students as the primary area of interest. The teaching of architectural practice and management in schools revolves primarily around the building contract and its application and on legislation affecting the design process. The education process should provide graduates with a level of understanding of the total architectural process which will prepare them for, and enable them to promote, the architect’s role as lead member of the design team. In
reality however, the major areas of project management, cost reporting and client contact are increasingly being controlled by others; the quantity surveyor and the project manager. The student’s experience of management within the office environment, during the year out, is likely to be restricted by the nature of the work on which they will spend the majority of their time; on the production of information. The management of the office, its financial and resource planning, are areas within which the majority of practices are unlikely to grant the student access to information. Within the field of architectural management, then, the teaching of entire areas of resource planning, financial planning, man-management, etc., are either covered in minimal outline only, or are omitted from the teaching process entirely. (Cairns: 1992).

In an ideal world, all design information is complete prior to construction but when time is of the essence, design and construction overlap, with design ideally sufficiently ahead of construction so as not to cause delay. It is very rare that modifications are not required during the construction period, be it to improve ‘buildability’, to overcome a design oversight or to react and overcome on site difficulties. It is therefore important during the construction stage to have good communication not only with the contractor but also with the client, so that the need for modifications can be identified early, redesigned or endorsed by the client without disrupting site operations. Furthermore, the client and contractor should be considered as potential members of the design team during the construction stage. (Sawczuk: 1992 and Twyford: 1998).
Could it be what Sawczuk (ibid.: 1992) recommends actually occurs in a ‘traditional
procurement’ process? It is well known that many of the features of the ‘traditional’
approach to construction used in the British construction industry can be traced back
one hundred years, and in some instances, still further back to the time of the Guilds.
For all that, there have been significant changes over the last twenty years and many
alternative procurement systems are now available. The process of services being
created, developed and then declining has been identified in the service management
in terms of service cycles. (Barratt: 1993). This view confirms the position that the
longevity of existing services cannot be taken for granted and professional firms, if
they are to survive in the longer term, need a marketing orientation which makes
them sensitive to changing client demands. One major identifiable trend is the
increasing demand for professional advice, which takes a particularly broad view.
This is evidenced in the rise of the project manager in the case of construction.

In New Zealand, it takes in the order of five years of full-time study to graduate with
the degree of Bachelor of Architecture from one of the country’s three schools. There
are approximately 150 graduates each year. Upon graduation the graduate is then
required to undergo a minimum of two years practical experience preferably under
the guidance of a registered architect. There is legislation\footnote{Architects Act 1963} in New Zealand which
makes it is an offence for anyone to call themselves an ‘architect’ unless the holder
of an Annual Practising Certificate issued by the AERB. However, there is no
restriction placed in New Zealand on a graduate (or any person for that matter) from
practising \textit{i.e.} preparing designs and contract documentation. Colleagues have
expressed an opinion that ‘registration’ (which allows the holder to be called an ‘architect’) can be at times be a hindrance rather than help. This is because of the expectations of professionalism that is placed upon registered architects which are not always placed on others.

Following completion of the prescribed period of practical experience an oral interview is conducted by a panel convened by the Board. There are currently no recognised courses conducted by any of New Zealand’s tertiary institutions to help candidates prepare for this examination. After a successful interview the applicant can apply for ‘registration’. It appears from the previous reports of the AERB examiners that some employers are not providing sufficient opportunities for their graduates in gaining experience in all aspects of the process both within the office and on the building site. Approximately 50% of those graduating are offering themselves for the practical examination. (AERB: 2000). The AERB have expressed growing concern about the lack of experience and preparedness of candidates presenting themselves for the registration examination. The Board noted with concern in 1995 that there appears to be a growing trend where some employers are clearly not providing graduates with adequate all round experience of the architect’s role. (AERB: 2000).

Statistics show that:

(i) In the period of 1990 to 2000 only 29% of graduates are achieving registration;
(ii) Of 1459 of those who graduated during the period 1987 to 1997, 47% are not registered or members of the N.Z. Institute of Architects;
(iii) 8% are registered but not members of the N.Z. Institute of Architects;
(iv) Only 21% are registered and members of the Institute; and
(v) The average time that it takes to obtain registration after graduation is 4.8 years making it one of the longest periods of any profession between beginning studies and being able to practice. [emphasis added].

(AERB: 2000).

The above comments may provide some explanation of why not all graduates are completing the ‘registration’ formalities although Wilkinson et al. (2003) believe that an architect is trained to take an overview of the whole building process.

Other reasons may include the lack of employment opportunities for graduates under the direction of a registered architect; and the fact that there is no mandatory requirement to be ‘registered’ in New Zealand in order to be able undertake any of the work normally associated with an architect. But the reasons why registered architects not undertaking the administration of building contracts is unclear and could be for a variety of factors, such as:

(i) The lack of training and experience in this role;
(ii) A preference to design the project and not to get involved in either the technological or legal processes necessary to bring a project to its successful conclusion;
(iii) The reduction of fees available for this stage of the work;
(iv) Clients with a ‘do it yourself’ attitude and perhaps considering that such an appointment will not be ‘value for money’;
(v) The result of pressure from builders who do not want an independent third party involved who would ‘keep them honest’; or
(vi) The threat of increasing litigation with claims for negligence of the type described earlier in the *Rowlands v Collow* [111] case?

This research does not intend to determine the reasons why architects are not undertaking the independent administration of contracts. Should the survey for this research show that there is a low incidence of architects being involved with the independent administration of building contracts, then suggestions for further

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research being undertaken will be made which should assist to determine the full range of reasons and implications of why this function may, or may not, be occurring.

3.5 Synopsis of seminal text

Comment was made earlier about the dearth of material on the topic of where projects are not administered by an independent third party and that the majority of material assumes that contracts are in fact, independently administered. However, there is no evidence to support that this is the case in New Zealand and in order to be able to present a full and balanced picture, a synopsis of the seminal text from a wide variety of sources including case law, covering the ‘administration of contracts’ and ‘dispute resolution’ is included.

The opinions of Bell (1999), Nai (1996) and Blaxter et al. (1996) were consulted and their comments in the context of this work are particularly relevant. It is accepted that most, if not all of the texts on the subject matter are written from the stance that all building contracts are administered by an independent third party and therefore, the resolution of disputes within those contracts are undertaken, in the first instance, by the independent third party. If this is the case then the texts written on ‘contract administration’ are of limited value in relation to this work and therefore, would not be appropriate in the New Zealand context. The research to be undertaken for this thesis expects to determine whether this is the case.
Duncan Wallace’s (1995) comment referred to earlier substantiates this assertion and Kennedy-Grant (1999) also bases his text on the assumption that the powers and duties of the employer’s professional representative in relation to the construction contract comprise:

a) administration of the contract;
b) supervision of the performance of the contract by the contractor; and
c) certification.

If the judiciary in New Zealand, following the *Rowlands v Collow* 112 case, interpret the role of the professionals as indicated above then this stance may be instrumental in providing a reason as to why ‘professionals’ are resisting, either consciously or unwittingly, the role of contract administration. Gray *et al.* (2001) believe that in practice over 70% of the total information for the project will be generated and issued once construction has commenced.

All of the major decisions will have been made, but there will be a myriad of detailed issues to resolve. Most of these issues will be at the level of the component and subcomponent interface with a constant need for the designers, and possibly the client, to be available to make rapid decisions. If projects are being undertaken in this fashion it would seem inevitable that an environment is created at the outset where disputes could arise.

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Pickavance’s (1997) work is based on the total premise and assumption that all contracts are being ‘administered’. His work also provides a priority to the definition of ‘contract administration’ as being the term given to the party responsible under the contract for determining what delay may be excused, or what damage is to be compensated.

Powell (1996) expresses the point that in deciding whether a duty of care was owed by a defendant to the plaintiff, it may be relevant to take into the terms of the contract between one of them and a third party. There can be no question in terms having contractual effect as between plaintiff and the defendant, since generally a contract binds only the parties thereto. A duty of care in tort, however, is a duty imposed by law having regard to all the relevant circumstances, which may include the terms of such contract.

In an Australian case ¹¹³ the Court considered the effect of the contracts made by the architect and the contractor in determining whether a duty of care was owed to strangers to those contracts and stated that neither the terms of the architect’s engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract is not an irrelevant circumstance. It

¹¹³ Voli v Inglewood Shire Council [1963] ALR 657

David Gatley RMIT University: Victoria: Australia
determines what was the task upon which he entered. (Windeyer J in Voli v Inglewood Shire Council: 1963).

Walker et al.: (2000) also provide an opinion that all ‘contracts are administered’ and that an advantage of the use of a ‘construction management’ approach to projects is that there will be reduced confrontation between the design teams and the team responsible for supervising construction. This infers that the designer is also not the administrator of the contract and also makes a definitive statement that suggests that contracts administered by the designer are likely to result in a dispute. Most model conditions are complex, difficult to understand and sometime introduce unnecessary issues of dispute. Problems arise where there are alterations to the clauses (either additions or omissions) or contract clauses are amended outside of the published document. This often evident where the initial agreement is verbal and then is confirmed in writing by one party, but not acknowledged by the other. Yet even unchanged contracts result in disputes.

Heath et al. (1994) found in research undertaken amongst quantity surveyors in England that virtually all of the widely used contract forms have a high incidence of claims. In the United Kingdom there are over 30 ‘standard’ forms of contract with 91 versions. (Hellard: 1991). It would be almost impossible to accept that everyone in the construction industry would know everything about each of these 91 versions.

In Australia, in recent years at least one new construction contract has been produced annually. (Hibberd et. al: 1996). In New Zealand, it is not known how many new
(and not ‘standard’) forms of building contracts are in use at any given time and this research intends to provide some data to confirm the usage of building contracts. There is anecdotal evidence that some projects, particularly in the residential area, are being undertaken with the minimum of contract documentation. Often this is in the form of a letter from one party and in many cases, simply by ‘word of mouth’.

The continual amendment of the ‘standard’ form of building contracts has often lead to conflict and has been addressed by various writers. A provision in a contract will only be void for uncertainty if the Court cannot reach a conclusion as to what was in the draftsman’s mind or where it is not safe for the Court to prefer one possible meaning to other equally possible meanings. (Lewinson: 1997). Amending a ‘standard’ contract, unless taken with great care and knowledge of the consequences, may build into the contract the very thing the draftsman is trying to avoid – confusion leading to disputes. The Courts usually resolve this on the basis that the traditional rules of offer, rejection, counter-offer and acceptance remain the traditional means by which courts resolve conflicts as to the terms upon which the parties have in fact contracted. (Eilenberg: 1999 and Dorter: 1990). This opinion concurs with comments made earlier, in relation to where a ‘formal’ contract does not exist and to cases where the Courts are hearing cases pleaded before them both under the ‘law of tort’ as well as under a ‘breach of contract’. In certain instances, cases are heard concurrently in contract and in tort, if it is the wish of the Court to do so. There is further concern where a building contract is not being administered by an independent third party, the lines of communication become even more restrained,
and maybe even, non-existent. The problem is being exacerbated by not having an ‘intermediary’ who can discern matters of difference of opinion between the parties.

It has been the authors’ personal experience in New Zealand where a client engages the professional only to prepare documentation sufficient to obtain a building consent, and not to provide full documentation, that it is in these instances where disputes often arise. This has been evidenced in a number of arbitrations personally conducted since 1977. Street (1999) confirms this position. Eilenberg (1999) believes that little building is undertaken without contract documentation – from drawings through to the contract itself. Poor documentation is a result of a number of factors, not least in many cases, an attempt to save money. When this occurs, prior to construction even commencing, the builder has to interpret the documents for the bid process. Add to this that often once construction is underway a change to the drawings in particular often leads to confusion, and the rise of conflict is hardly surprising. Yet this is one area that can, without too much difficulty, be readily avoided. This circumstance can be avoided but in New Zealand, where the attitude of self-sufficiency referred to in the introductory chapter exists, it is not always possible. The country currently does not have legislation to regulate the activities of non-professional persons and the consequence is that a lot of construction work is therefore, undertaken by unqualified persons.

The pilot study undertaken in 2000 alluded to this situation being manifest in all areas of the industry but more so in the residential area. Cashflow, or the lack of it, is often used as an excuse by clients for not paying a builder. Clients have initiated a
dispute with the builder because they really did not have the money to pay the builder. The insufficiency of a client’s cashflow becomes very obvious at a very early stage to the independent administrator who has to assess and certify progress payments in an impartial manner. If the process is exercised judicially both parties will generally be treated fairly by the independent administrator. Construction usually occurs between two parties, the client and the builder and is formalised with some form of written contract. Most of these contracts are in a ‘standard’ form published by industry associations or related bodies. Under these contracts, there are a series of obligations on both parties. Over the years, these forms have been updated and rewritten, changing the balance of responsibilities from one party to the other – usually from the client to the builder. Even with this change, the basics have stayed very similar. After using these contracts literally for decades there are many builders who, from both the findings of the early initial survey and from other independent research published in various papers (Heath et al: 1994) do not know the content of these contracts, or how to administer them. Many clients, especially those in the domestic arena, are equally ignorant. The inability of the two parties to fully appreciate their own requirements and expectations and to clearly communicate effectively with the other party would appear to underlie the problems of many construction disputes. (Eilenberg: 1999).

While totally agreeing with Eilenberg’s conclusions (ibid.: 1999), further study is necessary to determine whether the results of the ‘ignorance’ of the parties could have been curtailed and diminished had a third party been involved to assist them in the execution of their building contract.
Numerous other works that have discussed and researched the administration of building contracts were considered during the research for this project and these have not been referred to but the list of these works is included in the bibliography. In all cases, their pertinence to the specific area of this research is debatable but all have been duly considered and acknowledged. Other works surrounding the topic of this thesis included material prepared by Mulhorn (1987); Diaz-Hermidas (1994); Levin (1982); Onaran (1996); Pfatteicher (1996); (Day: 1989); Wallace (1987) and Press (1999).

The review in chapters 2 and 3 of the literature with reference to the various issues discussed has prompted the development of a series of research questions and a hypothesis in the next chapter.

CHAPTER 4
RESEARCH QUESTIONS AND HYPOTHESIS

Analysis of the literature available on the area of this research topic has shown that there are gaps in our knowledge on a variety of topics. The review prompts the following summary; research questions and hypothesis. The questions will be independently posed to both commercial and residential projects with contemporaneous analysis undertaken in chapter 6.

4.1 Research questions

4.1.1 Building contracts and provision for the resolution of disputes
From a review of the available literature, there appears on the face, to be an adequate number and variety of ‘standard’ forms of building contracts available for use by the construction industry in New Zealand. The individual building contracts were itemised and discussed earlier in chapter 2. Some indication as to the extent of the usage will be determined from the data collection proposed for this research. However, the following issues are therefore, raised and questioned.

4.1.1.1 Types of building contracts

Research Question 1:

To what extent are ‘standard’ and other forms of building contracts used in the construction industry in the Auckland region of New Zealand?

4.1.1.2 Contract formation

Research Question 2:

Who drew up these building contracts?

4.1.1.3 Provision for the resolution of disputes

Research Question 3:

What provision was made in these contracts for the resolution of disputes?

4.1.2 The administration of contracts and the resolution of disputes

The current version of the New Zealand Institute of Architects ‘Agreement for Services’ AAS2: 2000 document has a series of ‘tick-box’ forms and a space for the insertion of the cost of individual services to be completed. The document does not contain any definitions or explanations of what the particular service(s) includes or, more importantly, excludes. The manner in which these forms are to be completed...
also gives the distinct and perhaps wrong impression that some areas of service are optional and can be dispensed with. This advice can be confusing to architects and, more importantly, to their clients.

The literature, particularly with regard to Court judgments, form the distinct impression that there are certain components of the service normally provided by the architect that should be ‘non-negotiable’. That is, the architect would be expected to undertake the ‘contract administration’ whether contracted to or not. The cases quoted earlier, including recent cases in the United Kingdom, tend to support this proposition. A recent practice note issued by the New Zealand Institute of Architects (NZIA: 2002) also supports the current edition of RIBA ‘Plan of Work’ document (RIBA: 2000) which confirms the view of the profession that it is acceptable to undertake ‘partial commissions’. As a consequence, the design professions(s) are embarking on projects believing that they have been correctly advised. In the United Kingdom, this action has perhaps been partially responsible for the introduction of legislation\(^\text{114}\) which provides for collateral warranties intended to create a contractual relationship between parties which otherwise would not exist. The aim therefore, is to protect the rights of third parties, for example, between an end user of a building and a consultant. No similar legislation currently exists in New Zealand. The scope for difficulty in negotiating collateral warranties is huge, as there are as many variations on clauses. Advice should be sought from lawyers. The trend in the future will probably be for third party rights (rights in favour of third parties such as funders,\(^\text{114}\) Contracts (Rights of Third Parties) Act 1999 (United Kingdom)
purchasers and tenants) to be included within a building contract or appointment in order to circumvent the requirement for collateral warranties. (Green et al.: 2001).

It would appear from the literature, and supported by anecdotal evidence, that architects together with other designers and engineers are apparently making a conscious decision to abdicate the responsibility for the supervision of contracts. One of the biggest mistakes that architects, engineers and other professionals make is failing to make and retain adequate files. Many building industry professionals are unaware that cause of action in negligence arises not when work is done, but when the damage occurs or is ‘reasonably discoverable’ – and those two dates can be decades part. (Rudd et al.: 2001). This statement tends to confirm the supposition that architects and other designers are tending to defer the supervision of a contract to others. However, if the Rowlands v Collow judgment is followed, this can no longer be a guarantee of immunity from prosecution. Further, in another recent English Court case Dyson J reviewed an earlier 1979 decision by Judge Stabb QC who found that if a designer becomes aware of a defect after practical completion he is under a continuing obligation to review a design.

However, Dyson J (ibid.: 2001) found that such actions should be subject to the limitations to take action as governed by statute. With the constant threat of actions against the professional designers with claims of negligence that, potentially in the future may not be ‘time barred’, it is not too difficult to see why so many are perhaps

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115 Rowlands v Collow [1992] 1 NZLR 178
opting out of the supervisory role. (Greene et al.: 2001). This is done with the endorsement of the professional bodies but it is questionable whether it is done with the approbation of the Courts.

There is also a move in the United Kingdom to ‘ban retentions’ a move which is being supported by specialist contractors. (Building Services Journal: 2001). There are concerns being raised, where there is not an independent third party administering the contract, about who is to have ‘control’ over the retention monies. If this has been left to the employer (who can hardly be seen, in these instances, to be impartial) then abuses of the process could ensue.

Such a move, in New Zealand, may have some support in the commercial sector but no one really knows how the system would work, particularly in the residential sector where ‘non-standard’; ‘minimal’ contracts (and contracts not administered) seem to be the norm. Consideration of the above poses the following questions.

4.1.2.1 Contract administration

Research Question 4:

Who was responsible for the independent administration of these building contracts?

4.1.2.2 The incidence, nature and resolution of disputes

Research Question 5:

What was the incidence of disputes that resulted as a consequence of the usage of these building contracts; what was the nature of the disputes; and how were they resolved?

After posing these questions, the progression to considering other issues follows.
4.1.3 Negligence and legislation

The government of New Zealand has enacted legislation whose principle aims are to improve the cashflow of the construction industry and to protect the payments due to both contractors and subcontractors alike. This will be in addition to a plethora of legislation that was listed and discussed earlier and which, in the authors’ opinion, appears to have been introduced as a reaction to adverse conditions. While some of this legislation, such as the Building Act 1991 is a substantial improvement on earlier regulations, there still seems in the author’s opinion, to be a need for a comprehensive range of legislation for both commercial and residential sectors of the industry. Also, considering that there is no current legislation that requires architects (or designers) to undertake the design, contract documentation or the administration of contracts, the following question is submitted.

4.1.3.1 The avoidance of disputes

Research Question 6:

Would the construction industry in New Zealand benefit from additional legislation that would require the architect (or designer) be engaged for all sections of service including the administration of the building contract?

The foregoing research questions have prompted the following hypothesis which the data collected will assist to test.

4.2 Hypothesis

118 Construction Contracts Act 2002
119 Building Act 1991
The literature review, its analysis and reflection on the research questions has promoted the following hypothesis. The hypothesis presupposes that the architect (or designer) has been contractually engaged by an employer to independently administer the contract and that the engagement is for a ‘full’ (and not ‘partial’) service for the ‘contract administration’ stage of the project.

The incidence of disputes is reduced in building contracts that are administered by an independent third party administrator for both commercial and residential sectors of the construction industry in New Zealand.

This hypothesis acknowledges that the commercial and residential sectors of the construction industry in New Zealand operate in different ways and the methodology being adopted for this research also acknowledges and is cognizant of this fact. It is further recognised that the official statistics refer to the categories of ‘non-residential’ and ‘residential’. The colloquial terminology used extensively by the industry is ‘commercial’ and ‘residential’. This research acknowledges the adopted terminology.

4.3 Concluding comments

It is conceded that there are many varying views and opinions concerning some of the issues raised in this review and analysis of available literature touching upon this topic. Sectors of the professions in New Zealand; the judiciary (both here and overseas); academics; members of the New Zealand construction industry ‘at large’ and indeed, the general public all have diverging notions about a variety of factors, *viz.*,  

1. Can architects (and designers) be held negligent for ultimately defective work designed by them but where they have not been
contracted to independently administer the contract works during their execution?

2. Can architects (and designers) undertake ‘partial’ services and by doing so, contract out of being liable for ensuing negligence claims as the professional bodies (such as the N.Z. Institute of Architects) purport or do they have to provide a comprehensive service as the Courts apparently advocate, as in the case of Rowlands v Collow? and

3. Can any such claims against the architect (or designer) for negligence be ‘time barred’? Whilst the case of Invercargill City Council v Hamlin was not directly related to a ‘designer’, the Privy Council did not think claims can be ‘time-barred’ whereas in the more recent case of Johnson and Johnson v Pitts the Court delivered an opposing decision.

What is certain is that there is no inevitability as to what is the correct position in any of the issues raised above. Whilst there is a growing list of precedent cases it seems that the Courts will continue to make judgments on the merits of each particular case heard. In any event, disputes do occur in the construction industry in New Zealand and probably will continue to do so and regardless of the outcome before the courts of any dispute. The specific point in question is:

Would the engagement of the architect (or designer) as the independent third party to administer a building contract executed between the employer and contractor assist to diminish or eliminate the incidence of disputes?

This is the essence of this research.

The next chapter proceeds to describe the methodology that will be adopted in order to provide answers to the research questions and to test the hypothesis.

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122 Johnson and Johnson v Pitts (Unreported) High Court, Whangarei. CP10/01/ Master Anne Gambrill.
CHAPTER 5

RESEARCH DESIGN

The aim of this research is to investigate if disputes are more likely to occur when a building contract is *not* administered by an independent third party and this chapter describes the methodology adopted. Using a randomly selected sample of commercial and residential projects in the Auckland region of New Zealand executed during the 1999 and 2000 calendar years, answers to the following research questions were sought:

1. To what extent are ‘standard’ and other forms of building contracts used by the construction industry in the Auckland region of New Zealand?
2. Who drew up these building contracts?
3. What provision was made in these building contracts for the resolution of disputes?
4. Who was responsible for the independent administration of these building contracts?
5. What was the incidence of disputes that resulted as a consequence of the usage of these building contracts; what was the nature of the disputes; and how were they resolved? and
6. Would the construction industry in New Zealand benefit from additional legislation that would require that the architect (or designer) be engaged for the administration of the building contract?

This chapter also substantiates the reasons why the selected research methodology was adopted. It is appropriate to state here that there are two major impediments that became evident when designing the research methodology. These restrictions are:

(i) The ‘confidentiality’ issue when attempting to solicit information about disputes which have developed to a point where the parties, and others involved with the process, are bound by legal constraints to maintain secrecy.

(ii) The accessibility of statistical data, whether from public, private or institutional sources, to support this area of research, *viz.*, contracts that are not administered by an independent third party.

These issues and the effect that they had on the design of the research will be discussed later.
5.1 Research

Firstly, what is research?

**research a. & v. 1. n**
'Careful search or inquiry after or for or into; endeavour to discover new or collate old facts etc. by scientific study of a subject, course of critical investigation'.

(Collins: 1988)

The term ‘research’ implies systematic and controlled searching, critical investigation, problem-solving, analysis and scientific interpretation and presentation. There are numerous definitions of research which encompass these aspects and from these definitions it can be seen that generally some form of problem is inherent when embarking upon a research project. This problem will require defining, limiting, analysing and solving. In fact, the term ‘problem-solving’ may be defined along parallel lines of research. Fellows *et al.*: (1997) provide the definition:

‘Research within the construction industry draws on a variety of established subjects, including natural sciences, social sciences, engineering and management and applies them to its particular context and requirements.’

Modern-day research has departed some way from the traditional methods where emphasis was placed more on scientific, quantitative research that underpins positivism. From the four predominant philosophical stances, which can be taken towards research ‘positivism’; ‘interpretative’; ‘critical’; and ‘post-structural the views of several authorities were considered including Acton: (1975); Gill *et al.*: (1997) and Runeson *et al.*: (1999). The research does not intend to discriminate against any specific contracts nor whether they were administered by an independent third party or not. As stated earlier, there are no statistics that are either available or could be researched to ascertain with any degree of certainty, just how many
contracts are or are not administered. It is inferred that a project is successful unless it is:

(i) The subject of litigation; or
(ii) Having been through a dispute resolution process, the decision is being appealed through the Courts.

It is only when a building dispute enters into this ‘public’ domain that a building contract comes under scrutiny. Whereas, during the alternative dispute resolution (ADR) process the details of the dispute remains confidential between the parties and the arbitrator unless the award is appealed to the Courts.

The next section discusses and states which methodology has been considered appropriate for this research.

5.1.1 Which research methodology is appropriate for this research?

After considering the options available, it was decided that the data required for this research would be best elicited using ‘post-structural’ methodology. The disputes that may or may not have eventuated as a result of pre-determined conditions, such as the type of building contract selected; the dispute provisions contained therein; and whether the contract was administered or not by an independent third party are all variables which will have an effect on the outcome of the research.

While participants would be asked to sign a consent form indicated that they accept that the information will be used for its stated purpose, there was potentially still a situation where information could be identifiable. Legislation\textsuperscript{123} was developed to ensure that no information collected from any person could be identifiable in any

\textsuperscript{123} The Privacy Act 1993
way without their consent. Principle 2 clause 2 (g) of the Privacy Act 1993 allows for:

‘The collection of information for statistical or research purposes and that such information will not be published in a form that could reasonably be expected to identify the individual concerned’.

When designing the questionnaire, several senior arbitrators in the New Zealand profession advised that they would decline to cooperate with the submission of data citing confidentiality and ethical reasons for this. Apparently, it is not the first occasion that researchers have been faced with this situation.

As no official (or other) comprehensive records are kept of the number and type or mediations, arbitrations, and etc., undertaken in New Zealand, it is very difficult to analyse the effectiveness or otherwise of dispute resolution processes other than those subjected to an appeal. It is only when an arbitration is challenged and an application made to the High Court to have an Award set aside (or for some other reason prescribed by the Arbitration Act 1996), does that the matter enter the ‘public domain’ and the matter then placed on the public record. Therefore, prior to detailing the methodology adopted for this research, the question of 'confidentiality', with particular regard to the legal constraints that potential participants would find themselves bound by, was given serious consideration. The following sections are intended to substantiate and reinforce the methodology adopted for this research and to also assist and confirm (for the benefit of future researchers) the difficulty of soliciting statistics and data of disputes that have entered in to the ‘formal’ stages of mediations and arbitration.
5.1.2 Disclosure of information relating to arbitral proceedings and awards.

The first issue which fellow arbitrators refer to when discussing the release of information or data from arbitral proceedings is contained in article 14 of the Arbitration Act 1996 which states:

(1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.

(2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection-

(a) If the publication, disclosure, or communication is contemplated by this Act; or

(b) To a professional or other adviser of the parties.

This section was not part of the Law Commission’s recommendations in Arbitration, NZLC R20, Wellington, 1991. It results from submissions to the parliamentary select committee and undoubtedly is designed to deal with the impact of the judgment of the High Court of Australia.\(^\text{124}\). However, the efficacy of the measure must be measured against the impact of a recent New Zealand.\(^\text{125}\) Green et al: (1993) comment that: `the Esso Resources Ltd v Plowman case provides a useful discussion about the conflicting way in which different jurisdictions have dealt with confidentiality issues. By contrast, in the Esso Australia Resources v Plowman case heard in Australia, the majority of the High Court held that there was no implied term in an arbitration agreement that documents produced for the arbitration are protected by any obligation of confidentiality between the parties. The practical effect of this decision is that one of the primary advantages of arbitration, that is the privacy of the proceedings, has been significantly undermined by the Court's refusal to protect documents produced in these proceedings.

\(^{124}\) Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10; 128 ALR 391; 69 ALR 404 (HCA)

\(^{125}\) TVNZ v Langley Productions Ltd. (2000) 2 NZLR 250.
This conclusion is despite a recognition by the Courts of both the importance of privacy to arbitration, and the need for that privacy to be coupled with an obligation of privacy. The High Court did however acknowledge an obligation of confidentiality for documents produced pursuant to an order for discovery. (Nosworthy: 1995). There are two sides to the question. First, the right of the general public to have access to knowledge of matters that may be relevant to it, and second, the rights of the parties to an arbitration to have their documents kept confidential and private from scrutiny by any other person or party. This question was raised in the Esso Australia Resources Ltd v Plowman case, as well as in another matter (Philips Fox: 1996).

The Court of Appeal in England expressed the common law position in a 1991 case where the Court restrained a party to an arbitration from disclosing on discovery in a subsequent action documents relating to the arbitration. That has not been a universally applied approach. Those concerned with arbitration in the area of international trade and commerce may well now prefer the New Zealand Act with its privacy/confidentiality protections rather than carrying the risk of unwelcome exposure if the arbitration is to take place in some other jurisdiction. This section only applies to the parties. ‘Party’ as defined in section 2 of the Act does not extend to the arbitrator nor does it extend to witnesses. However, arbitrators who are members of the Arbitrators’ and Mediators’ Institute of New Zealand are bound to

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128 Arbitration Act 1996.
observe the Institute’s code of ethics for arbitrators, which provides in Rule 6 that: an arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office. (Green et al.: 1993).

The parties may wish to include a provision in the agreement appointing the arbitrator that formally binds the arbitrator to a confidentiality agreement. Further, all forms of communication, oral, print, electronic, or indeed any other form, are caught by the wording of the Act. The use of the word ‘publish’ suggests a form of broadcasting of the information which goes beyond the narrower form of simple disclosure to some other person or communication or information to some other person, or publication to the world at large. A submission to the Law Commission, in response to their paper on improving the Arbitration Act 1996, about the question of ‘confidentiality’ included the statement that while referral was made to several cases that have considered the question of confidentiality there are a number of arbitrators who consider that the case of TVNZ v. Langley Productions Ltd., [2000] 2 NZLR 250 was not referred to in more detail.

Views have been expressed that this arbitration was appealed to the High Court purely so that the decision could be ‘made public’. If this was the case, a simple solution, and one perhaps the Commission should consider when recommending changes to government, would be for the details of all Awards, for which an application has been made to the Court to be set aside, are kept suppressed until such time as the matter has been dealt with by the Court. Upon the Court having dealt with

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129 TVNZ v. Langley Productions Ltd., [2000] 2 NZLR 250
the matter, the legal principles of the decision can (and perhaps should) be made public.

However, the identity of the parties should be permanently suppressed (unless both parties agree otherwise) as occurred in a 1991 case[^1] and in many other civil and criminal cases that come before the Courts. This would provide a solution to the question of ‘confidentiality versus open justice’. (Gatley: 2001).

### 5.1.3 Enforcement:

The issue of ‘confidentiality’ is further examined when discussing the enforcement of orders provided for in article 14.09 of the Act[^2]. The object is to prevent the publication of confidential material. To prevent a threatened publication, communication, or disclosure, parties have the right to seek an injunction from the High Court or District Courts. During the arbitration itself the arbitral tribunal has the power to grant an injunction. After the award has been made the Courts retain such power. An injunction and damages may be sought to prevent a continuation of any publication, disclosure, or communication prohibited by the Act. Those damages could seek to cover any losses suffered by a party as a result of the confidentiality provision being breached. An example would be loss of profit as a result of disclosure of the confidential information to a competitor.

[^2]: Arbitration Act 1996
Section 14(2)(b), which sanctions disclosure to professional or other advisers, will extend to witnesses where they have an advisory role, for example, expert witnesses. (Green et al.: 1993).

5.1.4 Confidentiality and Court proceedings:

The effect of ‘confidentiality’ and when a matter has been placed before the Courts is provided by Green et al. (1993) in discussing article 14.11 of the Act. The Court then considered whether the High Court proceedings were simply an extension of the arbitration, such that s14 could apply to the proceedings, or whether the proceedings stood alone and were subject to normal Court provisions concerned with disclosure.

The Court concluded that the confidentiality which the parties had adopted with regard to their arbitration could not automatically extend to processes for enforcement or challenge in the High Court. The judgement noted that the parties

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1) ‘General: Section 14 of the Act is solely concerned with the arbitral proceedings. It does not extend to cover proceedings which move outside the arbitration itself into the Court arena.

2) Background:
(a) In TVNZ v Langley Productions Ltd, a case involving an arbitration to determine damages concerning a high profile news presenter (Hawkesby), TVNZ appealed against the award of damages. The other party filed to enforce the award. One of the parties wanted the award, with reasons, released into the public domain before argument, while the other party opposed the release, relying on s14 of the 1996 Act.
(b) Judgment: The Court noted that there had been a degree of uncertainty about the nature of the arbitral proceedings and the confidentiality attached to them, in referring to Esso Petroleum Resources Ltd v Plowman (1995) 183 CLR 10; 128 ALR 391; 69 ALJR 404 (HCA) and observed that, unlike Australia, New Zealand has a specific provision to deal with confidentiality. The Court also referred (at p 6 para 26) to the policy consideration that proceedings in Court are, and long have been, prima facie held in public (see Scott v Scott [1913] AC 417. The openness of justice is a central tenet of our system. Proceedings will be open for reporting and scrutiny unless there are exceptional reasons which militate against that’.
had specifically chosen to allow for the right of appeal, and that the other party had sought to register the award and enforce it in the High Court. The Court considered that once either of those steps occurred, the High Court principles applied, which must determine the question of access and public knowledge. There are daily cases before the Court in its civil jurisdiction where the parties, if given the option, would wish to have the form of proceedings, the relief, and the issues involved not made public. The more the Court operates with some veil of secrecy over its activities the less confidence there can be in the administration of justice. The Court noted that there was a serious and public interest in the nature of the contract involving the news presenter and that public money was involved. The terms of the arbitral award (which is the foundation for all proceedings now in this Court) should be available for public scrutiny and without any impediment being created by the confidentiality term in the contract. The proceedings to dispose of the outstanding matters will take place in public. (Holland J: 1994 in Wilson Neill Ltd\textsuperscript{133}).

Finally, the Court gave leave for counsel to apply for specific items to be suppressed if that was required, having regard to the approach discussed by Hanson J in Gibson v A-G.\textsuperscript{134}

\textsuperscript{133} Wilson Neill Ltd. (1994) 7 NZLCLC 260,617, per Holland, J.
Comment was also made on this case by Williams et al. (2000) in respect of the Hawkesbury decision.

5.1.5 Commercial privacy respected:

The case for continued respect for commercial privacy, as required by article 14.13, and the divulging of information made available to the arbitral tribunal was made in the a New Zealand case. Where the Court demonstrated a willingness to give commercial privacy in respect of certain figures, and referred to the actual amount in dispute in general terms. (Green et al.: 1993). The Court in this decision provided further confirmation that any information disclosed during an alternative dispute resolution (ADR) process is to remain private.

5.1.6 Court support for confidentiality:

The support of the Courts in New Zealand for the continuation of ‘confidentiality’ is confirmed in the case of 0 v S M, where the High Court, although dealing with arguments about the award of interest and costs under the 1908 Act, expressly

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Firstly, in the light of the s14(2) exception allowed by the Act, there can be no doubt about the correctness of the Court's decision. By allowing proceedings in the High Court for the enforcement of arbitral awards and appeals of such awards, the Act implicitly recognises that some level of disclosure in Court must necessarily flow from such proceedings. Otherwise, the party applying for High Court determinations would breach their duty of confidentiality merely by pursuing judicial proceedings.

Secondly, Robertson J did not exclude the possibility of the High Court continuing some degree of confidentiality in respect of some material produced in arbitral proceedings, if the parties had specifically addressed confidentiality in relation to High Court proceedings in their arbitration agreement.

Thirdly, those advising in the dispute resolution field will need to avoid overstating the attraction of confidentiality in arbitral proceedings. Confidentiality in relation to arbitration is a good deal more complicated that it first appears.


referred to the provisions of s14 of the 1996 Act. The Court ordered that the names of the parties, the arbitrator, advocates, and a retired Judge (who had provided an opinion) not to be published. This particular dispute involved a sharemilking issue and had none of the high public profile of the *TVNZ v Langley Productions* case.  

(Green *et al.*: 1993).

### 5.1.7 Confidentiality in mediation:

The effect that the maintenance of ‘confidentiality’ has in respect to a mediation process has been confirmed by the Courts. On the related subject of whether the documents prepared for the purpose of a mediation are subject to a confidentiality agreement, several other cases have dealt with this matter.  

(Green *et al.*: 1993).

This delicate issue of ‘confidentiality’, which has been an important determinant factor on the methodology contemplated for this research, was given further emphasis when in a complaint issued by a party to a dispute against a member of the Arbitrators’ and Mediators’ Institute of New Zealand it was stated that it could be construed that the Institute were in breach of the s14 of the Act in that the parties would be breaching the confidentiality issues by providing details of the dispute, and any resultant award, to others (in this case the Institutes’ investigating body). (Keene: pers.comm: 2001).

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139 *Vaucluse Holdings Ltd v Lindsay* (1997) 10 PRNZ 557 (CA) at p 559.
*Crummer v Benchmark Building Supplies Ltd* (2000) 5 NZELC 98,661
*Sunnex Logging Ltd v Carter Holt Harvey Forests Ltd* 16 November 2000. Galazebrook J. High Court, Auckland. CP 166-SD00.
140 *Arbitration Act 1996*
Therefore, bearing this in mind, there are many members of the Institute who are engaged in ‘alternative dispute resolution’ in its many forms who are very apprehensive about providing details of any kind to those who are not directly entitled to be in possession of such information. Their stand on this issue has meant that the collection of survey information from them was discounted. In Australia, the situation is somewhat different and confirmation of this can be found where research has been conducted by using participants’ names which were derived from the membership list of the Building Disputes Practitioners Society of Australia. (Eilenberg: 1999).

Similar comments to confirm the availability of statistical data in Australia have been made by Watts (1998) and in England, by Fenn et. al. (1998). Therefore, because of the uncertainty of being able to obtain the information from arbitrators in New Zealand and together with the difficulty of being able to validate any information eventually obtained with the parties to the dispute, the notion of direct elicitation of information from those directly involved with dispute resolution was dispensed with. Further, during 2002, the Arbitrators’ and Mediators’ Institute of New Zealand placed their list of Panel Members on their internet web page with direct public access. As a result the Institute does not have any statistics whatsoever on the level of inquiry made for potential mediations and arbitrations.

Therefore, a research method that gives due consideration to these issues was designed and is detailed in the following section.
5.1.8 Qualitative or quantitative analysis or both?

In determining which research methodology to adopt in order to gain the best possible information upon which valid views may be formed, both quantitative and qualitative research methodologies were considered and ultimately, adopted.

Quantitative approaches use primarily numbers-based, factual methods of data collection and representation. Qualitative approaches however, are based on the meaning, interpretations and reasons given by people in response to issues and problems which need to be investigated. This type of data cannot be expressed statistically in a way that quantitative approaches can. Many research methods use both qualitative and quantitative data, and handled correctly, the two types of data can support each other very well. In determining if quantitative analysis methods should be used, an investigation of the views of several authorities including Burns (1997), Allen and Skinner (1991), McNeill (1985), and Cohen and Manion (1998) were duly considered. By far the greater part of research in historical studies is qualitative in nature. This is so because the proper subject-matter of historical research consists to a great extent of verbal and other symbolic material emanating from a society’s or a culture’s past. The basic skills required of the researcher to analyse this kind of qualitative or symbolic material involve collecting, classifying, ordering, synthesising, evaluating and interpreting. At the basis of all these acts lies sound personal judgment. In the comparatively recent past, however, attempts have been made to apply the quantitative methods of the scientist to the solution of historical problems. Of these methods, the one having greatest relevance to historical research is that of content analysis, the basic goal of which is to take the verbal non-
quantitative document and transform it into quantitative data. (Cohen and Manion: 1998).

In deciding should qualitative analysis be adopted, the opinions of Cohen and Manion (1997), Burns (1994) and Oppenheim (1992) were consulted. In believing that a combined approach of using both qualitative and quantitative methods should be adopted the emphasis in extreme cases tends to be placed upon the explanation and understanding of what is unique and particular to the individual rather than of what is general and universal. This approach questions whether there exists an external reality worthy of study. In methodological terms it is an approach which emphasises the relativistic nature of the social world. (Cohen and Manion: 1998 and Burrell et al.: 1979). Qualitative and quantitative analysis can both fit well within a methodological process described by triangulation. Conceptually the process is very simply explained and the logical adaptation to methodological thinking has its roots in basic geometry. Stripped to its basics, triangulation is supposed to support a finding by showing that independent measures of it agree with it, or at least, do not contradict it. (Miles and Huberman 1994). The theorem is derived from the field of surveying where the implication is that when we have only two data points all that we have is a measure of agreement or disagreement. The inclusion of additional information from a third source can be used as a confirmation of the trustworthiness from the first two source points or can be used as a more general theoretical explanation of apparent disagreements between the two source points. The underlying notion of triangulation is one of validation. (Lenard et al: 1998). The idea of combining qualitative and quantitative approaches in a single study owes much to
past discussions about mixing methods, linking paradigms to methods, and combining research designs in all phases of a study and that mixing methods from qualitative and quantitative traditions has contributed to discussions about their value, especially because they raise the question of the paradigm being used. (Cresswell: 1994).

Having considered the commentary and the opinions for and against a combined approach, it was decided that participants will be selected, at random and be asked to complete a questionnaire either during a personal interview or by way of a mailed-out questionnaire.

The width versus the depth of the study to be all important and states that this is a fundamental problem with postgraduate work of this kind. While some students prefer to keep a broader overview others move more rapidly to a pioneering frontier; and portrays research as mining for buried treasure and contends that most research will contain elements of both kind of exploration – width v. depth and that the depth of study will normally be achieved by attacking one factor – this may be a survey across many different circumstances. There is a tendency here to be formal and quantitative. Width however, would be achieved from looking at one circumstance entailing many factors – this may be a case study of one project at a time. There is a tendency to be informal and qualitative. (Kim: 1990).

Cohen and Manion (1997) point out that the three pre-requisites to the design of any survey are the specification of the exact purpose of the inquiry; the population on
which it is to focus; and the resources that are available. Should the construction industry, at large, in New Zealand be surveyed or a random sample only selected? It is argued that the group selected could be identified and able to be contacted and, therefore that a suitable questionnaire could be forwarded to this sample. The justification for the selection criteria is made later in this chapter. Cohen et al. (1997) and Yin (1994) are supported by Runeson et al. (1999) who contend that: ‘everything that can be done with a sample of 1000 can be done equally well with a sample of 100.’ Whatever the sample size, such a survey must provide information that a view could be formed upon.

However, as Oppenheim (1992) points out that too often, surveys, are carried out on the basis of insufficient design and planning' and even if this is corrected then: ‘the advantages and disadvantages of such surveys are almost the mirror-image of personal interviews and that such advantages of interviews are that they have a higher response rate; they offer the opportunity to correct misunderstandings and carry out observations and ratings while controlling for incompleteness and for answering sequence; and interviewers can often succeed with respondents who have reading or language difficulties.

There is a degree of certainty and because of the personal input, the resultant interviews should ensure that none of the potential problems present themselves. Further approbation for the use of this methodology can be found in Burns (1997) whose view is that it seeks to embrace the host of personal meanings that are derived from the context of direct experiencing. Such methodologies provide avenues which
can lead to the discovery of deeper levels of meaning and provides an appropriate justification for a qualitative methodology in saying that they are essentially concerned with processes rather than consequences, with organic wholeness rather than independent variables, and with meanings rather than behavioural statistics. (Burns: 1997).

The limitations to the use of qualitative analysis are documented by Burns (1997) in terms of adequate validity and reliability. Because of the subjective nature of qualitative data and the way it originates in single contexts, conventional reliability and validity standards are difficult to apply. Conditions and interactions cannot be replicated in a formal way as they can using a quantitative experimental method. It is also not possible to apply generalisations to the wider context than the one being studied. The richness, individuality and subjective nature of a participant's perspective and understanding is not amenable to the usual scientific criteria but adds that this does not make such understandings any less real or valid for the participant, and that they do contribute an explanatory function for that person's behaviour. (Burns: 1997).

Cohen et al: (1998) and Burns (1997) share the view that research which embraces interpretive and subjective dimensions is best employed by case study methods and such methods have limitations in the analysis and interpretation of the data received, the studies will provide, on a case by case basis, a descriptive report.
Allen et al. (1991) support the notion that social science research, which is concerned with the interaction of humans, is best suited to qualitative research methodology. It is for these several and varied reasons that a dual approach is being adopted. The use of a quantitative methodology supported by a qualitative approach should ensure that the limitations of one methodology against the other (and vice versa) are thus eliminated.

5.2 Reliability and validity

Oppenheim (1992) expresses reliability as a precondition for validity. Reliability means consistency whereas validity is defined as being 'a correlation coefficient'. The literature search did not reveal that any similar research had been undertaken either in New Zealand or overseas and therefore, the likelihood of other studies that would either confirm or question this research was negligible.

Whatever procedure for collecting data is selected, it should always be examined critically to assess to what extent it is likely to be reliable and valid. Reliability is the extent to which a test or procedure produces similar results under constant conditions on all occasions, whereas validity is a more complex concept. It tells us whether an item measures or describes what is supposed to measure or describe. If an item is unreliable, then it must also lack validity, but a reliable item is not necessarily also valid. (Bell: 1999).

The validation of a theory through testing is in one way very simple, in another way, very complex. Obviously, a theory that consistently survives testing will be
considered as more and more likely to be true and whilst it is impossible to prove a theory, it is almost as difficult to reject it conclusively, even when it fails a test. The so-called ‘Duhem-Quine Thesis’ suggests that where the correspondence rules are not part of theory itself, we cannot maintain the idea of either rejecting or accepting the theory because the operational variables can not be taken as true and unmodifiable (Bechtel: 1988). They must be regarded as subject to revision as we learn more about the application of the theory. When a theoretical prediction is threatened by an empirical result that is based upon operational definitions of theoretical terms, one immunising strategy is to revise the operational definitions to save the theory. The reliance on tradition can sometimes lead to the wrong conclusions being made and Because something is contrary to popular belief, and therefore suspect, and despite the irrefutable improvement on what has gone on before, does not mean that the theory is not correct. (Runeson et al.: 1999). McNeill (1985) supported by Oppenheim (1992) is of the opinion that case study interviews provide a higher level of validity where the interviewer is able to receive and observe responses at first hand. Therefore, with regard to commercial projects, a series of interviews will be undertaken using:

(i) Interviews (structured);
(ii) Observation (non-participative); and
(iii) Questionnaires.

Therefore, there is full support of the views of Allen et al. (1991) and Oppenheim (1992) who contend that qualitative survey methods which use a consistent form of case study interviews and analysis provide the most reliable type of information. This, supported by statistical data elicited from those interviewed, will provide both valid and reliable information upon which a detailed analysis to test the research’s
hypothesis will be available and in-depth interviews provide a clearer picture for the researcher.

In proportion to the extent in which reliability is enhanced by rationalisation, validity would decrease. For the main purpose of using an interview in research is that it is believed that in an interpersonal encounter people are more likely to disclose aspects of themselves, their thoughts, their feelings and values, than they would in a less human situation. At least for some purposes, it is necessary to generate a kind of conversation in which the respondent feels at ease. In other words, the distinctly human element in the interviews is necessary to its validity. The more the interviewer becomes rational, calculating, and detached, the less likely the interview is to be perceived as a friendly transaction, and the more calculated the response is likely to be. (Kittwood: 1977 in Cohen and Manion: 1998).

While the above details the preferred method of data collection, the collection of data for the residential projects required that the questionnaire be mailed out. The database of the Registered Master Builders Federation was not made directly available to me. After negotiating with them a compromise solution was reached where the questionnaires together with a covering letter, ethical consent forms and a freepost return envelope were supplied to them so that their staff could affix a label containing the name and address of their members.

The conducting of in-depth interviews with a questionnaire was not possible in the case of the residential projects. However, the reliability and validity of the method
used is still well-founded and the advantages far out-weighed any possible disadvantages. The advice of Burns (1997) about how to obtain a high return on a mailed out questionnaire was heeded as was the opinion of Runeson et al. (1999) about the appropriateness of the sample size.

The synonyms for *reliability* are: dependability, stability, consistency, predictability, accuracy and that the subject of *validity* is complex, controversial, and peculiarly important in research. Here more than anywhere else, the nature of reality is questioned. It is possible to study reliability without inquiring into the meaning of the variables. It is not possible to study, however, without sooner or later inquiring into the nature and meaning of one’s variables and concludes by comparing them thus:

a) *Reliability* refers to the stability, accuracy and dependability of data;

and

b) *Validity* assesses whether the test measures what it claims to measure.

(Burns: 1997).

*Validity* refers to the accuracy of the measurement process whilst the *reliability* of measurement refers to its consistency’ and that: ‘*reliability* requires that indicators or measures are created which represent empirically observable instances or occurrences of the concept under investigation or by using the same indicators of a concept, and by standardising the recording of the results of any observations, it should be possible to have a “reliable” measure of a relevant concept. (Gill et al.: 1977).

The next section proceeds to explain the rationale adopted when determining how to select suitable participants to take part in the surveys.
5.3 Selection criteria

The population of New Zealand is approximately 3.8 million with over a third living in the Auckland region. (Source: Auckland Regional Council). There are currently over 350,000 dwellings in the region and an extra 268,000 will be needed by 2025. The region’s population is forecasted to reach 1.6 million in the next 20 years. The Auckland region provides 35% of New Zealand’s jobs and is the home to 28% of all business enterprises. Not surprisingly, the majority of ‘work put in place’ is undertaken in the Auckland region. In March 2001, the ‘number of dwellings authorised’ (i.e. building consents issued) for the region accounted for 39% of the total for the country. A similar ratio was recorded in March 2000. (Statistics New Zealand). Table 5.1 shows the ‘Value of Work Put Into Place’ for the 1999 calendar year and table 5.2 the statistics for the 2000 calendar year.

Further, it was referred to earlier but the assertion cannot be overstated that 61.2% of the ‘value of work put in place’ in New Zealand in 1999, was residential work. In 2000 the amount was 60.6%. This is due in no small part to the reliance that the citizens of New Zealand have on using their own property (or a second and supplementary dwelling) as either their principal asset or as a source of funds for their retirement / superannuation scheme. The impact that residential work has on the construction industry in New Zealand cannot be ignored. Nevertheless, this research duly considers the dual importance of both residential and commercial construction.
### Table 5.1: Value of building work put in place: 1999
(Source: Statistics New Zealand)

<table>
<thead>
<tr>
<th></th>
<th>Mar</th>
<th>Jun</th>
<th>Sep</th>
<th>Dec</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Building Type</td>
<td>$ (million)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Residential Buildings</td>
<td>826.6</td>
<td>1,023.3</td>
<td>1,122.9</td>
<td>1,186.4</td>
<td>4,159.2</td>
</tr>
<tr>
<td>Non-Residential</td>
<td>575.4</td>
<td>625.1</td>
<td>691.7</td>
<td>744.3</td>
<td>2,636.5</td>
</tr>
<tr>
<td>Total</td>
<td>1,402.0</td>
<td>1,648.4</td>
<td>1,814.6</td>
<td>1,930.7</td>
<td>6,795.7</td>
</tr>
</tbody>
</table>

### Table 5.2: Value of building work put in place: 2000
(Source: Statistics New Zealand)

<table>
<thead>
<tr>
<th></th>
<th>Mar</th>
<th>Jun</th>
<th>Sep</th>
<th>Dec</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Building Type</td>
<td>$ (million)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Residential Buildings</td>
<td>1,271.6</td>
<td>1,063.8</td>
<td>1,094.9</td>
<td>957.4</td>
<td>4,387.7</td>
</tr>
<tr>
<td>Non-Residential</td>
<td>678.8</td>
<td>686.5</td>
<td>690.2</td>
<td>789.0</td>
<td>2,844.5</td>
</tr>
<tr>
<td>Total</td>
<td>1,950.4</td>
<td>1,750.3</td>
<td>1,785.1</td>
<td>1,746.4</td>
<td>7,232.2</td>
</tr>
</tbody>
</table>

Note:
All amounts exclude Goods and Services Tax.
Residential Buildings include alterations and additions
Non-Residential include hotels & boarding houses, hospitals & nursing homes, factories & industrial buildings, educational buildings, social, cultural, religious, recreational & farm buildings, shops, restaurants, taverns, offices, administrative buildings and storage buildings.
5.4 Research procedure

The methodology for this research has been developed so that the research questions and hypothesis can be tested. Chapter 1 refers to the collapses of major commercial construction companies in New Zealand towards the end of 1999 and during the early part of 2000. There was anecdotal evidence to suggest that during this period of time that it was not only the commercial sector of the industry that was experiencing difficulties caused by such problems as poor cashflow and defective workmanship but that the residential sector could also be similarly and possibly more adversely effected. Therefore, prior to embarking upon this research and as a part of inquiries made for complementary research (Gatley: 2000, 2002) a pilot study was conducted. Yin (1994) believes that with respect to pilot studies that they help the investigator to refine their data collection plans with respect to both content of the data and the procedures to be followed, and that it is important to note that it is a pilot test and not a pretest.

The pilot study was undertaken by using informal semi-structured interviews. Three commercial and three residential contractors were randomly selected and asked their views on the following:

1. The type of building contract being used and who was forming and administering them;
2. If dispute provisions were contained in these contracts and in the event that disputes arose during the execution of the contract to indicate how they were dealt with; and
3. If an independent third party is being appointed to administer these projects and whether such an engagement (of the architect or designer) to administer the contract during the execution of the works assists in reducing the number of disputes.
The pilot study confirmed that there was a need for further research by providing preliminary but inconclusive information that the construction industry was:

1. Currently using a variety of ‘non-standard’ building contracts;
2. Using ‘standard’ forms of building contract on occasions where they are substantially changed to the extent that they are not identifiable as being ‘standard’ forms;
3. Appointing independent third parties to administer contracts only on limited occasions;
4. Experiencing disputes as a consequence which were being resolved by a variety of methods; and that
5. Further research in this area was warranted.

The pilot study in 2000 assisted in identifying a number factors that this research would need to address and confirmed that the following action be taken:

1. The data and the sources required for the analysis the hypothesis were identified.
2. The preliminary questionnaire was developed over a period of time and forwarded to the supervisors for comment and approval.
3. After recommended changes were made, the questionnaire was subsequently checked with the assistance of colleagues with experience in the field.
4. Following the receipt of ethical consent from the Faculty and Research Committee at RMIT, a pro-forma letter was sent to the selected participants to ask for their assistance in the research. This letter advised the nature of the information being requested so as to allow the time for the participants to accumulate the data required.
5. The following method was adopted:
6. Commercial projects: Face to face interviews using the pre-prepared and approved questionnaire were then undertaken with all participants.
7. Residential projects; The same questionnaire was mailed out to participants.
8. The results of the survey were then subjected to analysis using both graphical and statistical methods.

5.5 Interview procedures

Following the pilot study undertaken in 2000 and referred to above, information using the developed questionnaire was elicited during 2001. Results of the statistical data and other information received are contained in chapter 5 with additional tables and charts in Appendix A. The following procedure was adopted.
5.5.1 Commercial projects

There are approximately 19 major contractors in New Zealand and some of these contractors have several branch offices and undertake work throughout the country. A random selection was made of the ‘major’ contractors based in Auckland and they were specifically asked to report and provide data on Auckland based commercial projects only. It was determined that the survey of 100 commercial projects undertaken in the 1999 and 2000 calendar years would provide adequate data for which to be able to provide answers to the research questions.

5.5.2 Residential projects

Initially from a database of information provided by the territorial authorities several residential contractors were selected at random and who were to be asked to participate in the survey. Because building consents are applied for in New Zealand by the building owner and issued directly to them, the names of the builders were generally not available. The alternative strategy of using the Registered Master Builders Federation database became the preferred method. The Federation agreed to provide the data which would allow for a wider and therefore, more reliable survey. There are 1707 members of this organisation nationwide of which 542 are based in the Auckland region. All 542 Auckland members were asked to provide data by way of a mailed out questionnaire, a copy of which is contained in Appendix A. The results are recorded in the chapter 6.
Excluded from consideration were houses built by their owners; those built as speculative developments (where the ultimate owner would not be a party to the initial contract during construction); and those built by ‘major’ companies and sold upon completion. The questionnaires were returned in April 2002 and until that time it was not determinable how many projects that each of the individual participants had undertaken in the 1999 and 2000 calendar years.

The nature of the ‘standard’ forms of building contracts used for both commercial and residential projects, as indicated in the literature review in chapter 2, are identical and therefore, the same questionnaire was used for both and a comparison of the results was consequently, made possible.

5.5.3 Questionnaire

The questionnaire was developed after undertaking a pilot study in 2000 and subsequently tested with several colleagues. Following this, minor changes to the format were made. The questionnaire was subsequently forwarded for approval by supervisors and for ethical consent from the Faculty and Research Committee at RMIT. A copy of the questionnaire is in Appendix A. The questionnaire solicited information on the following:

1. The number of commercial (or residential) projects undertaken by you or your company in each of the 1999 and 2000 calendar years in the Auckland region.
2. The individual value and total value of these projects.
   [This information was requested so that the value of projects undertaken could be put into a ‘context’ and used for comparison against national statistics].
3. The type of building contract used on each project.
   Were ‘standard’ forms of building contract used such as NZIA SCCI, NZS 3910, specific, etc?
4. Who drew up these building contracts?
5. The dispute provisions contained in each contract.

If these were not ‘standard’, photocopies of the dispute provisions contained in each specific contract, were requested.

6. The participants were asked to advise if each contract was administered by an ‘independent third party’ and if the answer was ‘yes’, to advise who administered the contract.

In this instance, the discipline of the person, not the name, was requested. E.g. Architect, Engineer, QS, Project Manager, etc.

7. The participants were asked to advise if any disputes arose during the execution of the contract.

8. If the answer to q7 was ‘yes’, what was the nature of the dispute(s). For example, was the dispute caused because of variations; extension of time; standard of work; the final account; and etc?

9. How was each dispute resolved?

Were they dealt with informally by the administrator of the contract; formally (i.e. by determination by the administrator); mediation; arbitration; litigation; and etc?

10. If an independent third party was appointed, the participants were asked to consider if they thought that the appointment was directly beneficial in the avoidance and/or resolution of the disputes (if any)?

11. The participants were asked their view as to whether the appointment, in terms of dispute avoidance and/or resolution, was worthwhile?

12. The participants were also asked to proffer their opinion as to whether the engagement of the architect or designer to administer the contract during the execution of the works has assisted in reducing the number of disputes.

Questions 1 to 9 required factual answers while questions 10, 11 and 12 invited opinions from the participants on a per project basis. Inaccuracy and bias may be minimised by careful structuring of the questions when inviting answers to that could be both factual and a matter of opinion. (Tuckman: 1972).

5.6 Ethical considerations

Comment has been made earlier about ‘confidentiality’ issues when a dispute enters into a ‘formal’ stage, i.e. mediation or arbitration and how the design of this research has coped with this situation. Because there was no correlation of projects between client and contractor and the names of the projects and the parties involved was not
solicited, the ethical consideration, as requested by the ethical consenting authority, has been maintained.

At no time was there any identifiable connection between any project(s). None were identifiable and consequently, if a project had proceeded to a formal dispute, the parties were not identified. This maintained the ‘confidentiality’ of all parties as referred to earlier. Each survey participant was presented with and asked to sign an ethical consent form, which outlined the purpose of the survey, and the purpose to which the details and results will be used. The confidentiality issues are dealt with in such a manner that the final document will not name any project, company, individual or any other person connected with the project or projects. Only the author and the principal supervisor will have access to the material.

Educational research requires obtaining the consent and co-operation of the people who are to assist in any investigations. The principle of informed consent arises from an individual’s right to freedom and self-determination - it seeks to respect and protect these rights. Informed consent also maintains that individuals involved in research shall not in any way be harmed. (Burgess: 1989). It was an important component, and it was reaffirmed at the commencement of each interview, that each interviewee was assured that all information provided and recorded would be kept ‘confidential’ to be seen only by the author and the Principal Supervisor. Interviews therefore, were conducted on the basis of strict confidentiality. Anonymity was of importance both during the pilot case study and when undertaking the substantive survey for this research.
5.7 Data management and analysis

The best preparation for conducting case study analysis is to have a general analytical strategy. Yin (1994) describes the two general strategies as being:

1. The reliance on theoretical propositions; and
2. Developing a case description.

The first and more preferred strategy is to follow theoretical propositions that led to the case study, whereas the second strategy is to develop a descriptive framework for organising the case study. Yin (1994) believes that the case study strategy is less preferable than the former but serves as an alternative when theoretical propositions are absent.

The author has considerable experience in a variety of areas of the construction industry and, in particular, with dispute resolution processes. While a view was formed on the likely outcomes of the research which assisted in the formation of the research questions and in the development of the hypothesis, no pre-conceived conclusions were entertained.

That is the purpose of undertaking the research and thus an open-minded approach to the collection of data and to the analysis of the results of the research was maintained.

5.8 Replication and comparability

Chapter 6 contains a summary of the data received and additional charts and tables can be located in Appendix A on the CD-ROM.
The report of the research outcome must also be believable, in the sense that a reasonable person reading the report should believe that the information and conclusions are reasonable, with the hope, of course, that such beliefs will turn out to be justified. This boils down to the research being perceived as genuine ‘search for truth’ and that ‘the majority of research projects are variations on previous research, and it is worthwhile having a more formal look at that now. If a previous work is being repeated as accurately as possible, it is being replicated. We talk about comparability when we repeat a study under some different conditions to a previous study but use the same method, for example repeating in Australia a study that has been previously been done in America. When we arrive at the same conclusion as other studies through the use of a different approach we call it convergence. Obviously both the comparability and the convergence are important considerations in our ability to generalise from our findings. Both comparability and convergence provide independent support for our results and make it more probable that the theory has a wide application, and therefore, that we can generalise from our results. All three approaches are perfectly legitimate forms of research. By using well-established tests to measure the attributes of the variables, a high degree of reliability is achieved. Any other researcher measuring the same thing is likely to use the same approach and arrive at the same or at least a very comparable result. (Runeson et al.: 1999).

This work is not a replication of any previous work and consequently and formulae have been developed in the following chapters that will enable future researchers to be able to replicate the research and therefore, further test the hypothesis.
5.9 Statistical methodology

The responses to the questionnaires and their application to the research questions prompt the following statistical analysis. The results are comparative between those received for each of the commercial and residential sectors. The small number of disputed contracts meant that the Fisher Exact Test (Agresti: 1990) was used primarily for investigating differences between the proportions to produce the above p-values and significance statements (with 0.05 as the critical value). A t-test was used to discern the difference between the proportions of residential and commercial disputes (Wild and Seber: 2000).

<table>
<thead>
<tr>
<th>Approximate size of p-value</th>
<th>Translation (Ho = Hypothesis)</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; 0.12 (12%)</td>
<td>No evidence against Ho</td>
</tr>
<tr>
<td>0.10 (10%)</td>
<td>Weak evidence against Ho</td>
</tr>
<tr>
<td>0.05 (5%)</td>
<td>Some evidence against Ho</td>
</tr>
<tr>
<td>0.01 (1%)</td>
<td>Strong evidence against Ho</td>
</tr>
<tr>
<td>&lt; 0.001 (0.1%)</td>
<td>Very strong evidence against Ho</td>
</tr>
</tbody>
</table>

Table 5.3: Interpreting the size of a ‘p-value’

Wild and Seber (2000 in table 9.3.2) (Refer Table 5.3 above) differentiate the results to test the hypothesis and provide the statement on the use of the table by stating that the translations are the authors’ and are not universally accepted. Such a translation is acceptable for the number of literal replications, an appropriate analogy from statistical studies is the selection of the criterion for establishing levels of significance. Much as the choice of ‘p< .05’ or ‘p< .01’ is not derived from any
formula but is a matter of discretionary, judgmental choice, the selection of the number of replications depends upon the certainty you want to have about your multiple-case results. (Yin: 1994).

5.10 Statistical data

Using the questionnaire and methodology described earlier 160 projects undertaken during a two year period were surveyed. The results were collected over a period of ten months from the randomly selected respondents. The results are collated in such a way so that differentiation between commercial and residential projects that will enable comparative testing of the hypothesis to be undertaken. The data collected from the returned questionnaires and/or interviews were compiled and analysed using both the Microsoft Excel 97 programme and the S-PLUS Statistical Package version 6 (for the Fisher Exact Test).

The answers to the questionnaires were entered into a database file in a coded form, as follows: yes was entered as ‘1’ while no was entered as ‘2’ in the database. Where ‘0’ is used this represents a neutral answer and this is particularly relevant to questions 10, 11 and 12 of the questionnaire. Blank spaces in the raw data file represented no answer from the respondents. The data was entered as a large matrix with each questionnaire containing in excess of 40 variables for each project. The ‘raw’ data collected is shown in Appendix A within tables A.2.1 to A.2.10 for commercial projects and tables A.2.11 to A.2.16 for residential projects. The Excel spreadsheets containing a summary of the data received is also recorded on the CD-ROM. Table 6.1 (commercial) and table 6.2 (residential) contain a summary of the
data received and analysed. The summary is tabulated to show the statistics from each of the 1999 and 2000 calendar years together with a combined total in each category for both of those years. Table 6.3 contains a breakdown of projects that had disputes and with those that did not in both commercial and residential sectors.

5.10.1 Commercial projects

Tables A.2.1 to A.2.5 inclusive:

1999: 50 projects: total value NZ$ 487,450,000: 18.48% of all work undertaken in New Zealand.

Table A.2.6 to A.2.10 inclusive:

2000: 50 projects: total value NZ$ 297,240,000: 10.04% of all work undertaken in New Zealand. The total work surveyed equates to NZ$ 784,690,000 or 14.31% of all work undertaken in New Zealand during the 1999 and 2000 calendar years. (Source: Statistics New Zealand). The percentage of work undertaken is shown as a comparison to the value of all work undertaken in New Zealand in this particular sector and is given to show that in the context of this research that an adequate proportion of work is surveyed.

5.10.2 Residential projects

Tables A.2.11 to A.2.13 inclusive:

1999: 30 projects: total value NZ$ 24,000,000: 0.57% of all work undertaken in New Zealand.

Tables A.2.14 to a.2.16:
2000: 30 projects: total value NZ$ 10,605,000: 0.24% of all work undertaken in New Zealand. The total work surveyed equates to NZ$ 34,605,000 or 0.41% of all work undertaken in New Zealand during the 1999 and 2000 calendar years. (Source: Statistics New Zealand). The survey represents a total number of 60 projects from the 542 contractors invited to complete the questionnaire. A follow-up interview was undertaken with five of the respondents (who had provided their contact details) in order to clarify some of their responses and to ensure that the data was properly recorded. It was not possible however, to contact any of those who did not respond to the questionnaire due to unavailability of the mailing list due to ‘privacy’ reasons referred to earlier. The data collected and as contained in chapter 6 and in Appendix A is as elicited from the participants either by way of a structured interview or from the postal questionnaire. In all cases, the data has not been amended. During the collection of the data, confirmation that the data being collected was, in many cases, at the limit of the respondents’ memory validating the decision not to collect data from an earlier and longer period. By contrast, there were projects, particularly in the commercial sector, that had started in the 2000 calendar year but when the data was being collected were just being completed.

The following chapter now tabulates the data received and then proceeds to analyse and discuss those results.

CHAPTER 6

RESEARCH RESULTS, ANALYSIS AND DISCUSSION

The purpose of this chapter is to present the results of the questionnaires developed for this research after which the results will be analysed and discussed. All analysis
techniques discussed in chapter 5.9 concerning statistical methodology have here been applied to the data to assist with the analysis of the research questions and to test the hypothesis.

Tables 6.1 and 6.2 contain a summary of the data received for both commercial and residential projects surveyed. The summary is tabulated to show the statistics for the combined years of 1999 and 2000. Appendix A (on the CD-ROM) contains supplementary charts and tables of the data for each individual year. Table 6.3 compares the results received for all commercial and residential projects surveyed where disputes arose against those where they did not. The comparative results are used later to test the hypothesis.

The results have been recorded to one decimal point. Commercial projects have been analysed in bands of up to $1m; between $1m and $10m; and over $10m and residential projects have been analysed in bands of up to $200,000; between $200,000 and $1m; and over $1m.
<table>
<thead>
<tr>
<th>3. Type of Contract</th>
<th>1999</th>
<th>2000</th>
<th>TOTALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>NZIA SCC1</td>
<td>16</td>
<td>25</td>
<td>41</td>
</tr>
<tr>
<td>As above (amended)</td>
<td>9</td>
<td>12</td>
<td>21</td>
</tr>
<tr>
<td>NZS 3910</td>
<td>7</td>
<td>8</td>
<td>15</td>
</tr>
<tr>
<td>Specific</td>
<td>14</td>
<td>5</td>
<td>19</td>
</tr>
<tr>
<td>Exchange of Letters</td>
<td>7</td>
<td>8</td>
<td>15</td>
</tr>
<tr>
<td>Registered Master Builders</td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Architect</td>
<td>11</td>
<td>20</td>
<td>31</td>
</tr>
<tr>
<td>Engineer</td>
<td>6</td>
<td>8</td>
<td>14</td>
</tr>
<tr>
<td>Quantity Surveyor</td>
<td>7</td>
<td>1</td>
<td>8</td>
</tr>
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<td>Project Manager</td>
<td>6</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>Solicitor</td>
<td>10</td>
<td>9</td>
<td>19</td>
</tr>
<tr>
<td>Other</td>
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<td>3</td>
<td>6</td>
</tr>
<tr>
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<td>40</td>
</tr>
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<td>22</td>
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<td>1</td>
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<td>22</td>
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<td>1</td>
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</tr>
<tr>
<td>Architect</td>
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<td>10</td>
<td>21</td>
</tr>
<tr>
<td>Engineer</td>
<td>7</td>
<td>13</td>
<td>20</td>
</tr>
<tr>
<td>Quantity Surveyor</td>
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<td>7</td>
<td>12</td>
</tr>
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<td>Project Manager</td>
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<td>10</td>
</tr>
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<td>19</td>
<td>37</td>
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<tr>
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<tr>
<td>Variations</td>
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<td>1</td>
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<td>Extensions of Time</td>
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<td>2</td>
</tr>
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<td>2</td>
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<td>1</td>
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</tr>
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<td>1</td>
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<td>N6</td>
<td>Y34</td>
</tr>
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<td>Appointment beneficial</td>
<td>Y32</td>
<td>N6</td>
<td>Y34</td>
</tr>
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<td>Principle of Remotivity +ve</td>
<td>30</td>
<td>9</td>
<td>34</td>
</tr>
<tr>
<td>Principle of Remotivity -ve</td>
<td>11</td>
<td>12</td>
<td>12</td>
</tr>
</tbody>
</table>

Table 6.1: COMMERCIAL PROJECTS: 1999 & 2000

SUMMARY OF TABLES A.2.1 to A.2.10 (Appendix A)
### Table 6.2: RESIDENTIAL PROJECTS: 1999 & 2000

**SUMMARY OF TABLES A.2.11 to A.2.16 (Appendix A)**

<table>
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<tr>
<th></th>
<th>1999</th>
<th>2000</th>
<th>TOTAL</th>
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</tr>
<tr>
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<td>3</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>As above (amended)</td>
<td>5</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>NZS 3910</td>
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<td>3</td>
<td>6</td>
</tr>
<tr>
<td>As above (amended)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Specific</td>
<td></td>
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<tr>
<td>Exchange of Letters</td>
<td>7</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Registered Master Builders</td>
<td>12</td>
<td>16</td>
<td>28</td>
</tr>
<tr>
<td><strong>4. Who drew up contract</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Architect</td>
<td>2</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Engineer</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Quantity Surveyor</td>
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</tr>
<tr>
<td>Project Manager</td>
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<td>9</td>
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<tr>
<td>Solicitor</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>17</td>
<td>21</td>
<td>38</td>
</tr>
<tr>
<td><strong>5. Dispute Provisions</strong> (None)</td>
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<td>6</td>
<td>13</td>
</tr>
<tr>
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</tr>
<tr>
<td>Section K amended</td>
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<td></td>
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<tr>
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<td>3</td>
<td>9</td>
</tr>
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<td>Section 13 amended</td>
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<td>2</td>
</tr>
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<td>1</td>
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</tr>
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<td><strong>6. Contract admin by</strong> (None)</td>
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<td>18</td>
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<tr>
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</tr>
<tr>
<td>Other</td>
<td>3</td>
<td>6</td>
<td>9</td>
</tr>
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<td><strong>7. Disputes</strong> (Yes)</td>
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<td>4</td>
</tr>
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<td><strong>8. Nature of Disputes</strong></td>
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<td>Extensions of Time</td>
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<td>Standard of Work</td>
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</tr>
<tr>
<td>Final Account</td>
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</tr>
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<td><strong>9. How resolved</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Informally</td>
<td>4</td>
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<tr>
<td>Determination</td>
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<td></td>
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<td>1</td>
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</tr>
<tr>
<td>Arbitration</td>
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<td>1</td>
<td>3</td>
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<td><strong>10. Appointment worthwhile</strong></td>
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<td></td>
</tr>
<tr>
<td>Litigation</td>
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<tr>
<td><strong>11. Appointment beneficial</strong></td>
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<td><strong>12. Principle of Remotivity</strong></td>
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### Table 6.3: SUMMARY: Commercial and Residential Projects: 1999 & 2000

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<td>Total</td>
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</tr>
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<td>4</td>
<td>37</td>
<td>6</td>
</tr>
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<td>28</td>
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<td>12 Architect</td>
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</tr>
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<td>5</td>
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<td>47 12. Principle of Remotivity</td>
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<td>21</td>
<td>2</td>
<td>23</td>
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</table>

Where disputes arose versus those where no disputes arose
This section now proceeds to analyse and discuss the data received and recorded in tables 6.1, 6.2 and 6.3 with respect to the research questions and hypothesis. Additional charts and tables are included on the attached CD-ROM. Chapter 7 will discuss the outcome of the research; draw some conclusions and make suggestions that are as a result of the finding plus provide additional views, for future research, that represent the author’s opinions. The suggestions are substantiated by the findings and represent a comprehensive range of related issues for consideration.

The analysis and discussion of the data in this chapter will be undertaken in three parts. Following the discourse of the data, a statistical analysis is provided.

1. Research questions 1 to 4 inclusive:
   - Research question 1: Types of building contracts.
   - Research question 2: Contract formation.
   - Research question 3: Provision for the resolution of disputes.
   - Research question 4: The administration of contracts.

2. Research questions 5 and 6.
   - Research question 5: The incidence, nature and resolution of disputes.
   - Research question 6: The avoidance of disputes.

3. The hypothesis.

The analysis for research questions 1 to 4 uses the data extracted from the records of the 100 commercial and 60 residential projects recorded in tables 6.1, 6.2 and 6.3. The information was as supplied by the participants in response to the questionnaire prepared for the research. The data analysis for research questions 5 and 6 are opinions received from the same participants and relative to the corresponding projects. The analysis and testing of the hypothesis is undertaken utilising all information received.
6.1 Types of building contracts

Research question 1 posed the following:

To what extent are ‘standard’ and other forms of building contracts used in the construction industry in the Auckland region of New Zealand?

The review of the data revealed that:

6.1.1 Commercial projects

The results indicate that ‘standard’ forms of building contract are more often used on lower value projects but not necessarily on larger projects with values in excess of $10m. The results show that there were:

- 43 (43%) projects undertaken with a value of up to $1m of which 21 (48%) used NZIA SCC1 (2000) and 7 (16%) used NZS 3910 (1998). The remaining 15 (36%) used some other form of contract.
- 35 (35%) projects undertaken with values between $1m and $10m of which 17 (48%) used NZIA SCC1 (2000) and 12 (34%) used NZS 3910 (1998). The remaining 6 (18%) used some other form of contract.
- 22 (22%) projects undertaken with values in excess of $10m of which 3 (13%) used NZIA SCC1 (2000) and 4 (18%) used NZS 3910 (1998). The remaining 15 (69%) used some other form of contract.
- ‘Other’ contracts include 19 (19%) which used a specific contract; 15 (15%) which used an exchange of letters; and 2 (2%) which used the Registered Master Builders contract.

The adoption of the industry accepted standard forms of contracts are not, from the results of this research, widely used. 41% of all commercial projects used NZIA SCC1 (2000) and 23% used NZS 3910 (1998). The majority of these were used where the project values were under $10m. (Refer Appendix A Charts A.3.4 and A.3.5).
Reference was made in chapter 2 to the use of ‘partnering’ and other similar agreements. Of the 100 projects surveyed, none used any form of this type of agreement. There was evidence of the use of an exchange of letters in 15 (15%) projects. On further inquiry it was determined that these were in instances where a relationship had been established on an earlier project(s) and where the parties had agreed to use a previously agreed contract for later work.

No evidence was provided to show that any of the other building contracts, including NZS 3915: 2000, was used. It should be noted that this contract was only introduced during 2000.

Of the 11 commercial projects that resulted in a dispute, NZIA SCC1 (2000) was used for 4 projects; NZS 3910 (1998) was used on 4; and the other 3 were specific contracts. (Refer Tables 6.4 and 6.5). These tables also show that of the 15 projects with values over $10m, 6 (40%) projects (Project nos. 1.2, 1.21, 1.23, 1.26, 1.30 and 2.5) resulted in some form of dispute between the parties to the contract. Of these 3 were administered by a project manager; 1 by the architect; and 1 by a quantity surveyor. The other project did not have an independent third party administrator.
### Table 6.4: Incidence of disputes: Commercial projects: 1999

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<tr>
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<td>SCC1</td>
<td>Spec.</td>
<td>Spec.</td>
<td>Spec.</td>
<td>3910</td>
</tr>
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<td>Arch</td>
<td>Other</td>
<td>Sol.</td>
<td>PM</td>
<td>Eng</td>
</tr>
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<td>PM</td>
<td>PM</td>
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<td>Eng</td>
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### Table 6.5: Incidence of disputes: Commercial projects: 2000

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<td>Arch</td>
<td>Eng</td>
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6.1.1.1 The use of specific contracts on commercial projects

Of the 15 (15%) projects where specific contracts were used, the results reveal that all contracts were drawn up by solicitors acting on behalf of the client. Of these, 7 (7%) were on projects in excess of $10m. (Refer Table 6.6) Disputes arose in only 2 projects which were not independently administered (projects 1.26 and 2.1).

<table>
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<th>Project No.</th>
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<th>Nature</th>
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<td></td>
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<td>$98m.</td>
<td>PM</td>
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<td>$99m.</td>
<td>NONE</td>
<td>YES</td>
<td>Final Account</td>
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</table>

Table 6.6: ‘Specific’ commercial contracts over $10m

The dispute that arose during the execution of Project no. 1.26 was resolved by mediation. The dispute concerned the ‘interpretation of the contract’ and the fact that no independent administrator of the contract was appointed, is noteworthy in the context of this research.

Comment was made by the respondent that, in this particular case, such an appointment would probably not have avoided the dispute. A similar response was supplied in connection with project 2.1.
6.1.2 Residential projects

As with commercial projects, the adoption of the different forms of contracts for residential projects was not evenly spread throughout all categories. The results (Refer Appendix A: Table A.3.9) indicate that there were:

- 32 (53.1%) projects undertaken with a value of up to $200,000 none of which used NZIA SCC1 (2000) and 1 used NZS 3910 (1998). Of the remainder, 14 (23.2%) contracts were undertaken following an exchange of letters and the other 17 (28.2%) used the Registered Master Builders form of contract.
- 20 (33.2%) projects undertaken with a value between $200,000 and $1m of which 7 (11.5%) used a form of NZIA SCC1 (2000) and 2 (3.3%) used NZS 3910 (1998). The remaining 11 (18.2%) used the Registered Master Builders form of contract.
- 8 (13.2%) projects undertaken with values in excess of $1m of which 5 (8.3%) used an amended form of NZIA SCC1 (2000) and 3 (4.9%) used NZS 3910 (1998). No other forms of contract were used on projects over $1m.
- 14 (23.2%) of all residential projects surveyed were executed by the exchange of letters and 28 (46.4%) used the Registered Master Builders contract.

Results of this research indicate that the construction industry seldom use the ‘standard’ forms of building contract (NZIA SCC1: 2000 and NZS 3910: 1998) on residential projects under $1m in value. On residential projects with values over $1m, an unaltered form of NZIA SCC1 (2000) was not used for any of the projects. On 6 residential projects, NZIA SCC1 (2000) was used in situations where the conditions of the contract were substantially amended. Appendix A: Chart A.3.11
shows the distribution (by percentage) of contracts used on the residential projects surveyed. It is again noticeable that none of the other ‘standard’ forms of building contracts referred to in the literature review showed up in the survey.

Of the 9 residential projects that resulted in a dispute, NZIA SCC1 (2000) was used on 3 projects; NZS 3910 (1998) was used on 3 projects; and the Registered Master Builders contracts on the remaining 3 projects. (Refer Tables 6.7 and 6.8).

Further reference to Tables 6.7 and 6.8 shows that of the 60 residential projects surveyed that 9 (15%) resulted in a dispute. Of those 2 were administered by an architect and 1 by an engineer. The other 7 projects were not administered by an independent third party.

6.1.3 Comparison of the usage of contracts on commercial and residential projects

The combined results of both commercial and residential projects indicate that, of the 160 projects surveyed, the NZIA SCC1 (2000) and NZS 3910 (1998) ‘standard’ forms of building contracts were used by 116 (72.5%) of the 160 projects surveyed with NZIA SCC1 (2000) adopted on only 3 of the larger commercial projects in excess of $10m.

By contrast, this form of building contract was used on 6 residential projects in the $200,000 to $1m range.
<table>
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<th>Project Identity No.</th>
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<td>Eng</td>
<td>PM</td>
<td>PM</td>
<td>Arch</td>
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<td>36</td>
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</tr>
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<tr>
<td>41</td>
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<td>43</td>
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<td>X</td>
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</tr>
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</tr>
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<td>2</td>
<td>3</td>
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<td>3</td>
</tr>
<tr>
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<td>Appointment beneficial</td>
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<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
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<td>47</td>
<td>Principle of Remotivity</td>
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<td>3</td>
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<td>3</td>
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Table 6.7 Incidence of disputes: Residential projects: 1999

<table>
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<th></th>
<th>Project Identity No.</th>
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<th>4.30</th>
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<td>20,000</td>
<td>900,000</td>
</tr>
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<td>3</td>
<td>Type of Contract</td>
<td>SCC1</td>
<td>RMB</td>
<td>3910</td>
</tr>
<tr>
<td>11</td>
<td>Who drew up contract</td>
<td>Arch</td>
<td>Other</td>
<td>Other</td>
</tr>
<tr>
<td>18</td>
<td>Dispute Provisions</td>
<td>SCC1</td>
<td>RMB</td>
<td>Other</td>
</tr>
<tr>
<td>26</td>
<td>Contract admin by:</td>
<td>None</td>
<td>None</td>
<td>PM</td>
</tr>
<tr>
<td>33</td>
<td>Nature of Disputes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>Variations</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>35</td>
<td>Extensions of Time</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>36</td>
<td>Standard of Work</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>Final Account</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>38</td>
<td>Other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>39</td>
<td>How resolved</td>
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<td>X</td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>Informally</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>41</td>
<td>Determination</td>
<td></td>
<td></td>
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<td>42</td>
<td>Mediation</td>
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<tr>
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<td>Litigation</td>
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<tr>
<td>45</td>
<td>Appointment worthwhile</td>
<td>3</td>
<td>1</td>
<td>2</td>
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<td>46</td>
<td>Appointment beneficial</td>
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<tr>
<td>47</td>
<td>Principle of Remotivity</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

Table 6.8: Incidence of disputes: Residential projects: 2000
The results revealed that NZS 3910 (1998) was used on a total of 30 (18.75%) of all commercial and residential projects surveyed. The use of both NZIA SCC1 (2000) and NZS 3910 (1998) on residential projects under $200,000 was limited and NZIA SCC1 (2000) was not used at all on any residential projects surveyed with contract values in excess of $1m. On larger commercial projects (over $10m) NZIA SCC1 (2000) was used on 3 of the projects surveyed.

6.1.4 Other types of building contracts

69% of projects executed with values over $10m were specifically drawn up contracts, principally drafted by solicitors. The Registered Master Builders contract was used in 28 (46.4%) of the 60 residential projects surveyed which was perhaps not unexpected given that the survey was executed by members from this organisation.

Comment was made in chapter 2 about the ‘out-dated’ dispute resolution provisions in the Registered Master Builders contract. There were 3 residential projects (nos. 3.13; 3.14 and 4.21) which used this form of building contract that resulted in a dispute. The results did not sustain this opinion as the data indicated that the disputes that eventuated during the execution of these contracts were all resolved informally. (Refer Tables 6.7 and 6.8).

Two commercial participants referred to a specific contract prepared by a firm of Auckland solicitors that were widely used during the late 1990s in Auckland. It was
commented during interviews with these commercial contractors that this contract placed all of the contractual risks directly with the contractor. The results indicate that only one of these commercial contracts (project no. 1.30) resulted in a dispute. The dispute was resolved by mediation. (Refer Table 6.4).

Another commercial contractor also stated during an interview that, after being told that a tender based on NZS 3910 (1998) for a multi-million dollar project had been accepted, the solicitor attempted to substitute this contract with the specific (and in their opinion, unacceptable) contract. When the contractor threatened to withdraw their tender the client interceded and the original NZS 3910 (1998) contract was retained.

As stated earlier, the use of ‘partnering’ or other similar agreements was not encountered in either the commercial or residential sectors of the survey. However, there was evidence in 15 (15%) commercial projects and 14 (23.2%) residential projects that contracts were executed following an exchange of letters. This represents a collective rate of 18.1% of all projects being implemented without a ‘standard’ form of building contract. It could be argued that, in the New Zealand context that if these projects were new contracts using previously agreed contracts, that this could be a form of ‘partnering’ while the participants did not refer to this process as such. The results of the survey concur with the views of a number of commercial contractors who were of the opinion that: ‘partnering is of no use’.
The reason being promoted was that the culture of the industry in New Zealand does not foster such arrangements where most construction work has historically been tendered for and not negotiated on an ‘individual’ basis. A number of major commercial contractors commented during the interviews that the ‘tender system’ was not the most suitable procurement method if ‘the client’s intentions are honourable’. There were also suggestions made that there is an element of mistrust in the industry and alternative views expressed that only a tender system can be competitive. There were claims made that the tender system ‘disadvantages reputable companies’ where the lowest price will always be accepted by the client.

The absence of an acceptable standard form of ‘partnering’ contract was given as one reason why such agreements are not encountered. Also it was stated by a contractor during an interview that whilst an arrangement between the client and contractor may be possible, the same arrangements do not seem, in their opinion, to be workable between contractors and subcontractors.

The literature review identified several other forms of contracts such as the NZIA Small Works Contracts (NZIA SW1: 2000); NZIA National Building Contract (NZIA NBC-SW2); the NZS 3915: 2000 contract and the NZIOB Design and Build contract (NZIOB DB1: 2000). None of these or any other ‘standard’ form of building contracts was encountered in any of the 160 projects surveyed. A further comment received from a residential contractor was that he had been in business since 1982 and was yet to have a dispute with a client. He joined the Registered Master Builders recently and is amazed at the level of recent correspondence about
disputes. He believed that if designers were more thorough and builders did their “homework” and kept the client informed, then there would be less disputes and that: the Registered Master Builders contract intimidated clients. A solicitor also became involved with this form of contract and on one project deleted many clauses and changed just about every other one.

This comment support the tenet of this thesis in that the types of building contracts used; the method of formation; and the way in which they are administered have changed in recent years.

6.1.5 Conclusions: Types of building contracts

The literature review revealed that there are a variety of ‘standard’ forms of building contracts available in New Zealand and the research indicated that only a few are used and only then, in varying degrees. Their usage is not in the areas where it could have been previously forecasted. The inference is that these ‘standard’ forms of contract are not being employed in a practice that both the N.Z. Institute of Architects and the N.Z. Standards Association would perhaps anticipate.

The data revealed that all commercial projects surveyed had some form of building contract albeit that 15% were by way of an exchange of letters and these were generally in instances where a prior relationship had been established. By contrast, the residential sector survey showed that 23.2% of projects were executed without a ‘formal’ contract. Most of these were for clients for whom work had not been done previously and therefore, a working relationship had not been established.
Nevertheless, in terms of the ‘incidence of disputes’ none of the 15 commercial or 14 residential projects undertaken by an exchange of letters resulted in a dispute. (Refer Table 6.3)

The survey, and subsequent inquiry, did not give any indication why ‘formal’ written contracts are not being entered into. This could be for a number of reasons that may include the confusion about the suitability of the wide variety of building contracts available. The next chapter suggests a way of resolving this issue by the development of a list of suitable contracts. Nevertheless, the survey revealed that there were a number of projects that had no ‘formal and written’ contract in the residential sector and that there were no disputes arising in these contracts.

The pilot study and the literature review revealed that, particularly overseas, there is an extensive use of ‘partnering’ agreements. As stated, the research for this thesis indicated that the use of such partnering arrangements was not encountered in any of the projects surveyed. The literature is supportive of such agreements and there is a recommendation in the next chapter that further examination of the potentiality of the use and adoption of such agreements in New Zealand be undertaken.

The survey revealed that solicitors developed specific contracts for use on 15 commercial projects of which 7 were on contracts over NZ$10m in value. The interviews revealed that these building contracts are a combination of many ‘standard’ forms of building contracts and altered so that they tend to be biased in favour of the client. The research also revealed that architects, who are involved in
many cases in the preparation of the other sections of the contract documentation required (*e.g.* drawings and specifications) are not being engaged, at the outset, to undertake the contract formation on ‘larger’ projects. The reasons for this occurring are unknown and further research is recommended to provide some answers to this question.

### 6.2 Contract formation

Research question 2 asked:

> Who drew up these building contracts?

#### 6.2.1 Commercial projects

The results recorded in chapter 4 show that 90 (90%) of the 100 projects surveyed were executed by ‘formal’ contracts. The remaining 10 (10%) projects had no ‘formal’ contract and were executed by an exchange of letters. The values of these projects ranged from $200,000 and up to $13m. The results shown in Appendix A: Tables A.3.13 to A.3.16 inclusive and Chart A.3.17 reveal that there were:

- 34 projects undertaken with a value of up to $1m of which 16 (47%) were drawn up by the architect and 6 (17%) by the engineer. The remaining 12 (36%) were drawn up by others.
- 40 projects undertaken with values of $1m and to $10m of which 13 (32%) were drawn up by the architect and 8 (20%) by the engineer. The remaining 19 (48%) were drawn up by others.
- 17 projects undertaken with a value in excess of $10m. 2 (11%) were drawn up by the architect and none by the engineer. The remaining 15 (89%) were drawn up by others.

The survey of ‘contract formation’ provides a parallel result to the ‘types of building contracts’ used. Of the commercial projects surveyed, the results show that there is an acceptance of the architect and/or engineer drawing up the contracts for
use on ‘lower’ value projects but not on ‘larger’ projects. With commercial projects in excess of $10m the involvement of architects and/or engineers in the formation of contracts was diminished whereas, solicitors were responsible for the ‘contract formation’ of 12 projects up to $10m and on 7 projects with values in excess of $10m. Appendix A: Chart A.3.18 illustrates the percentage distribution by percentage of those responsible for the formation of the commercial contracts surveyed.

The results reveal that the involvement of quantity surveyors and project managers in the formation of commercial contracts also increased on projects over $10m as opposed to their participation on ‘lower’ value projects. (Refer Appendix A: Tables A.3.13 to A.3.17.6 inclusive and Chart A.3.18).

Out of 100 commercial projects surveyed, 11 resulted in a dispute. Of these, 3 were drafted by the architect; 3 by the engineer; 1 by the quantity surveyor; and the other 4 by others (solicitor; project manager; and the developed/builder). (Refer Table 6.9). Further, of 11 commercial projects that resulted in a dispute, 6 were resolved informally and 2 went to mediation.

Of the remainder, 1 went to arbitration and 1 to litigation. The respective contracts for these projects (projects nos. 1.23 and 2.1) were drawn up by the client and the solicitor.
Table 6.9: Contract formation and resultant disputes:

<table>
<thead>
<tr>
<th>Project No.</th>
<th>Value</th>
<th>Contract by</th>
<th>Nature of Dispute</th>
<th>How resolved</th>
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<tr>
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<td>QS</td>
<td>Final Account</td>
<td>Informally</td>
</tr>
<tr>
<td>1.21</td>
<td>$25m.</td>
<td>ARCH</td>
<td>Interpretation of Contract</td>
<td>Informally</td>
</tr>
<tr>
<td>1.23</td>
<td>$13m.</td>
<td>OTHER</td>
<td>Performance of Subcontractor</td>
<td>Arbitration</td>
</tr>
<tr>
<td>1.26</td>
<td>$17m.</td>
<td>SOL</td>
<td>Interpretation of Contract</td>
<td>Mediation</td>
</tr>
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<td>1.30</td>
<td>$98m.</td>
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<td>Extensions of Time</td>
<td>Mediation</td>
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<td>1.39</td>
<td>$1.7m.</td>
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<td>Variations</td>
<td>Informally</td>
</tr>
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<td>2.1</td>
<td>$8.5m.</td>
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<td>Final Account</td>
<td>Litigation</td>
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<td>ARCH</td>
<td>Extensions of Time</td>
<td>Informally</td>
</tr>
<tr>
<td>2.23</td>
<td>$1.5m.</td>
<td>ENG</td>
<td>Payments</td>
<td>Informally</td>
</tr>
<tr>
<td>2.32</td>
<td>$2.22m.</td>
<td>ENG</td>
<td>Variations</td>
<td>Informally</td>
</tr>
<tr>
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<td>$2.4m.</td>
<td>ARCH</td>
<td>Variations</td>
<td>Informally</td>
</tr>
</tbody>
</table>

6.2.2 Residential projects

The results from the survey as detailed in chapter 5 show that 63% of residential contracts were formed by the builder when compared to the involvement of architects at a level of (9.9%). Appendix A: Table A.3.22 and Chart A.3.23 show that of the 60 projects surveyed, 6 contracts were drawn up by the architect. The breakdown of the data received indicates that there were:

- 34 projects undertaken with values up to $200,000 of which 29 (85.2%) utilised contracts drawn up by the builder.
• 18 projects undertaken with a value of $200,000 and up to $1m of which 5 (27.7%) were contracts drawn up by the architect and 7 (38.8%) by the builder.
• 8 projects undertaken with a value in excess of $1m. The distribution of who was responsible for the formation of these contracts was evenly spread between all consultants.

The survey showed that quantity surveyors (9.8%) have the same degree of participation in the formation of residential building contracts as architects but more involvement than engineers (1.6%). Further, project managers (14.9%) have a higher participation than an architect does in the formation of residential contracts.

The incidence of the involvement of consultants in the formation of residential building contracts is limited. This is particularly noticeable when projects are considered ‘by value’. The engagement of architects is low within each value band of projects. (Refer Appendix A: Tables A.3.19 to A.3.22 inclusive). Appendix A Chart A.3.24 illustrates the distribution (by percentage) of the professional who was responsible for the formation of the building contracts surveyed. Of the 9 residential projects that resulted in a dispute, 2 were drawn up by the architect; 1 by the engineer; 1 by the quantity surveyor; and the builder and/or project manager were responsible for formation of the 5 remaining building contracts. (Refer Table 6.10).

<table>
<thead>
<tr>
<th>Project No.</th>
<th>Value</th>
<th>Contract by</th>
<th>Nature of Dispute</th>
<th>How resolved</th>
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</thead>
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<tr>
<td>3.1</td>
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<td>Variations &amp; Extensions of Time</td>
<td>Informally</td>
</tr>
<tr>
<td>3.7</td>
<td>$1.1m.</td>
<td>BUILDER</td>
<td>Various</td>
<td>Arbitration</td>
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</table>
### Table 6.10: Contract formation and resultant disputes:

Residential projects

<table>
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<th>Case</th>
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<th>Party</th>
<th>Issue</th>
<th>Resolution</th>
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<td>PM</td>
<td>Standard of Work</td>
<td>Informally</td>
</tr>
<tr>
<td>3.14</td>
<td>$500,000</td>
<td>PM</td>
<td>Final Account</td>
<td>Informally</td>
</tr>
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<td>3.23</td>
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<td>ARCH</td>
<td>Final Account</td>
<td>Informally</td>
</tr>
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<td>4.8</td>
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<td>ARCH</td>
<td>Final Account</td>
<td>Informally</td>
</tr>
<tr>
<td>4.21</td>
<td>$20,000</td>
<td>BUILDER</td>
<td>Extensions of Time</td>
<td>Informally</td>
</tr>
<tr>
<td>4.30</td>
<td>$900,000</td>
<td>BUILDER</td>
<td>Final Account</td>
<td>Arbitration</td>
</tr>
</tbody>
</table>
Of 60 residential projects surveyed 9 (15%) resulted in a dispute, of these 6 were resolved informally and 3 went to arbitration. Of the 3 projects that were resolved by arbitration, 2 (project nos. 3.7 and 4.30) the builder drew up the building contract and an engineer drew up the other building contract (project no. 3.10).

### 6.2.3 Comparison of the formation of building contracts of commercial and residential projects

With regard to the ‘formation of building contracts’, the architect was responsible for the generation of 31 (31%) of commercial projects compared to 6 (10%) of residential projects.

The aggregated total of 23.1% of all those surveyed indicates that the client did not anticipate that the architect would be involved with the contract administration and suggests that this decision was made at the time that the contract documents were being prepared.

The results show that the higher the value that the project is that the more it is likely that a quantity surveyor or project manager will be involved in the formation of the building contract. With ‘higher’ value projects, these building contracts are more likely to be drafted by solicitors.

There were 7 commercial projects over $10m that were executed by specific contracts and only 1 (project no. 1.26) resulted in a dispute that was over the
‘interpretation of the contract’. (Refer Table 6.6). The formation of this $17m contract was undertaken by a solicitor but not administered by an independent third party and there was support for this position from this particular participant who, during the interview, stated that they were not surprised that disputes arose on this particular project. Three other participants stated that both the contractors and their clients no longer see this form of building contract as being acceptable.

The literature review referred to many problems being encountered during 1999 and 2000 in the commercial sector. The survey indicated that during this same period many ‘large’ projects were successfully completed using ‘standard’ forms of building contracts but that some problems were being encountered with some specific contracts that were drawn up by solicitors. It is not known what type of building contracts were used on the various projects by the companies that collapsed; who drafted them; and if the projects were independently administered because this information was not available. There was however, anecdotal evidence that suggested that specific contracts were used and that the projects were not independently administered. If so, this could provide some explanation as to why disputes arose during the execution of those contracts.

Of the residential projects surveyed, the results revealed that builders who, it cannot be said are impartial, drew up 63% of the contracts surveyed. This is in direct contrast to projects where a consultant was involved where the results revealed that such activities were limited. (Refer Appendix A: Tables A.3.19 to A.3.22 inclusive)
6.2.4 Conclusions: Contract formation

With regard to the ‘formation of the contracts’, the results of this research have indicated that when the incidence of disputes are related to the person responsible for the drafting of that contract, there was distribution throughout all professional categories. (Refer Table 6.6) That is, the profession of the person who drafted the contract seemingly did not effect whether disputes arose or not. In the context of this research, the results indicated that the mere fact that there was a contract in place that was independently administered apparently was sufficient to avoid disputes. While the results of this survey are reliable, a suggestion is made in the next chapter on how this could be examined further.

6.3 Provision for the resolution of disputes

Research question 3 asked the following:
What provision was made in these building contracts for the resolution of disputes?

6.3.1 Commercial projects

The analysis of Table A.3.27 and Chart A.2.28 in Appendix A reveal that there were:

- 44 projects undertaken with a value of up to $1m of which 21 (47.7%) used the standard NZIA SCC1 (2000) provisions; 6 (13.6%) used the standard NZS 3910 (1998) provisions. 10 used specific provisions or those in the Registered Master Builders contract. The remaining 10 did not contain any provisions.
- 40 projects undertaken with values of $1m and to $10m of which 16 (40%) used the standard NZIA SCC1 (2000) provisions; 14 (35%) used the standard NZS 3910 (1998) provisions; and 7 (17.5%) used specific
provisions or those in the Registered Master Builders contract. The remaining 3 did not contain any provisions.

- 16 projects undertaken with a value in excess of $10m of which 3 used the standard NZIA SCC1 (2000) provisions; used the standard NZS 3910 (1998) provisions; and 10 used specific provisions or those in the Registered Master Builders contract. All projects undertaken in this range contained provisions for the resolution of disputes.

Of the commercial contracts that resulted in a dispute, Table 6.11 indicates which dispute provisions was contained in those contracts; the value of the projects; who was responsible for the administration of the contract; and how the disputes were resolved.

<table>
<thead>
<tr>
<th>Project No.</th>
<th>Value</th>
<th>Drawn up by</th>
<th>Dispute Resolution Provisions</th>
<th>How resolved</th>
</tr>
</thead>
<tbody>
<tr>
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<td>$23m.</td>
<td>QS</td>
<td>NZS 3910 amended</td>
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<td>ARCH</td>
<td>NZIA SCC1</td>
<td>Informally</td>
</tr>
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<td>1.23</td>
<td>$13m.</td>
<td>OTHER</td>
<td>SPECIFIC</td>
<td>Arbitration</td>
</tr>
<tr>
<td>1.26</td>
<td>$17m.</td>
<td>SOL</td>
<td>SPECIFIC</td>
<td>Mediation</td>
</tr>
<tr>
<td>1.28</td>
<td>$98m.</td>
<td>PM</td>
<td>SPECIFIC</td>
<td>Mediation</td>
</tr>
<tr>
<td>1.39</td>
<td>$1.7m.</td>
<td>ENG</td>
<td>NZS 3910</td>
<td>Informally</td>
</tr>
</tbody>
</table>
Table 6.11: Resolution of disputes: Commercial projects

The results demonstrate that of the 4 projects that used the NZIA SCC1 (2000) provisions for the resolution of disputes, 3 were resolved informally and the other was settled by litigation. The dispute that arose during the execution of project no. 2.1 was an NZIA SCC1 (2000) contract drawn up by a solicitor and not independently administered. The dispute over the ‘final account’ resulted in litigation.

Of the 11 commercial projects that resulted in a dispute, the NZIA SCC1 (2000) provisions were used in 4 projects and the NZS 3910 (1998) provisions used in 3 projects. The remaining 3 used specific provisions and 1 used an amended form of NZS 3910 (1998). In the 3 specific contracts which resulted in a dispute, 2 (project nos. 1.26 and 1.28) were resolved by mediation and 1 dispute (project no. 1.23) was resolved by arbitration. (Refer Table 6.11).
6.3.2 Residential projects

The analysis of Table A.3.31 and Chart A.3.32 in Appendix A reveal that the provision for the resolution of disputes in the contracts surveyed. There were:

- 34 projects undertaken with a value of up to $200,000. None used NZIA SCC1 (2000); 1 used the standard NZS 3910 (1998) provisions; and 20 (43.2%) used specific provisions or those in the Registered Master Builders contract. The remaining 13 (38.2%) did not contain any provisions.
- 18 projects undertaken with values of $200,000 and to $1m of which 6 (33.3%) used the standard NZIA SCC1 (2000) provisions; 2 used the standard NZS 3910 (1998) provisions; and 10 (55.5%) used specific provisions or those in the Registered Master Builders contract. All contracts surveyed in this value range contained provisions for the resolution of disputes.
- 8 projects undertaken with a value in excess of $1m of which 1 used the standard NZIA SCC1 (2000) provisions and 7 (87.5%) used the standard NZS 3910 (1998) provisions. All projects undertaken in this value range contained provisions for the resolution of disputes. None of the contracts surveyed used specific provisions or those in the Registered Master Builders contract.

Of the 9 residential contracts that resulted in a dispute, 4 projects used the NZIA SCC1 (2000) provisions for the resolution of disputes, and of these 3 had the standard clauses amended. 2 disputes were resolved informally and the other 2 were resolved by arbitration. (Refer Table 6.12).

<table>
<thead>
<tr>
<th>Project No.</th>
<th>Value</th>
<th>Contract by</th>
<th>Dispute Resolution Provisions</th>
<th>How resolved</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The contracts for the 3 projects (nos. 3.7; 3.10 and 4.8) that used an amended form of NZIA SCC1 (2000) were drawn up by a builder; an engineer and an architect respectively. This is not in a manner prescribed by the authors of that contract. It is intended for use where the architect forms and administers the contract and the contract states this quite implicitly. The N.Z. Institute of Architects holds the copyright over the NZIA SCC1 (2000) contract and is intended that the contract is only used where a registered architect has been specifically engaged to administer the contract.

The results reveal the following:

- The execution of project no. 3.23, a contract with a value of $750,000, was by way of an NZIA SCC1 (2000) contract drawn up by the

---

### Table 6.12: Resolution of disputes: Residential projects

<table>
<thead>
<tr>
<th>No.</th>
<th>Value</th>
<th>Consultant</th>
<th>Contract</th>
<th>Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.7</td>
<td>$1.1m.</td>
<td>BUILDER</td>
<td>NZIA SCC1 am</td>
<td>Arbitration</td>
</tr>
<tr>
<td>3.10</td>
<td>$4m.</td>
<td>ENG</td>
<td>NZIA SCC1 am</td>
<td>Arbitration</td>
</tr>
<tr>
<td>3.13</td>
<td>$500,000</td>
<td>ARCH</td>
<td>NZS 3910</td>
<td>Informally</td>
</tr>
<tr>
<td>3.14</td>
<td>$500,000</td>
<td>PM</td>
<td>RMB</td>
<td>Informally</td>
</tr>
<tr>
<td>3.23</td>
<td>$750,000</td>
<td>ARCH</td>
<td>NZIA SCC1</td>
<td>Informally</td>
</tr>
<tr>
<td>4.8</td>
<td>$1.5m.</td>
<td>ARCH</td>
<td>NZIA SCC1 am</td>
<td>Informally</td>
</tr>
<tr>
<td>4.21</td>
<td>$20,000</td>
<td>BUILDER</td>
<td>RMB</td>
<td>Informally</td>
</tr>
<tr>
<td>4.30</td>
<td>$900,000</td>
<td>BUILDER</td>
<td>NZS 3910</td>
<td>Arbitration</td>
</tr>
</tbody>
</table>
architect and administered by the architect. The dispute, over the ‘final account’, was resolved informally.

- Project 3.7 was a $1.1m contract that used an NZIA SCC1 (2000) form of contract drawn up by the builder with substantially amended dispute resolution provisions. The architect administered the contract. The resultant dispute was over a ‘variety of issues’ and was ultimately resolved by arbitration.

- Similarly, project no. 4.8, a contract with a value of $4.8m, was also an NZIA SCC1 (2000) contract drawn up by an architect but not independently administered. The dispute resolution provisions in the contract were amended. The dispute over the ‘final account’ was resolved informally.

(Refer Table 6.12)

The requirement that the architect administer the contract did not occur in the case of projects 2.1 and 4.8.

6.3.3 Comparison of the provisions for the resolution of disputes in commercial and residential projects

Research question 3 inquired as to what dispute resolution provisions are included in the individual contracts surveyed. Of all 160 projects surveyed, the provisions provided for in NZIA SCC1 (2000) and NZS 3910 (1998) collectively accounted for 63 (63%) of all commercial projects and 17 (28%) of residential projects. Cumulatively, this equates to 80 projects (50%) of all projects surveyed. Comments were made by several participants that the provision for the resolution of disputes contained within those contracts do not meet with universal approbation and as a consequence, many provisions are amended.
The use of specific or the Registered Master Builders contracts accounted for 24% of all commercial and 30% of all residential projects. The literature review showed that the Registered Master Builders contract contains only the arbitration process for the resolution of disputes. There were 3 residential projects that used this contract that resulted in a dispute and none were independently administered. Nevertheless, all 3 disputes were resolved without the need for the arbitration procedure. (Refer Tables 6.7 and 6.8).

The results revealed that there were contracts where no provisions for the resolution of disputes were included in 13 (13%) commercial and 13 (21.5%) residential contracts. These were principally where there was no ‘formal’ contract or the contract was by way of an exchange of letters. Disputes resulted in 3 of these commercial contracts of which 2 were resolved by mediation and 1 by arbitration. (Refer Table 6.1 and 6.2). None of the residential projects executed using specific contracts and ‘non-specific’ dispute resolution provisions resulted in a dispute.

The literature review referred to other alternative dispute resolution (ADR) methods such as conciliation and mediation/arbitration. The participants advised that no such processes were included in any of the contracts surveyed. Further, if any of the specific contracts allowed for these processes to be adopted the survey results showed that they were not used to resolve any of the disputes.

Additionally, although not specifically referred to in the contracts, where the NZIA SCCI (2000) and NZS 3910 (1998) contracts were used, the results showed that
where a contract resulted in a dispute neither the conciliation or mediation / arbitration processes were used. More importantly in the context of this research is that the ‘determination’ procedure was not used to resolve any disputes.

There were 11 commercial disputes notified where 4 projects used the provisions of NZIA SCC1 (2000) and of these 3 disputes were resolved informally and the other was resolved by litigation. This project (no. 2.1) was a contract drawn up by a solicitor and not administered by an independent third party. The dispute that arose during the execution of this $8.5m contract was resolved by litigation even though this process is not a measure provided for in NZIA SCC1 (2000). Refer to Figure 2.1 in Chapter 2. Whether litigation could have been avoided had the contract been independently administered and the alternative dispute resolution (ADR) provisions that are allowed for in this contract adopted is uncertain.

By contrast, of the 9 residential projects that used NZIA SCC1 (2000) that resulted in a dispute, 3 had the provisions for the resolution of disputes substantially amended. (Refer Table 6.12). All 3 participants stated that some clients consider that the provisions contained within NZIA SCC1 (2000) tend to favour the builder and this provides the impetus to amend the contract accordingly. Of the 3 projects in this category:

- The contract for project 3.7 was drawn up by a builder and the dispute resolved by arbitration;
- The contract for project 3.10 was drawn up by an engineer and the dispute resolved by arbitration; and
• The contract for project 4.8 was drawn up by an architect and the dispute was resolved informally.

That the dispute resolution provisions in NZIA SCC1 (2000) are being used in an amended form in building contracts that result in a dispute is of concern. Much effort was made during the development of this contract by the New Zealand Institute of Architects and its solicitors to provide a procedure that, in the event of disputes arising, such disputes can be resolved by the architect who is administering the contract by following a pre-determined process. This did not occur in projects 3.10 and 4.8 referred to above. While project 3.7 was administered by the architect, the contract was drawn up by the builder who it was reported, amended the dispute resolution provisions. This is not a practice that is approved by the Institute and in this case, did not promote a satisfactory conclusion to the contract.

6.3.4 Conclusions: Provision for the resolution of disputes

The conclusions deduced from the data collected for this research are that the informal, mediation and arbitration procedures contained within the ‘standard’ forms of building contracts are used when these contracts have been adopted.

However, the only project in all sectors surveyed that had a dispute that was resolved by litigation was a contract executed using NZIA SCC1 (2000). This process is not allowed for in this contract and yet one of the parties decided to instigate legal proceedings. An opinion was formed that the contractor was unable to obtain the cooperation of the client to instigate the provisions contained within the contract where the dispute could have been resolved either informally; by
determination, by mediation; or as final resort, arbitration. The fact that a contract had been signed by both parties, in this case NZIA SCC1 (2000), is considered to be a pre-agreement to the alternative dispute resolution (ADR) processes contained within that contract being utilised. It was reported, that the contractor and his solicitor were not aware of the remedies available under the terms of the contract and more importantly, how to put them into place. Consequently, the matter was resolved by litigation. A suggestion will be made in the next chapter to how this situation could have been avoided.

Although mediation was initiated and proved to be the successful method of dispute resolution in 2 of the commercial projects surveyed (as provided for in the ‘standard’ forms of building contracts), both participants interviewed stated that the process is not popular. (Refer Table 6.11). Concerns were raised during interviews with these participants that the mediation step was often seen to be a ‘precursor to arbitration’ and allows a ‘dominant’ party to both obtain a preview of the other party’s position and to also use the mediation process to delay the final decision.

The process allowable under many contracts where the architect (under NZIA SCC1: 2000: Section K Rule 93) and the engineer (under NZS 3910: 1998: Section 13 Rule 13.2) are required, after making an informal decision, to make a determination also requires comment. In all commercial and residential cases surveyed there were no disputes resolved by this process. All disputes, which were not resolved at the earlier ‘informal’ stage, were ultimately referred to more formal processes such as mediation, arbitration or litigation for resolution. The existing
procedures promoted by NZIA SCC1 (2000) and NZS 3910 (1998) are described in chapter 2 and further illustrated in figure 2.1. A suggestion is made in chapter 7 that proposes amendments to the dispute resolution provisions in all building contracts including the ‘standard’ forms of building contracts. The changes are supported by this research and incorporate the recently introduced, and now mandatory, adjudication process.

6.4 Contract administration

Research question 4 asked:

Who was responsible for the independent administration of these building contracts?

6.4.1 Commercial projects

The results revealed that an architect is more likely to be involved with the administration of contracts with ‘lower’ values (11% of projects up to $1m) than on ‘higher’ value projects (1% of projects over $10m). Engineers were responsible for 12 (12%) of all commercial projects surveyed. (Refer Appendix A: Table A.3.35). The converse was the case with quantity surveyors and project managers who collectively were responsible for the administration of 41 (41%) of the commercial projects surveyed. The number of commercial projects which had no independent third party appointed to administer the contract was higher with ‘lower’ value projects (12% of projects up to $1m) than on higher value projects (3% of projects over $10m). 21 (21%) of all commercial projects surveyed had no independent third party appointed to administer the contract. (Refer Appendix A: Table A.3.35).

Of the 11 commercial projects that resulted in a dispute the administration of the contract was undertaken in 1 by the architect; 3 by the engineer; 1 by the
quantity surveyor; and 3 by the project manager. 3 projects had no independent third party administration. In the context of this research, either the architect or engineer administered 36% of these projects. The remaining 64% were administered by either the quantity surveyor, the project manager or there was no administrator, at all. (Refer Table 6.13).

<table>
<thead>
<tr>
<th>Project No.</th>
<th>Value</th>
<th>Drawn up by</th>
<th>Admin. by</th>
<th>How resolved</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.2</td>
<td>$23m.</td>
<td>QS</td>
<td>QS</td>
<td>Informally</td>
</tr>
<tr>
<td>1.21</td>
<td>$25m.</td>
<td>ARCH</td>
<td>PM</td>
<td>Informally</td>
</tr>
<tr>
<td>1.23</td>
<td>$13m.</td>
<td>OTHER</td>
<td>PM</td>
<td>Arbitration</td>
</tr>
<tr>
<td>1.26</td>
<td>$17m.</td>
<td>SOL</td>
<td>NONE</td>
<td>Mediation</td>
</tr>
<tr>
<td>1.28</td>
<td>$98m.</td>
<td>PM</td>
<td>PM</td>
<td>Mediation</td>
</tr>
<tr>
<td>1.39</td>
<td>$1.7m.</td>
<td>ENG</td>
<td>ENG</td>
<td>Informally</td>
</tr>
<tr>
<td>2.1</td>
<td>$8.5m.</td>
<td>SOL</td>
<td>NONE</td>
<td>Litigation</td>
</tr>
<tr>
<td>2.5</td>
<td>$33m.</td>
<td>ARCH</td>
<td>ARCH</td>
<td>Informally</td>
</tr>
<tr>
<td>2.23</td>
<td>$1.5m.</td>
<td>ENG</td>
<td>ENG</td>
<td>Informally</td>
</tr>
<tr>
<td>2.32</td>
<td>$2.22m.</td>
<td>ENG</td>
<td>NONE</td>
<td>Informally</td>
</tr>
<tr>
<td>2.44</td>
<td>$2.4m.</td>
<td>ARCH</td>
<td>ENG</td>
<td>Informally</td>
</tr>
</tbody>
</table>

Table 6.13: Contract administration and resultant disputes:

Commercial projects
6.4.2 Residential projects

The results reveal that 35 (58.1%) of all residential projects surveyed had no independent third party administering the contract. Of these, 27 (77.1%) were in the range of project values of up to $200,000. (Refer Appendix A: Tables A.3.38 to A.3.40 inclusive).

Of the 9 residential projects that resulted in a dispute the architect administered 2; 1 by the project manager; and 6 had no independent administrator. (Refer Table 6.14).

<table>
<thead>
<tr>
<th>Project No.</th>
<th>Value</th>
<th>Contract by</th>
<th>Admin by</th>
<th>How resolved</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1</td>
<td>$7m.</td>
<td>QS</td>
<td>NONE</td>
<td>Informally</td>
</tr>
<tr>
<td>3.7</td>
<td>$1.1m.</td>
<td>BUILDER</td>
<td>ARCH</td>
<td>Arbitration</td>
</tr>
<tr>
<td>3.10</td>
<td>$4m.</td>
<td>ENG</td>
<td>NONE</td>
<td>Arbitration</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.13</td>
<td>$500,000</td>
<td>ARCH</td>
<td>NONE</td>
<td>Informally</td>
</tr>
<tr>
<td>3.14</td>
<td>$500,000</td>
<td>PM</td>
<td>NONE</td>
<td>Informally</td>
</tr>
<tr>
<td>3.23</td>
<td>$750,000</td>
<td>ARCH</td>
<td>ARCH</td>
<td>Informally</td>
</tr>
<tr>
<td>4.8</td>
<td>$1.5m.</td>
<td>ARCH</td>
<td>NONE</td>
<td>Informally</td>
</tr>
<tr>
<td>4.21</td>
<td>$20,000</td>
<td>BUILDER</td>
<td>NONE</td>
<td>Informally</td>
</tr>
<tr>
<td>4.30</td>
<td>$900,000</td>
<td>BUILDER</td>
<td>PM</td>
<td>Arbitration</td>
</tr>
</tbody>
</table>

Table 6.14: Contract administration and resultant disputes:

Residential projects
While architects (22%) and project managers (11%) were responsible for a minor part of the contract administration of all residential projects surveyed, in the context of this research, the pertinent statistic is that 67% of all residential projects surveyed did not have any independent person administering the contract.

Engineers had little involvement with the administration of residential projects surveyed. (Refer Appendix A: Chart A.3.43). The contract administration of project no. 3.1 was notified as being undertaken by the developer, where in fact, this constitutes that no independent third party administered the contract.

6.4.3 The administration of commercial and residential building contracts

Professional bodies are advocating that it is acceptable for architects to engage in ‘partial’ service with respect to the administration of contracts. This is in contrast to judgments in cases referred to earlier particularly the case of *Rowlands v Collow*; sustain the view that professional persons should be involved in the total execution of a project. The judgment however, was not as concise in the case of *Body Corporate 114424 v Glossop Chan Partnership Architects Limited*.

Research questions 4 and 5 were specifically asked so that an indication of the level of involvement of professional persons engaged to independently administer contracts could be obtained. Following is an analysis of the involvement in the ‘contract administration’ stage by the various *individual* professions who were commissioned in the projects surveyed.
When the questionnaire for this research was being developed the categories of ‘administrator’ were determined as being the architect; or the engineer, or the quantity surveyor; or the project manager or ‘another’. In the context of this research the role of the ‘designer’ of the project with particular regard to their input into the ‘contract administration’ stage of the project was ascertained. In the Rowlands v Collow case the engineer was the considered by the Court to be the ‘designer’ and therefore, it is necessary that the distinction be made. During the collection of data however, it became apparent that many respondents advised that the project manager for the project, was in fact, the representative from a firm of Quantity Surveyors.

In 1992, the government of New Zealand repealed the Quantity Surveyors Act 1968. The effect of this was that quantity surveyors were denied ‘registration’ and as a consequence many ‘re-positioned’ themselves in the market place by defining their positions as ‘project managers’. Therefore, the analysis of this section combines the roles of quantity surveyors and project managers. Where quantity surveyors are identified this is where they are can be specifically identified as being from a professional practice of Quantity Surveyors. In all projects surveyed neither quantity surveyors or project managers were identified as being the ‘designer’ of any project.

6.4.3.1 Architects

6.4.3.1.1 Commercial projects
The results show that architects were involved with the contract administration of 11% of the projects surveyed with values up to $1m. Their involvement with median range projects decreased to (8%) and there was only one project over $10m where an architect was engaged to administer the contract. This project (no. 2.5) was a $33m contract and the dispute arose over a claim for ‘extensions of time’. The contract was an NZIA SCC1 (2000) contract and the dispute was resolved informally.

Of the 11 commercial projects in the range of up to $1m, none of the contracts administered by the architect resulted in a dispute and of the 8 in the range of $1m to $10m, only one project (no. 2.44) resulted in a dispute over ‘variations’. The NZIA SCC1 (2000) contract was used and the dispute was resolved informally.

### 6.4.3.1.2 Residential projects

With respect to residential projects, architects were involved with the contract administration of 7 (11.6%) of contracts in the range of $200,000 to $1m. Only one of these resulted in a dispute. Project no. 3.23 was a $750,000 contract executed using NZIA SCC1 (2000). The dispute concerned the ‘final account’ and was resolved informally.

The involvement of an architect occurred with only one residential project under $200,000. (Refer Appendix A: Table A.3.38). There were 2 other residential projects where an architect was involved in the administration of the contract, one resulted in a dispute. This $1.1m contract (no. 3.7) was an NZIA SCC1 (2000)
contract with substantially amended dispute resolution provisions drawn up by the builder and administered by the architect. The dispute was over a variety of issues and was resolved by arbitration.

The issue to be considered here is whether it is wise for a builder, who will be a party to the contract, to be involved with the drawing up the contract. What is certain is that there will always be a suggestion that a party to the contract cannot be seen to be ‘independent’ and ‘impartial’. The same applies to the architect in this particular case and if it could be implied that being appointed by a builder to administer a contract that the builder had drawn up, whether the architects’ appointment could be seen to be ‘impartial’. The issue here is that architects are generally appointed and paid by the client and the builder has to rely on the architect acting in a quasi-judicial capacity that the Courts expect of them. When the reverse occurs architects are expected to act in the same manner.

This perceived position of conflict, where the architect is paid by the client but expected to act impartially, could provide a reason why architects are not being engaged to administer contracts, particularly in the residential sector. In any event a suggestion is made in the next chapter on how this conflict can be overcome.

6.4.3.2 Engineers

6.4.3.2.1 Commercial projects

Engineers were involved with the contract administration of 4% of the projects surveyed with values up to $1m and 8% of contracts in the middle value range
projects. There were no projects over $10m where an engineer was engaged to administer the contract.

Of the 4 commercial projects in the range of up to $1m, none of the contracts administered by the engineer resulted in a dispute. There were 3 in the range of $1m to $10m, 2 projects (nos. 1.39 and 2.20) that resulted in a dispute. The projects, with values of $1.7m and $1.5m, used the NZS 3910 (1998) form of contract. The respective disputes concerned ‘variations’ and ‘late payments’ and were both resolved informally.

6.4.3.2.2 Residential projects

With regard to residential projects, engineers were involved with the contract administration of 1 contract. The contract (no. 3.10) had a value of $4m and disputes over a variety of issues eventuated. The engineer who used an amended form of NZIA SCC1 (2000) drew up the contract and the dispute was resolved by arbitration.

In the *Rowlands v Collow* case the Courts determined that the engineer was responsible for the contract administration even though not contracted to do so. The survey results for this research revealed that 12 commercial and 1 residential contracts were administered by the engineer and of these, 3 commercial and the one residential resulted in a dispute.

6.4.3.3 Quantity surveyors and project managers
6.4.3.3.1 Commercial projects

The results revealed that quantity surveyors and/or project managers were involved with the contract administration of 14 (14%) of the commercial projects surveyed with values up to $1m. Their involvement with median range projects was at 20 (20%) and there were 13 (13%) projects over $10m where a quantity surveyor or project manager was engaged to administer the contract. 3 projects surveyed which were administered by a project manager (nos. 1.21; 1.23 and 1.30) and 1 project (no. 1.2) administered by a quantity surveyor resulted in a dispute.

- Project no. 1.21 was a $25m contract and the dispute arose over the ‘interpretation of the contract’. The contract was an NZIA SCC1 (2000) contract drawn up by the architect and administered by a project manager. The dispute was resolved informally.
- Project no. 1.23 was a $13m contract and the dispute arose over the ‘performance of a subcontractor’. The contract was a ‘specific’ contract drawn up by the client/developer and administered by a project manager. The dispute was resolved by arbitration.
- Project no. 1.30 was a $11m contract and the dispute arose over a variety of issues involving several parties. The contract was a ‘specific’ contract drawn up by a solicitor and administered by a project manager. The dispute was resolved by mediation.
- Project no. 1.2 was a $23m contract and the dispute arose over the ‘final account’. The contract was NZS 3910 (1998) drawn up by a quantity surveyor and administered by him. The dispute was resolved informally.

(Refer Tables 6.4 and 6.5).
Of the 14 commercial projects in the range of up to $1m and of the 20 in the range of $1m to $10m that were administered by a quantity surveyor and/or project manager none resulted in a dispute. (Refer Tables 6.4 and 6.5).

### 6.4.3.3.2 Residential projects

With regard to residential projects, quantity surveyors or project managers were involved with the contract administration of 6 (10%) of projects in the range of $200,000 to $1m of which 1 resulted in a dispute. Project no. 4.30 was a $900,000 contract drawn up by the builder and executed using NZS 3910 (1998). The dispute, over the ‘final account’, was resolved by arbitration.

Of the 15 (25%) of residential projects surveyed which were administered by either a quantity surveyor and/or project manager, only 1 (no. 4.30) resulted in a dispute.

### 6.4.3.4 No independent third party administration

The survey identified 21 (21%) commercial projects and 35 (58.1%) residential projects had no independent third party undertaking the administration of the contract. Whilst this appears to be a high rate, it is important to note that of all projects surveyed that only 2 (2%) of commercial (nos. 1.26 and 2.1) and 3 (5%) of residential projects (nos. 3.7, 3.10 and 4.30) resulted in a dispute that required resolution by either by mediation, arbitration or litigation. Overall, these 5 projects represent 3.1% of the total of all commercial and residential contracts surveyed.
Project 2.1 was the only commercial contract with no independent third party administrator to result in a dispute. The $99m contract was an NZIA SCC1 (2000) drawn up by a solicitor. The dispute over the ‘final account’ was resolved by litigation. There were no residential projects undertaken without an independent third party administrator that resulted in a dispute that had to be resolved by mediation, arbitration or litigation. The survey indicated that the appointment of an independent person to administer project 2.1 would not have had any positive impact as the interviewee reported that the client was ‘litigious’ in nature.

6.4.4 Conclusions: Contract administration

The responses to questions 10, 11 and 12 are outlined in tables 6.1; 6.2 and 6.3. The results received are in response to whether the appointment of an independent third party was worthwhile and/or beneficial. These are further illustrated in Appendix A: Tables A.3.46; A.3.48 and A.3.51

In addition to the data received on this topic many participants also provided qualitative responses. The majority of the comments received were positive in their nature and that many believed that the appointment of an independent third party to administer the contract was advantageous and certainly helped to diffuse any problems before they had a chance to develop. There was a general confidence in this precept. (Refer to Appendix A: Tables A.3.46; A.3.48 and A.3.51 plus Charts A.3.47; A.3.49 and A.3.52) Comments were qualified with statements such as:

‘The appointee must be impartial and the cost is not excessive but the savings can be massive and that when the fee of the administrator is paid by the client, there is a suspicion that the appointee is biased’.
The conclusion to be drawn from many of these comments is that consideration should be given to an alternative form of appointment of the independent administrator of the contract. A suggestion of how this can be achieved is made in chapter 7 where the results are used to propose a ‘principle of remotivity’, which will be discussed later.

There now follows a statistical analysis of the responses to research questions 1, 2, 3 and 4 using the methodology referred to in chapter 5.

6.5 Statistical analysis of research questions 1 to 4

The aim of this section is to compare the results from commercial and residential projects where disputes arose against projects where disputes did not arise. The analysis of table 6.3 and the results of the research questions tabled in chapter 4 and discussed in chapter 6 reveal that over the course of the study, 60 residential and 100 commercial building contracts were reviewed. 15% of the residential contracts and 11% of the commercial contracts involved some form of dispute (p-value = 0.47, no significant difference between these proportions).

There were no statistically significant differences in the commercial setting between those contracts with disputes and those without. That is, the type of building contract; who drew up the building contract; what provisions were contained in those contracts for the resolution of disputes; and who administered the contract had no effect on whether there was a dispute or not.

• Interview question 3: Research question 1:
Type of contract (p-value = 0.54)

- Interview question 4: Research question 2:

Who drew up contract (p-value = 0.86)

- Interview question 5: Research question 3:

Dispute provisions (p-value = 0.25)

- Interview question 6: Research question 4:

Contract administration (p-value = 0.44).

There were several statistically significant relationships in the residential setting between those contracts that resulted in disputes and those that did not:

- Interview question 3: Research question 1:

  Type of contract (p-value = 0.02)

- Interview question 4: Research question 2:

  Who drew up contract (p-value = 0.04)

- Interview question 5: Research question 3:

  Dispute provisions (p-value = 0.08)

- Interview question 6: Research question 4:

  Contract administration (p-value = 0.30).

The tests indicate that there was a significant difference amongst residential contracts between those that resulted in disputes and those that did not, depending on the type of building contract; who drew up the building contract and whether or not there were dispute provisions.
In conclusion, of those contracts involving disputes, there was no difference in the nature of the dispute between residential and commercial projects (p-value = 0.44), nor in how the disputes were resolved (p-value = 0.39).

6.6 The incidence, nature and resolution of disputes

Research question 5 asked:
What was the incidence of disputes that resulted as a consequence of the usage of these building contracts; what was the nature of the disputes; and how were they resolved?

6.6.1 The incidence of disputes: Commercial projects

Tables 6.4 and 6.6 together with the detailed breakdown (by project) in Appendix A: Tables A.2.1 to A.2.10 inclusive provide the results to the above questions. There were 6 commercial projects undertaken during 1999 out of the 50 surveyed that had an incidence of a dispute. This equates to 12% of those surveyed. Of these 3 were resolved informally; 2 by mediation and 1 by arbitration. The project resolved by arbitration was a $13m project (no. 1.23) which used a contract specifically drawn up by a project manager who also administered the contract. (Refer Table 6.4).

Table 6.5 shows that during 2000 there were 5 commercial projects out of the 50 surveyed that had an incidence of a dispute. This equates to 10% of those surveyed. Of the 5, 4 were resolved informally and 1 by litigation. The dispute resolved by litigation was a $8.5m project (no. 2.1) which used the NZIA SCC1 (2000) form of building contract drawn up by a solicitor. The contract was not administered by an
independent third party and in fact, an architect was not involved in the ‘contract administration’ stage whatsoever. The dispute was in relation to the ‘final account’.

6.6.2 The incidence of disputes: Residential projects

Tables 6.2 and 6.3 together with the detailed breakdown (by project) in Appendix A: Tables A.2.11 to A.2.16 inclusive were consulted. Table 6.7 shows that there were 6 residential projects undertaken during 1999 out of the 30 surveyed that had an incidence of a dispute. This equates to 20% of those surveyed. Of the 6, 4 were resolved informally and 2 by arbitration.

There were 3 residential projects out of the 30 undertaken during 2000 that had an incidence of a dispute. This equates to 10% of those surveyed. Of the 3, 2 were resolved informally and 1 by arbitration. The dispute (project no. 4.30) resolved by arbitration was a contract initially administered by a project manager. (Refer Table 6.8).

Derived from the results from this survey is that of all 160 commercial and residential projects surveyed that 11 commercial and 9 residential contracts resulted in a dispute of which 4 commercial and 3 residential contracts were resolved by mediation, arbitration or litigation. The total of 7 projects represents a low incidence of disputes where 4.3% of all projects surveyed resulted in mediation, arbitration or litigation. These results coincided with the time when the commercial sector of the construction industry in Auckland was purported to be in a ‘poor state’. The results
of this survey, if they are indicative of the industry, suggests that the problems that caused the collapses in commercial sector during 1999 and 2000 were not widespread.

6.6.3 The nature of disputes: Commercial projects

There were 4 commercial projects that resulted in formal disputes. The results show that the nature of the disputes to be as follows:

- The dispute between the builder and subcontractor that eventuated during the execution of project no. 1.23 was resolved following by arbitration. A project manager prepared a ‘specific’ contract for the project that was administered by the same person. The dispute resolution provisions were especially drawn up and were not followed and in fact, totally ignored. The dispute concerned the performance of a subcontractor’.
- The disputes that resulted in projects 1.26 and 1.30 were over a variety of issues and both resolved by mediation.
- The dispute that eventuated during the execution of project no. 2.1 was resolved following a lengthy and expensive process of litigation. The dispute, between the contractor and the client, was in connection with the ‘final account’. The dispute resolution procedures in the contract, which were specifically drawn up by a solicitor and were totally ignored. The contract was not administered independently. An employee of the client undertook the administration of the contract.

(Refer Tables 6.4 and 6.5)

6.6.4 The nature of disputes: Residential projects

Of the 9 disputes notified, there were 6 that were resolved informally and the other 3 by arbitration. The results reveal that:
• The dispute that eventuated during the execution of project no. 3.1 was over the ‘standard of work’ and ‘variations’ and resolved by the parties informally.

• The dispute that eventuated during the execution of project no. 3.7 was over a variety of issues and resolved by arbitration. The architect administered the $1.1m contract.

• The dispute that eventuated during the execution of project no. 3.10 was over a variety of issues and resolved by arbitration. The engineer administered the $4m contract.

• The dispute that eventuated during the execution of project no. 3.13 was over the ‘standard of work’ and resolved informally. The $500,000 contract had no independent third party administrator.

• The dispute that eventuated during the execution of project no. 3.14 was over the ‘final account’ and resolved informally. The $500,000 contract had no independent third party administrator.

• The dispute that eventuated during the execution of project no. 3.14 was ‘variations’ to the contract and the ‘final account’. The dispute was resolved informally. The architect administered the $750,000 contract.

• The dispute that eventuated during the execution of project no. 4.8 was over the final account’ and resolved informally. The $1.5m contract had no independent third party administrator.

• The dispute that eventuated during the execution of project no. 4.21 was over claims for an ‘extension of time’ and resolved informally. The $20,000 contract had no independent third party administrator.

• The dispute that eventuated during the execution of project no. 4.30 was over the ‘final account’ and resolved by arbitration. The $900,000 project was executed by way of a NZS 3910 (1998) contract drawn up by the builder and administered by a project manager.

(Refer Tables 6.7 and 6.8)
6.6.5 The resolution of disputes: Commercial projects

Tables 6.4 and 6.5 identify the manner in which all 11 disputes notified were resolved. Of those, 7 were resolved informally, and all except 1 (project 2.32) was administered by an independent third party. The remaining 4 disputes were resolved 2 by mediation, 1 by arbitration and 1 by litigation. One of the mediated settlements (project 1.26) did not have an independent third party administrator and the contract for project 2.1 also did not have an independent third party administrator with the resultant dispute being resolved by litigation.

64% of disputes were resolved informally with 18% resolved by mediation; 9% by arbitration and 9% by litigation. (Refer Appendix A: Chart A.3.44). The results from the research show that, once a dispute had arisen with contracts that allowed for alternative dispute resolution processes (and which were being administered by an independent third party), if the dispute could not be resolved informally then the parties would generally avoid the determination process. This is confirmed by the data received. None of the projects surveyed that resulted in a dispute were resolved at the determination stage. The dispute would proceed to either mediation or arbitration. Normally, litigation is seen as a last resort although some parties (normally the ‘dominant’ party) still attempt to manipulate the system by pursuing a course of litigation. Only one project surveyed resulted in litigation.

6.6.6 The resolution of disputes: Residential projects

Tables 6.7 and 6.8 identify the manner in which all 9 residential disputes notified were resolved and of those 6 were resolved informally and 3 were resolved by
arbitration. Only 3 projects (project nos. 3.7, 3.10 and 3.23) were administered by an independent third party. 1 project was resolved informally and 2 projects were resolved by arbitration. The remaining 6 disputes were resolved informally. 4 projects, project nos. 3.7 (architect), 3.10 (engineer), 3.23 (architect) and 4.30 (project manager) had an independent third party administrator.

Of all residential projects surveyed that had disputes, 67% were resolved informally with the remainder 33% being resolved by arbitration. (Refer Appendix A: Chart A.3.45).

### 6.7 The avoidance of disputes

Research question 6 asked:

Would the construction industry in New Zealand benefit from additional legislation that would require that an independent third party be engaged for the administration of the building contract?

The answer to this question was determined by considering the opinions solicited from the participants in response to questions 10 and 11 in the questionnaire. Question 10 asks if, in the event that the contract was not administered by an independent third party, would such an appointment have assisted to avoid and/or resolve any disputes? Whereas question 11 asks that, if an independent third party was appointed, in terms of dispute avoidance and/or resolution, was the appointment worthwhile?

#### 6.7.1 The avoidance of disputes: Commercial projects

Table 6.1 indicates that 36 (72%) of commercial projects undertaken during 1999 and 34 (68%) in 2000 believed that, where there was no independent third party
appointed to administer the contract, that such an appointment would have helped to avoid and/or resolve disputes. Of those interviewed, 6 (12%) in 1999 and 4 (8%) in 2000 were of the opinion that the appointment would not have made any difference. The primary reason given was that the client would still have dictated and controlled the process.

Of the 21 commercial projects that were not administered by an independent third party, 11 (52.3%) resulted in a dispute. Of these 4 believed that the appointment on an independent third party to administer the contract would have been worthwhile; 4 were of the opinion that it would not have made any difference; and 3 did not offer an opinion. (Refer Table 6.15)

<table>
<thead>
<tr>
<th>Project No.</th>
<th>Value</th>
<th>Drawn up by</th>
<th>Admin. by</th>
<th>How resolved</th>
<th>Appointment Beneficial</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.2</td>
<td>$23m.</td>
<td>QS</td>
<td>QS</td>
<td>Informally</td>
<td>NO</td>
</tr>
<tr>
<td>1.21</td>
<td>$25m.</td>
<td>ARCH</td>
<td>PM</td>
<td>Informally</td>
<td>NO</td>
</tr>
<tr>
<td>1.23</td>
<td>$13m.</td>
<td>OTHER</td>
<td>PM</td>
<td>Arbitration</td>
<td>YES</td>
</tr>
<tr>
<td>1.30</td>
<td>$98m.</td>
<td>PM</td>
<td>PM</td>
<td>Mediation</td>
<td>NO</td>
</tr>
<tr>
<td>1.39</td>
<td>$1.7m.</td>
<td>ENG</td>
<td>ENG</td>
<td>Informally</td>
<td>YES</td>
</tr>
<tr>
<td>2.5</td>
<td>$33m.</td>
<td>ARCH</td>
<td>ARCH</td>
<td>Informally</td>
<td>YES</td>
</tr>
<tr>
<td>2.23</td>
<td>$1.5m.</td>
<td>ENG</td>
<td>ENG</td>
<td>Informally</td>
<td>NO</td>
</tr>
<tr>
<td>2.44</td>
<td>$2.4m.</td>
<td>ARCH</td>
<td>ENG</td>
<td>Informally</td>
<td>NO</td>
</tr>
</tbody>
</table>

Table 6.15: The avoidance of disputes: Commercial projects
Further, of the 11 projects that resulted in a dispute, 3 were not administered by an independent third party. The disputes arose during the execution of project nos. 1.26; 2.1 and 2.32 were resolved informally; by mediation; and by arbitration, respectively. 2 contracts were drawn up by solicitors and the other by an engineer. The respective contracts were a specific; an NZIA SCC1 (2000) contract drawn up by a solicitor (but not administered by an architect); and a NZS 3910 (1998) contract. (Refer Tables 6.4 and 6.5).

In response to question 11 in the questionnaire, which asked that, if there was an independent third party appointed whether the appointment was directly responsible for the avoidance and/or resolution of disputes? 79 of the commercial projects surveyed that were administered revealed that 71 (89.9%) were dispute free. Where there was a dispute, 6 were resolved informally; 1 by mediation; and 1 by arbitration. Of these 5 of the respondents were of the opinion that the appointment was not beneficial whereas 3 believed that it was. Of the 5 negative answers, these contracts were administered 1 by a quantity surveyor; 2 by a project manager; and 2 by an engineer. Of the 3 positive answers, 1 contract was administered by a project manager; 1 by an engineer and 1 by an architect. (Refer Table 6.15).

6.7.2 The avoidance of disputes: Residential projects
Table 6.2 indicates that 15 (50%) undertaken during 1999 and 10 (33.3%) in 2000 believed that, where there was no independent third party appointed to administer the contract, that such an appointment would have helped to avoid and/or resolve disputes. Of those interviewed, 5 in 1999 and 3 in 2000 were of the opinion that the appointment would not have had made any difference. On further inquiry, the main
supplied reason was that they believed the client would still have dictated and controlled the process.

Of the 35 projects surveyed that were not administered by an independent third party, 6 (17.1%) resulted in a dispute. Of these, 5 believed that the appointment on an independent third party to administer the contract would have been worthwhile and 1 was of the opinion that it would not have made any difference. (Refer Tables 6.4 and 6.5). Of the 9 projects that resulted in a dispute, 5 were not administered by an independent third party. The disputes on these 6 projects (nos. 3.1, 3.13, 3.14, 3.15, 4.8 and 4.21) were resolved informally and 3 projects (nos. 3.7, 3.10 and 4.30) were resolved by arbitration. 2 contracts were drawn up by the developer/builder and the other by an engineer. All 3 contracts that resulted in a dispute, and resolved by arbitration, were NZS 3910 (1998) contracts. (Refer Tables 6.7 and 6.8)

In response to question 11 in the questionnaire which asked that ‘if there was an independent third party appointed whether the appointment was directly responsible for the avoidance and/or resolution of disputes’? 25 (41.6%) of the 60 projects were independently administered and the results show that of the 25 projects that were administered revealed 22 (88%) were dispute free. Where there was a dispute, 1 was resolved informally and 2 by arbitration. All 3 of the respondents were of the opinion that the appointment was not beneficial whereas 1 offered a neutral opinion. (Refer Tables 6.7; 6.8 and 6.16).
Table 6.16: The avoidance of disputes: Residential projects

There now follows an analysis of the responses to research questions 5 and 6 using the methodology referred to in chapter 5.

6.8 Statistical analysis of research questions 5 and 6

The aim is to compare, in the opinion of the participants, whether the engagement of an independent third party to administer the contract was beneficial or not. The responses to commercial and residential projects where disputes arose against projects where disputes did not arise were solicited. Consequently, additional questions were posed concerning whether the appointment of a third party contract administrator was or would have been worthwhile, and also if such was directly beneficial in avoiding or resolving disputes.

In both the commercial and residential projects there was a clear difference between the responses from contracts that resulted in disputes and those that did not.
The analysis of the responses to question 10, using the data from research questions 5 and 6, showed that far more than expected responses from contracts with disputes disagreed that such an appointment would be worthwhile (residential: p-value < 0.001, commercial: p-value = 0.08). (Refer Table 6.3).

There were no differences in the responses to question 11 from disputed and undisputed residential contracts concerning the direct benefits of a third-party appointment (p-value = 1), but a very clear difference was indicated in the responses from commercial contracts to the same question (p-value < 0.001).

6.9 Testing of hypothesis

Although the survey was limited to 100 commercial and 60 residential projects undertaken during a two-year period in the Auckland region with a total value of projects of NZ$ 7,881,295,000 which represented 14.31% of commercial and 0.41% of residential of all construction work undertaken in New Zealand, it is noted that only 2 commercial and 3 residential projects resulted in a dispute requiring the resolution by either arbitration or litigation.

The results revealed that any disputes that do arise are generally resolved using the informal procedures that are included in the ‘standard’ forms of building contracts and in many specific contracts. The use of the process in the ‘standard’ forms of building contracts where the administrator is asked to make a determination was avoided in all of the cases surveyed.
The residential sector seems to be adopting a stance where the parties to the contracts, certainly in the range of projects up to $200,000, are not engaging an independent third party administrator. 44.8% of all projects in this category and 58.1% of all projects surveyed had no independent third party. The ‘higher’ the value of the project, the more likely an appointment will be made. The results received from the survey were used to test the following hypothesis.

The hypothesis promoted by the literature review was that:

‘The incidence of disputes is reduced in building contracts that are administered by an independent third party for both commercial and residential sectors of the construction industry in New Zealand’.

6.9.1 Commercial projects

The data collected and shown in Appendix A: Table A.3.16 shows that from all commercial projects surveyed that architects were responsible for the contract formation of 31 (34.4%) of those projects and that the architect was responsible for 20 (20%) of the independent administration of all commercial contracts. (Refer Appendix A Table A.3.35) Of these only 1 project (no. 2.44) resulted in a dispute which was resolved informally. The respondent believed that the engagement of the architect to administer this contract was not beneficial, in this instance even though the dispute was resolved informally. That only 1 project in 22 resulted in a dispute where the architect was appointed to administer the contract is notable and statistically significant.
6.9.2 Residential projects

The data collected and shown in Appendix A: Table A.3.22 shows that from 60 residential projects surveyed that architects were responsible for the contract formation of 6 (10%) of those projects and that the architect was responsible for 9 (15%) of the independent administration of all contracts surveyed. (Refer Appendix A: Table A.3.40).

Of those which the architect drafted and administered the contract, only 1 project (no. 3.23) resulted in a dispute which was resolved informally. The respondent was neutral in their opinion as to whether the engagement of the architect to administer this contract was beneficial or not. This was the only 1 residential project in 9 that resulted in a dispute where the architect was appointed to administer the contract and in the context of this research, significant.

Therefore, the result show that from the survey of a total of 160 commercial and residential projects only 2 (1.25%) of all projects, which were administered by the architect, resulted in a dispute.

6.10 Summary

The analysis of the literature referred to the company liquidations during the latter part of 1999 and the early part of 2000 contributed to inducing the government to introduce the Construction Contractors Act 2002. The opinion of many of those surveyed was that the commercial sector of the industry during this period was generally sound with the many of the projects being undertaken adopting
conventional methods and with the independent administration of the contracts (often undertaken by consultants).

Any disputes that do arise are generally resolved using the informal procedures that are included in the ‘standard’ forms of building contracts. Of the 29 projects where the architect was the independent administrator of the contract only 2 (6.9%) of the projects resulted in a ‘formal’ dispute.

The majority of respondents, particularly in the commercial sector were of the opinion that the Construction Contractors Act 2002, will:

a) Change the ‘behaviour’ of the industry;
b) Clients will properly finance their projects rather than delay payments to contractors (and subcontractors) which has been the norm in recent times; and
c) Sub-contractors will keep and produce better accounts and records that they are currently prone to doing.

Many participants were also of the opinion that the problems being encountered by the industry will not be fully resolved by the Construction Contractors Act 2002. There are, in the author’s opinion, many other issues that this Act and the many other pieces of current legislation do not address.

The residential sector seems to be adopting a stance where the parties to the contracts, certainly in the range of projects up to $200,000, are not engaging an independent third party administrator. 44.8% of all projects in this category and 58.1% of all projects surveyed had no independent third party. It seems that the ‘higher’ the value of the project the more likely an appointment will be made. As a result, there was as a view widely expressed (and supported by the author) that the
residential sector requires serious attention and that this can only be done by the imposition of suitable legislation. While the commercial survey was undertaken at a time when the construction industry was subjected to some major company collapses the residential survey was also taken during at a time, but completed, when it became the subject of some serious concerns. Such concerns include the use of untreated timber for the framing of houses and the high incidence of ‘leaking buildings’. It has been estimated that the cost of remedial work to be in excess of NZ$ 2 billion. The effect of these concerns prompted the government to introduce, under urgency, the Weathertight Homes Resolution Services Act at the end of 2002 with the purpose of the Act being:

‘To provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost effective procedures for assessment and resolution of claims relating to these buildings’.

This action is another example of where legislation is enacted as a reaction to adverse circumstances. Such steps, in the author’s opinion, would not be required if the majority of the recommendations and suggestions made in this thesis were adopted. This legislation recognises that specific laws are required to help with the resolution of disputes and in doing so acknowledges that the residential sector has not been operating in a manner where the participants have not been taking a responsible attitude to their activities and thus, Government intervention is required.

The results of the survey also confirm that the prevailing attitude in the construction industry, in particular in the residential sector, is to a disposition of residential clients and owners being very ‘casual’ and with a ‘do-it-yourself’ attitude.
This approach will undoubtedly continue unless a wide range of targeted legislation is considered and introduced. Such legislation must embrace the performance of the construction industry and all its participants from the inception of a project through to its completion.

6.11 Conclusion

The hypothesis was tested against the statistical data in Table 6.3 which revealed that, in both the commercial and residential settings there were statistically significant differences between those contracts that resulted in disputes and those that did not (residential: p-value < 0.001, commercial: p-value = 0.02). There is strong statistical evidence and therefore, support for the hypothesis that there is a difference between those contracts resulting in disputes when compared to those which did not. In addition to the statistical evidence solicited, opinions of a qualitative nature were also solicited from the participants to elicit a more detailed analysis. The results show that from all projects surveyed that 64% of commercial and 41.5% of residential participants were of the opinion that the appointment of the architect (or designer) was beneficial. (Refer Appendix A: Table A.3.46 and Chart A.3.47). By contrast, on a project where a dispute arose and there was independent administration, the degree of approbation increased to 85.9% on commercial and 80% on residential projects. (Refer Appendix A: Table A.3.51).
Further, on all commercial and residential projects that were independently administered and had no disputes the overall level of ‘positiveness’ was 84.6% of all those surveyed. (Refer Appendix A Tables A.3.54, A.3.57 and A.3.60). Therefore, the inference to be drawn from the data received and the information elicited from the qualitative analysis is that there is support for the appointment of an independent third party to administrate the contract between the client and the builder.

Chapter 7 now proceeds to summarise the conclusions and to make suggestions that were referred to in this chapter and as a consequence of the results of this research in conjunction with the author’s own views and suggestions.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

This study developed from two elements:

a) To investigate if the failures of the commercial companies referred to earlier were symptomatic of the construction industry in Auckland region of New Zealand; and
b) From a desire to quantify several elements of anecdotal evidence accumulated over many years of practice as an architect and arbitrator.

The second component was grounded by the author’s exposure to a variety of disputes in the construction industry. After conducting an arbitration in 1977 and resolving a dispute between an architect and his client there followed a number of
similar cases. An analysis of these disputes showed that there was a definite trend in that the majority did not have an independent third party to administer the contracts. These disputes could arguably have been avoided had such an appointment been made which may have diffused many of the problems before the dispute arose.

From the outset then, it was anticipated that this study would assist to extend the understanding of the way that the commercial and residential sectors of the construction industry in New Zealand operate and perform particularly within the scope of the research questions posed for this thesis. Following are the author’s conclusions and suggestions on a range of issues raised as a result of the conclusions reached in chapter 6.

7.1 Conclusions

Out of the conclusions reached in the last chapter several points arise from which a number of suggestions that, if adopted, will optimistically be beneficial to the construction industry in New Zealand. Therefore, suggestions covering the aspects of:

(i) The types of building contracts and their rationalisation;
(ii) The administration of contracts and the resolution of disputes;
(iii) The issues of negligence and legislation and how they affect the construction industry in New Zealand; and
(iv) The post-graduate education and training of architects.

While the suggestions are categorised in sections, it must be emphasised that all recommendations are intended to promote a harmonious atmosphere and assist in the avoidance disputes in the construction industry in New Zealand.
7.1.1 Types of building contracts

The inference made in chapter 6 is that ‘standard’ forms of building contract are not being employed in a practice that both the N.Z. Institute of Architects and the N.Z. Standards Association would anticipate. Additionally, the fact that the survey showed that the NZIA SCC1 (2000) contract is not being used in an appropriate manner, in that the contract is not being formed and administered by the architect, is also disturbing. Therefore, the following suggestions are made:

**Recommendation 1:** That the N.Z. Institute of Architects and the Standards Association of New Zealand together with a wide representation of the industry; other interested parties including national and local government examine and rationalise the number of building contracts available in New Zealand.

**Recommendation 2:** An idea is promoted that such contracts could be separated into the various categories as follows:
(i) Alternative building contracts for commercial and residential projects;
(ii) Separate forms of building contracts (for both sectors) be developed that are suitable for projects up to $1m and over $1m in value; and
(iii) All building contracts are developed in such a way so as to ensure that the contracts are independently administered.

Comment will be made as a prelude to recommendation 14 about why, in the author’s opinion, recommendation 2 (iii) should be actively encouraged and to why all contracts should be independently administered. The research undertaken for this thesis has provided conclusive support for this proposition.

As the ‘standard’ forms of building contracts NZIA SCC1 (2000) and NZS 3910 (1998) already allow for the independent administration of those contracts there will not be a need to amend them. However, other building contracts referred to in chapter 2.2 will require modification. Such contracts include the NZIA National Building Contract (NBC-SW2) and the Registered Master Builders contract.
However, the author would recommend the withdrawal of the NZS 3915 (2000) form of building contract and any other building contracts which do not allow for the independent administration of that contract.

The literature review exposed an abundance of material concerning the use of ‘partnering’ agreements and yet the research revealed that such agreements were not used on any of the projects surveyed. There is a disparity of conclusions and therefore, the following suggestion is made that:

**Recommendation 3:** Further research is undertaken to determine the reasons why, (contrary to the literature although confirmed by the results of this survey), why ‘partnering’ agreements are not extensively used in New Zealand.

Further, the research showed that the usage of NZIA SCC1 (2000) and NZS 3910 (1998) are seldom used on residential projects under NZ$1m and on commercial projects over NZ$10m. So recommendations that further research is undertaken to determine:

**Recommendation 4:** If the results of this survey are indicative of the usage of ‘standard’ forms of contracts on projects under $200,000; and if so, provide reasons why ‘standard’ forms of building contract (such as NZIA SCC1 (2000) and NZS 3910 (1998) are not being adopted on small residential projects.

**Recommendation 5:** The usage of ‘standard’ forms of building contracts on commercial projects of over NZ$10m in value: and if so, explore the reasons why ‘standard’ (and unaltered) forms of building contract (such as NZIA SCC1: 2000 and NZS 3910: 1998) are not being adopted on large commercial projects.

### 7.1.2 Contract formation
With respect to ‘contract formation’ and the effect that this has on the avoidance of disputes, the results showed that the number of projects where a dispute arose was not dependent upon who drafted the contract. The data showed that:

a) It did not matter who drafted the contract. Disputes were spread across all of the professions surveyed; and that
b) 10% of commercial and 23.2% of residential projects surveyed were executed without a ‘formal’ contract is of concern.

The author promotes the view that a party to a contract should not form the building contract. Historically, architects have undertaken this function but the survey indicates that this is not necessarily the case. Therefore, a suggestion is made that:

Recommedation 6: Legislation be considered (similar to that enacted in many states in Australia and as referred to in the literature review in chapter 2) that:
(i) Requires all residential projects, over NZ$10,000 be executed by an approved ‘formal and written’ building contract within 10 days of the agreement of the parties of the acceptance of a tender; and that
(ii) The legislation should specifically state what terms and conditions are to be included in the building contracts. This should include but not be limited to, the responsibility for the provision for progress payments, insurance of the contract works, inspection of the works; and the provision for the resolution of disputes.

The principal reason why commercial projects are excluded from this proposal is that it appears to be the opinion of government that any commercial enterprise should be founded on good business practices and be free from naivety. Although the Construction Contracts Act 2002, which is specifically targeted at commercial contracts, does not concur with this view. Alternatively, it could be said that the opposite is true of residential clients where many do not come into regular contact with the construction industry and therefore, specific regulation to protect their interests should be enacted.
The initial method of data collection selected for this survey also revealed that the builders of various projects, particularly in the residential sector were not identified in the building consent application. The Building Act 1991 requires that the application is in the name of the owner and very few applications nominated the builder. This, in the authors’ opinion, is a flaw in the system as residential clients in particular are rarely competent to be in charge of such operations. Further, it provides a difficulty for Territorial Authorities (and others) to be able to identify the builder of the project and to be able to contact them to undertake any required remedial work. The difficulty experienced in contacting residential contractors for this survey (as referred to in chapter 5) confirms this view. As stated, there is no licensing system in place in New Zealand and therefore, the following is suggested:

**Recommendation 7:** That all commercial and residential building consent applications shall nominate the licensed builder who shall take and retain responsibility for the construction of that project from the time that a building consent is issued and until a Code Compliance Certificate is issued in accordance with the Building Act 1991.

It is intended that, should the above suggestion be adopted, the licence (as suggested in recommendation 8) will be in the name of an individual (and not in the name of a partnerships or company). Further, that the individual nominated will be responsible and liable for all activities relating to the building project.

### 7.1.3 The provision for the resolution of disputes

As stated earlier, all recommendations made in chapter 7 are intended to assist with the avoidance and/or resolution of disputes. The literature review exposed that the current legislation does not dictate how the design and construction of projects should be undertaken. It confirms only to what standards buildings are to be
constructed to. The Building Act 1991 is a ‘performance based’ code which dictates
the standards which buildings have to be constructed to. The Act does not describe
how this is to be achieved. There is also no requirement, as stated earlier, that
builders in New Zealand are to be licensed or that the builder has to be proactive in
presenting his employer with a ‘formal’ written contract. Anyone can build in New
Zealand without any form of registration, trade or any other form of qualifications.
This is in direct contrast to many states in Australia, for example, where there are
laws that dictate and regulate such activities. The only tradesmen who require a
licensed in New Zealand in order to undertake a particular section of construction
work are electricians, plumbers and drain-layers. There is a suggestion that the
following are implemented.

**Recommendation 8:** In order to be able to construct residential projects in
excess of NZ$10,000, that legislation is enacted that would require that:
(i) Builders to be suitably trained and qualified and have an annual
renewable licence which is issued by an appropriate government agency;
(ii) Each licensed builder shall be required to carry suitable insurances (at
a level as nominated in the ‘approved’ building contracts as recommended in
suggestion no. 1) to indemnify the owner against defective work; and
(iii) All builders shall undergo ‘on-going’ training as a condition of the
annual renewal of their licence (and registration).

The adoption of recommendations 7 and 8 would not preclude persons from being
able to construct their own home if the following is also adopted:

**Recommendation 9:** A person wishing to construct their own residential
building will be required, as a condition of obtaining a building consent, to
undertake an approved course that instructs them about their rights and
obligations in terms of contract obligations; building consent process; health
and safety requirements; and etc.

It is understood that such a provision operates successfully in many states in
Australia where ‘Further Education’ institutions provide appropriate courses.
With regard to the standards of professional persons, there is legislative support for the precept of mandatory registration of specific groups such as medical practitioners. However, it seems incongruous that in New Zealand anyone can design and construct any type of commercial or residential building but the sale of that completed building by anyone other than the owner, is restricted by regulation. The legislation strictly governs the activities of persons engaged in this area. Whilst there is no evidence to suggest that there has been any collusion with respect to the fixing of sales commissions, there does not seem to be any ‘dutch-auctions’ with real estate agency fees. The government appears to be content with this arrangement. With respect to architect’s fees, the literature review (refer chapter 3) comments about situations where this appears to be occurring. As stated, there is no legislation covering who can prepare contract documents in New Zealand and as a consequence, there is widespread competition amongst qualified and unqualified persons. In the author’s opinion, there has been both a reduction of fees paid (as referred to in the chapter 3) and consequently, a diminution of service both in the amount of documentation and in the reduction and/or abstention of contract administration. Therefore, the author believes that any review of existing legislation should also include the consideration of relaxing the sections of the Commerce Act 1986 that currently preclude professional bodies from publishing mandatory ‘scales of fees’. Colleagues and associates have expressed united opinions that the ‘free market / low inflation’ economy that successive governments in New Zealand have promoted since the 1980s has been the single and most influential reason in promoting the reduction in professional fees. The impact of this has been a major

141  Real Estate Agents Act 1976
142  Commerce Act 1986
cause to some of the problems being experienced by both the commercial and residential sectors of the construction industry.

The author agrees with these views. The reduction in the amount of contract documentation being made available is as a result of the reduction in fees being offered (as referred to in the literature review chapter 3) which is a direct consequence of certain provisions of the Commerce Act 1986. Whether there is a political will to make such changes however, is doubtful but nevertheless, the following idea is promoted that:

**Recommendation 10:** The New Zealand Government be urged to reconsider the 'price fixing’ sections of the Commerce Act 1986 in order to permit professional institutions to publish a minimum and mandatory scales of fees for all sections of the service that their members provide.

If the political inclination to revert to pre-1986 conditions does not exist then an alternative, but in the author’s opinion not a preferred option, is for the professional bodies, such as the N.Z. Institute of Architects, to widely advertise their ‘recommended minimum scale of fees’.

The effect would be so that the public / clients (and contractors), in the both the commercial and residential sectors of the industry, can make an informed decision as to whether the fees that they are being offered and negotiating are appropriate. This would ensure that, if a lower than recommended fee is accepted, it is being done so willingly. The consequences of such a decision are that it is likely that with a reduced fee that there will be the likelihood of less documentation and contract administration. With a reduced service there is the likely result that more disputes will eventuate.
While the Architects Act 1963 provides primarily for the registration and education of architects, there is no requirement either under this regulation or any other, that necessitates that the designers and/or producers of building documentation to be licensed as is the case in many states in Australia. (Refer chapter 2). The author is of the view that all persons producing contract documentation should be registered and/or licensed. Therefore, the following ideas are suggested that:

**Recommendation 11:** An appropriate government agency (or the Architects Education and Registration Board acting on behalf of such an agency) be authorised to:

(i) Issue licenses to all persons preparing contract documentation for all types of construction work;
(ii) That all building consent applications shall state the name of the person responsible for the preparation of the documentation (who shall be either a registered architect or licensed designer); and
(iii) That all registered architects or licensed designers shall carry professional indemnity insurance to indemnify the owner for any defective work undertaken by them for a period of 10 years from the completion of the project.

A comment will be made when discussing recommendation 17 later about the implications should suggestion 11 (iii) be adopted.

The previous chapter discussed the provision made for the resolution of disputes in the contracts surveyed and contrasted them with the existing procedures promoted by NZIA SCC1 (2000) and NZS 3910 (1998). These are described in chapter 2 and illustrated in figure 2.1.

The recently introduced Construction Contracts Act 2002 also includes for a mandatory ‘adjudication’ process which was referred to in the literature review in chapter 2. The following recommendation is therefore, made that:
Recommendation 12: The provisions in the ‘standard’ forms of building contracts for the resolution of disputes be amended to allow for the processes as described below and as illustrated in figure 7.1:

(i) Informal:  

(ii) Adjudication:  
The processes as described in part 3 of the Construction Contracts Act 2002 should be included in the ‘standard’ forms of building contracts. Should a party be dissatisfied with the adjudicator’s decision, the Act provides for the dispute to then be referred to arbitration. Both current editions of NZIA SCC1 (2000) and NZS 3910 (1998) prescribe the process for referring the matter to arbitration and this should be retained.

(iii) Arbitration:  
If the matter is referred to arbitration, the provisions of the Arbitration Act 1996 are applied.

It should be noted that all disputes are generally concluded at the ‘arbitration’ stage. The Arbitration Act 1996 decrees that an ‘award’ can only be appealed to the Court in limited circumstances and therefore, litigation would not generally be an option. Respondents to the survey were of the opinion that litigation should be avoided although many stated that they often have no option but to consider pursuing this avenue because their contract (in many cases an ‘unwritten’ contract) did not contain provisions for alternative dispute resolution (ADR). The survey revealed that the inclusion in a building contract of a process for the resolution of dispute is beneficial and there is statistical support for this. At the outset the parties are made aware of the processes available to them in the event of a dispute arising. However, not all those interviewed stated that they were fully cognizant with the procedures to be adopted once a dispute arises as they results from this survey indicate that they do. Figure 7.1 illustrates the 3-stage process that the author proposes and recommends for any new or amended forms of building contracts. This figure shows the relationship of these steps to the currently adopted alternative dispute resolution (ADR) processes.
An example of where parties did not know of the processes available to them was in the building contract for project no. 2.1. This dispute resulted in litigation even though other alternative methods were available. The following suggestion is, therefore made:

**Recommendation 13**: That the Arbitrators’ and Mediators’ Institute of New Zealand, the New Zealand Institute of Architects and other interested bodies actively engage in a *public* programme that educates the parties to a building contract and those involved with the formation and administration of contracts on how to avoid disputes. In particular educates and informs about the following:

(i) The types of building contract(s) available;
(ii) The roles and responsibilities of the parties;
(iii) The provisions in those contracts for the resolution of disputes; and
(iv) The methods available, the processes and procedures to be adopted for the resolution of disputes.

It is also the author’s opinion that the existing legislation is neither comprehensive nor coordinated.
1. INFORMAL

NEGOTIATION

NZIA SCC1 Sec.K Rule 93
NZS 3910 Sec. 13 Rule 13.2

2. ADJUDICATION

ADJUDICATION

NEW RULES REQUIRED

MEDIATION

MED. / ARB.

3. ARBITRATION

ARBITRATION

NZIA SCC1 Sec.K rule 94.3
NZS 3910 Sec. 13 rule 13.4

LITIGATION

DISPUTE RESOLUTION PROCESSES

TAXONOMY OF TERMS

AS PROPOSED
Figure 7.1: Dispute resolution processes as recommended for new and existing building contracts
7.1.4 The administration of building contracts and the issues of negligence and legislation

This section considers the issues of negligence and legislation that affect the construction industry in New Zealand. The literature review identified in excess of 90 pieces of legislation that affect the construction industry in New Zealand. While this may appear adequate this country is, by comparison to Australia, for example, and in the authors’ opinion, does not have sufficient legislation that is specifically created for the construction industry in New Zealand.

It is also the author’s opinion that the existing legislation is neither comprehensive nor coordinated.

The literature review exposed a lack of information of situations where contracts are not independently administered. There is no legislation in New Zealand that requires a project to be administered by someone acting in a quasi-judicial capacity. The review also disclosed that the professions, particularly the N.Z. Institute of Architects, are advocating the use of ‘partial’ services particularly for the ‘contract administration’ phase of the project. This is in direct contradiction to the views of the Courts in New Zealand and also of the New Zealand Architects Co-operative Society who represent the professional indemnity insurance interests of architects.

The insurers promote the acceptability of undertaking limited or ‘partial’ commissions and go to great lengths to point out the potential dangers of such
practices. Theirs is both a confusing and contradictory stance. The author does not support the introduction, or retention of contracts that are not intended to be independently administered as made in recommendation 2. Therefore, if the Rowlands v Collow\textsuperscript{143} case is an example to be followed, then the Courts in New Zealand also do not condone or support the ‘partial’ administration of contracts.

Further, the situation is not only exacerbated by the divergence of opinions being expressed by the professions and the judiciary as to whether ‘partial’ services should or should not be undertaken. There is also the issue of whether a claim against an architect, for negligence, can be time barred (whether a contract exists or not). The latter being potentially more serious as the literature review showed that the Courts in New Zealand are taking a more liberal view to the award of damages.

As stated, the situation surrounding the licensing of those providing contract documentation and the execution of building construction requires, in the author’s opinion, attention and the same circumstances also apply to the need for the clarification of many pieces of existing legislation. A review of, and the introduction of, additional regulations covering the liability and negligence issues for all those involved in the construction industry in New Zealand are urgently required.

The research identified that 67% of contracts in the residential sector did not have an independent third party administrator. By contrast, the commercial sector had

\textsuperscript{143} Rowland v Collow [1992] 1 NZLR 178
more projects independently administered but that 64% of the projects surveyed were administered by a project manager or quantity surveyor or had no independent third party administration at all.

The answer to research question 6 provides the opinion of some the participants as to whether the appointment of an independent third party was beneficial and assisted in the avoidance or resolution of disputes.

The hypothesis promoted for this thesis were supported on the evidence of the statistical analysis and further approbation was received from comments made by respondents that specifically, where an architect (or designer) was engaged to independently administer the contract, their appointment was beneficial. Such an appointment assisted in the avoidance an/or resolution of disputes. It is the authors’ view that unless such an engagement is made mandatory, then such appointments (particularly in the residential sector), will continue to be the exception rather than the rule. It is for this reason that the author supports the recommendation made in 2 (iii) that promotes only the adoption of contracts that are independently administered.

Although it is doubtful that there will be widespread support for this proposition, the author’s opinion nevertheless, is in conformity with the views of the Courts and is further supported by the results of this research.
There is a firm belief that contracts must be independently administered and so, the following are suggested:

**Recommendation 14:** That legislation be enacted that would require all contracts in excess of NZ$10,000 to:
(i) Be independently administered by a registered architect or licensed designer (as provided for in recommendation 11) and
(ii) Require that the appointment be made jointly by agreement between the client and the builder.

The joint appointment would not only distribute the cost of such an appointment equitably between the client and the builder but would also help to remove the potentiality for any bias, which was alluded to in during the collection of data for this research. The author supports recommendation 14 but in doing so, not only confirms the opinion that contracts must be independently administered but signals that its adoption would require a clarification of both existing and any proposed legislation.

The research also confirms and endorses the author’s opinion that the architect (or designer) of the project should also be the administrator of the contract. However, if recommendation 14 (ii) is adopted, this could also permit another person (who may not have been the architect, or designer or the person(s) who prepared the contract documentation), to administer the contract. This proposal would also for a quantity surveyor to be appointed as the independent administrator of the building contract as promoted by Twyford (1998).

The literature review exposed a divergence of opinion between that of the professions and the Courts in New Zealand (and of the Privy Council) about the potentiality of claims for professional negligence with respect to the ‘contract
administration’ of projects. This disparity of approach was evident in the case of *Rowlands v Collow* where the Court found that the designer (in this situation, the engineer) should, in the Court’s opinion, have administered the contract even though he had not been contractually engaged to do so.

The situation in New Zealand remains volatile with new and different decisions coming to light on a regular basis and while conceding that each case must be considered and judged on its merit, there is still much confusion throughout the industry in New Zealand. The situation is further exacerbated by the variance of opinion being expressed by the professions and the judiciary as to whether ‘partial’ services should or should not be undertaken but also, whether a claim against an architect, for negligence, can be time barred. This is whether a contract exists or not and is an issue that requires clarification.

Therefore, should recommendation 14 (ii) be adopted there would be a need to revisit the whole topic of ‘negligence’ particularly with regard to ‘partial’ service and also, in situations where the architect (or designer) may not be the administrator of the contract.

Nevertheless, the author is of the opinion that the ‘traditional’ method of procurement of architect’s services that was detailed in chapter 3 should be retained and a recommendation flowing from this is made that:
**Recommendation 15:** The New Zealand Institute of Architects is urged to actively promote the preferred method of engagement as being:

(i) The ‘traditional procurement’ method of the engagement of architects as outlined in Appendix C: Figures C.1.2 (RIBA Fig.E.3.2) and C.1.3 (RIBA Fig.D.3.4.1); and that  
(ii) The N.Z. Institute of Architects and the N.Z. Architects Cooperative Society undertake a review the ‘Conditions of Engagement’ documents for architects with respect to alternative agreements for commercial and residential work for varying types of projects as listed in recommendation 2.

As stated, the differences of opinion between the judiciary and the professions is also manifested both in terms of the nature of the acceptance of claims for negligence and whether contractual obligations existed as in the *Rowlands v Collow* 144 case. There are also contentious views whether the claims should be time-barred as was the case of *Johnson and Johnson v Pitts* 145.

As with the situation surrounding the licensing of those providing contract documentation and the execution of building construction projects, the same applies to the need for both a clarification of existing and for the introduction of additional legislation covering the liability issues for all those involved in the construction industry in New Zealand. A further recommendation is made that.

**Recommendation 16:** Further research is undertaken with a view to clarifying the legislation surrounding the wide range of issues of ‘negligence’ and the ‘time limits’ for making such claims and on the impact that this has on all sectors and participants of the construction industry in New Zealand.

Such clarification, and the enactment of possible further legislation, would help to resolve many of the uncertainties surrounding these topics and assist architects (and

their professional body) to advise their clients with *a degree of certainty* whether the engagement for ‘partial’ services is acceptable or not. Further, the recommendation made in 11 (iii) is that the liability for defective work be for a period of 10 years. The current situation provides a conflict of views where the Limitations Act 1950 and the Building Act 1991 provide for different periods.

The adoption of recommendations 16 and 18 would assist with the clarification and a suggestion on how such legislation, and all recommendations made, can be patronised is made later. (Refer recommendation 18). Following is a section that discusses the post-graduate education and training of architects with particular regard to the administration of contracts. The recommendations are based following a review of the literature; on comments made during the collection of data; and the authors’ interpretation of the results of this research.

### 7.1.5 The post-graduate education and training of architects

Much has been made about the role of architects (and designers) being excluded from the role of independent administrator of the contract. While views have been expressed as to why this is occurring, the intrinsic reasons are unclear and further inquiry is required. The literature review exposed that:

a) Students should be at the least introduced to accountancy, contracts, and job and practice management when at Schools of Architecture;
b) The education of architects should prepare them to assist clients at all stages of a building project and to coordinate all the elements of the design and construction process; and
c) The major areas of project management, cost reporting and client contact are increasingly being controlled by other consultants such as the quantity surveyor and the project manager.
The longevity of existing services and of being engaged in the ‘traditional procurement’ method cannot therefore, be taken for granted and professional firms, if they are to survive in the longer term, need a marketing orientation which makes them sensitive to changing client demands. One major identifiable trend is the increasing demand for professional advice which takes a particularly broad view. This is evidenced from the results of the survey for this thesis in identifying the involvement of a quantity surveyor and/or project manager in many projects who were not involved in the design of the project.

The author questions the benefit of such appointments and the research supports this view. In the case of the company collapses referred to in chapter 1 it is understood that the architect responsible for the design was not involved in the independent administration of the contracts. Whether such an appointment would have assisted with the avoidance of disputes is conjecture. The possible reasons why architects not undertaking the administration of building contracts were discussed in chapter 3 where several issues were raised and discussed. In summary, these were:

a) The lack of training and experience in this role;

b) A preference to design the project and not to get involved in either the technological or legal processes necessary to bring a project to its successful conclusion;

c) The reduction of fees available for this stage of the work;

d) Clients with a ‘kiwi’ attitude that they can do it themselves;

e) The result of pressure from Builders who do not want an independent third party involved who would ‘keep them honest’; or

f) The threat of increasing litigation with claims for negligence of the type described earlier in the Rowlands v Collow¹⁴⁶ case?

In 1998, the author proposed that a post-graduate diploma be developed to assist graduates from New Zealand’s Schools of Architecture (and overseas architects wishing to practice in New Zealand) to gain registration. There appears to be unwillingness for this suggestion to be adopted. It is not certain why there is resistance to the introduction of such a course. Various reasons could include whether academics perceive that this is not their responsibility; or professions are apprehensive of the move; or practitioners are fearful of increased competition that would result with more graduates obtaining registration.

The literature review also referred to recent annual reports of the Architects and Education Registration Board (AERB). The Board express growing concern about the lack of experience and preparedness of candidates when presenting themselves for the registration examination. Therefore, the author recommends that:

**Recommendation 17:** Further studies are required to determine:
(i) The full range of reasons of why graduates are not obtaining registration with the Architects Education and Registration Board;
(ii) Why the involvement of registered architects in the independent administration of contracts appears to be diminishing; and
(iii) Whether the introduction of a post-graduate course that would facilitate and enable graduates to obtain registration is warranted.

The construction industry is currently under the ministerial jurisdiction of the Minister of Internal Affairs. Several other Ministers (and Government Departments) also have an interest as the industry impinges upon numerous portfolios. The result is that no single authority has the overall responsibility and control of the sector.

The appointment of a Minister for Construction with specific responsibility for the construction industry would recognise the important contribution that the
construction industry makes to the country and its economy and therefore, a further recommendation is made that:

**Recommendation 18:** A Minister for Construction be appointed with responsibility for:
(i) The review of existing legislation; and
(ii) Proposing a comprehensive range of legislation for the whole of the construction industry in New Zealand that includes, but is not limited to, the recommendations contained within this thesis.

While many recommendations have been made in this thesis that covers the specific areas of research and additionally, some that have resulted as a consequence of the analysis of the data, there are other matters which should be addressed. It is hoped that the appointment of a Minister with specific duties for the construction industry would be able to consider and implement a comprehensive range of measures. In addition to the High Court; District Court and Disputes Tribunal (referred to in chapter 2) New Zealand also has specialists Courts that deal with environmental and employment issues.

The results of this research together with the rate of claims being lodged following the enactment of recent legislation has shown that all sectors of the construction industry in New Zealand would also benefit from a specialist Court to assist with the resolution of disputes.

Therefore, a final recommendation is made:

**Recommendation 19:** Consideration should be given to the establishment of a Construction Court in New Zealand.

If specialist officers, with the mandate to deal with disputes effectively, efficiently and economically are appointed to such a Court then this could only be advantageous to the construction industry in New Zealand.

### 7.2 Principle of remotivity

An analysis of the results obtained for this research have also given support to the promotion of a further proposition that:

‘The further the architect (or designer) is from the independent administration of a contract acting in a *quasi-judicial* capacity as anticipated by the Courts, the more likely it is that disputes will arise during the execution of the contract’.

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147 *Weathertight Homes Resolution Services Act 2002*
Figure 7.2 shows the ‘traditional architect – client relationship’ where the architect is directly involved with the administration of the contract and figure 7.3 illustrates a ‘contemporary’ arrangement that is apparently being more widely promoted and adopted. In this scenario, the architect has no direct responsibility for the administration of the contract. All decisions made effecting the design are made via the project manager or others. These charts are a simplified version of the RIBA ‘Plan of Work’ (RIBA: 2000) charts for ‘traditional procurement’ and ‘management procurement’ as contained in the appendices and as referred to earlier in this chapter. (Refer Appendix C: figures C.1.3 and C.1.5 and Wilkinson et.al: 2003).

There is a suggestion that projects in the 21st century are becoming more complex so it is perhaps not surprising that disputes arise during the execution of building contracts. The exponential increase in the complexity of modern commercial buildings together with the decline in the use of ‘standard’ forms of building contracts and of the extent of documentation provided to tenderers have clearly combined to create an increased potential for claims and disputes. It could be argued that projects were just as complex as in the 1960s when it seemed, from personal experience, that disputes seldom arose. This could be due to the fact that during this era architects were engaged and projects executed by more ‘traditional’ methods. (Laan: 2000). In this manner, the architect was directly involved in the administration of the contract. The extent to which the architect is ‘remote’ from the execution of the administration of the building contract in figure 7.3 is clear in that they are required to report via the project manager who in many cases, in the New Zealand context, is the quantity surveyor.
Further qualification of their remoteness is confirmed by referring to the RIBA ‘Plan of Work’ (RIBA: 2000) documents contained in Appendix C. As stated earlier, the role of the architect in stages J, K and L are not arranged in a logical sequence in either the ‘design and build’ and ‘management contracting’ methods of procurement. Similar situations would also arise with ‘partnering’ and any other non-traditional forms of building contracts. (RIBA: 2000).

The consequences of being remote and from not being directly involved generally are that any design decisions, whether valid or not, if they effect cost will usually be detracted by the quantity surveyor. In addition, the contractor may wish to make changes that could prove to beneficial for the project. Such changes, if requested through the quantity surveyor may, or may not, be approved if they have an impact on the cost of the project. This is not to say that architects totally disregard the impact of any decisions that they may make on the final cost of the project. The contention is that, in the authors’ opinion, architects are supposedly trained to have the vision to look at the broader issues of changes of which cost is just a part and not the sole determinant.

The opinion of all 160 participants was solicited and the responses received were used to provide the data for the analysis. These results are indicated by the level of ‘positiveness’ by the respondents as to whether such an appointment assists in the avoidance and/or resolution of disputes. The results are recorded in Appendix A and summarised in chapter 6: Tables 6.1, 6.2 and
6.3. Where no response was received, the inference was made that the participant had a *neutral* view. Question 12 of the questionnaire asked:

> ‘Was the appointment of the independent third party, in terms of dispute avoidance and/or resolution, worthwhile?’

The first test of the principle was undertaken when testing the hypothesis promoted for this thesis. Chapter 6: table 6.3 revealed that, in both the commercial and residential settings there were statistically significant differences between those contracts that resulted in disputes and those that did not (residential: p-value < 0.001, commercial: p-value = 0.02). So, the engagement of the architect (or designer) assists in the avoidance and/or resolution of disputes and there is therefore, support for the ‘principle of remotivity’. The statistics show that such an engagement does make a positive difference.
Figure 7.2: Traditional architect-client relationship
Figure 7.3: Contemporary architect-client relationship
Further, in the residential setting, there were more than anticipated responses from disputed contracts that agreed with the statement; and for the commercial contracts, there were more than anticipated responses from disputed contracts as opposed to those that disagreed with the statement.

The second test of the principle was conducted by the supplementary analysis of the data received from the surveys carried out for this research in order to help further establish if there is any validity in the ‘principle’. An analysis was conducted by considering the results from the following situations:

- All commercial and residential projects surveyed.
- All commercial and residential projects surveyed where a dispute arose.
- All commercial and residential projects where disputes arose and where the contract was administered by an independent third party.
- All commercial projects surveyed with no disputes and where the contract was administered by an independent third party.
- All residential projects surveyed with no disputes and where the contract was administered by an independent third party.

Following is an analysis of the results in the above circumstances.

7.2.1 All commercial and residential projects surveyed

The results show that, overall, there was 55.6% to support that the engagement was worthwhile. Only 20% believed that the engagement was not worthwhile and 24.4% overall had a neutral opinion. (Refer Appendix A: Table A.3.46 and Chart A.3.47)
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When commercial projects are considered, the level of ‘positiveness’ was 64% as compared to 41% for residential projects.

7.2.2 All commercial and residential projects surveyed where a dispute arose

The results in this category reveal indicate that 45% believed that the engagement was positive. The comments received from the respondents indicated that, on projects where disputes arose, that the engagement was however, generally positive and that in many cases, the disputes could have been exacerbated had the appointment not been made. (Refer Chapter 6: Tables 6.4 to 6.8 inclusive and Table A.3.48).

This question was principally intended to determine that, if the architect (or designer) was appointed, whether the engagement was worthwhile and, if one were not appointed, would it have been so. The distribution from all respondents of all projects surveyed, which resulted in a dispute indicates that, in addition to the 45% positive response rate, 40% were of the opinion that the engagement was negative; and 15% were neutral.

The responses of the participants in relation to the role of the individual consultants are recorded in Appendix A: Table A.3.50. If just these results were to be considered they would show that there is no conclusive evidence to support the proposition that architects (or designers) assist with the avoidance an/or resolution of disputes. However, further analysis reveals a more expansive and different picture.
Whilst 9 responded positively to the engagement of an independent third party administrator, only 2 of these were where the architect was involved in the administration of the contract.

Several respondents were of the opinion that the dispute(s) would have arisen regardless of whether there was independent administration or not. The primary reason for this was often due to the ‘nature of the clients involved’. (Refer Appendix A; Table 3.50).

7.2.3 All commercial and residential projects where there were no disputes and the contract was administered by an independent third party

The responses received indicated the opinions of the participants on whose projects there was the engagement of an independent third party to administer the contract and disputes did not arise. (Refer Chapter 6: Tables 6.4 to 6.8 inclusive).

This question was intended to determine whether the engagement of the architect (or designer) was worthwhile and assisted in the avoidance and/or resolution of disputes. The distribution of responses from all respondents and show that 84.6% were of the opinion that the mere fact of having an independent third party administering the contract was worthwhile in either avoiding and/or resolving any potential disputes. (Refer Appendix A: Table
A.3.51 read in conjunction with Charts A.3.52 and A.3.53) Only 4.4% believed that the engagement was *negative* and 11% were *neutral* in their opinion.

7.2.4 All commercial projects surveyed with no disputes and the contract was administered by an independent third party

The responses received from commercial participants indicated that, on projects where there was the engagement of an independent third party to administer the contract and disputes did not arise, 86% were of the opinion that such an engagement was *positive* and was *worthwhile* in either avoiding and/or resolving any potential disputes. Further, 8.4% believed that the engagement was *negative* and 5.6% were *neutral* in their opinion. (Refer Appendix A: Table A.3.54 and Charts A.3.55 and A.3.56).

7.2.5 All residential projects surveyed with no disputes and the contract was administered by an independent third party

The responses received from residential questionnaires indicated the opinions of the participants on whose projects there was the engagement of an independent third party to administer the contract and disputes did not arise. This question was intended to determine whether the engagement of the architect (or designer) was *worthwhile* and assisted in the avoidance and/or resolution of disputes. The distribution of responses from all respondents show that 80% were of the opinion that the appointment of an independent third party to administer the contract was *worthwhile* in either avoiding and/or resolving any potential disputes. 20% believed that the engagement was *neutral*
Chapter 7: Conclusions and Recommendations

and there were no negative responses. (Refer Appendix A: Tables A.3.54 and A.3.57 read in conjunction with Charts A.3.58 and A.3.59).

When the combined results of both commercial and residential projects are analysed, the degree of ‘positiveness’ for all consultant involvement is 84.6%. The negative response was 4.4% and 11% were neutral. (Refer Appendix A: Table A.3.60 and Charts A.3.61 and A.3.62).

7.3 Summary

The following conclusions have been drawn. With regard to commercial projects, all of the projects surveyed that did not result in a dispute and which were independently administered, 86% of the respondents were of the opinion that the appointment was beneficial, with only 5.6% considering that it was not.

All responses (26.7% of the total) regarding the appointment of an architect were positive whereas the opinions were not as conclusive when asked about the similar appointment of a quantity surveyor and/or project manager. Comments received during interviews were unanimous in that all would like to see a situation where the architect (or designer) is directly involved in the administration of the contract.

Several also however, suggested that many architects were not capable of undertaking this role form due to either being technically incapable and/or
from the point that some are unable to act impartially. This was discussed earlier in this chapter with appropriate suggestions made.

Of the 29 projects where the architect was the independent administrator of the contract only 2 of the projects resulted in a ‘formal’ dispute which was resolved by either arbitration or litigation.

When the person who administered the particular contracts is individually analysed, the responses received are shown in separate the categories of ‘who administered the contract’ and the ‘level of positiveness’ perceived by the participants. The results are separated into the commercial, residential and combined responses. (Refer Appendix A: Tables A.3.54, A.3.57 and A.3.60 and illustrated in Charts A.3.55, A.3.56, A.3.58, A.3.59, A.3.61 and A.3.62).

With regard to all commercial projects surveyed, 64% believed that the appointment was positive as opposed to 13% negative and 23% neutral. Where commercial projects resulted in a dispute the result was different. 18.2% were positive, 9.1% were neutral, and 72.7% were negative in their opinion that the appointment was not worthwhile and assisted in the avoidance and/or resolution of disputes. (Refer Appendix A: Tables A.3.46 and A.3.48).

With respect to the proposition, in the 19 commercial projects where an architect was engaged to independently administer the contract and which had no disputes, all responses were positive in that the appointment helped to avoid
and/or resolve any disputes. In these cases any potential disputes were resolved before they arose. There were no negative or neutral responses. (Refer Appendix A: Table A.3.54).

With the residential projects surveyed, the results were different. The results show that, of all projects surveyed, 55.6% were positive, 24.4% were neutral and 20% negative in their response to the question. Where residential projects that resulted in a dispute are considered, the results are different. 77.8% were positive and 22.2% were neutral. There were no negative responses confirming that, in their opinion that the appointment was worthwhile and assisted in the avoidance and/or resolution of disputes. (Refer Appendix A: Tables A.3.46 and A.3.48).

The results indicate that there were 12 (60%) of the residential projects but none of the commercial projects surveyed where no disputes arose and which were independently administered. (Refer Appendix A: Tables A.3.54 and A.3.57). Where the charts show that ‘no administration’ was undertaken, this in fact, in terms of this research was an indication that any administration undertaken was not ‘independent’. Nevertheless, it must be stated that even in these cases, disputes did not arise.

80% of all those surveyed in the residential category were of the opinion that the appointment of an independent third party administrator would be worthwhile and would have helped to avoid and/or resolve disputes. Of these 6
believed that the engagement of an architect was beneficial and 1 was neutral. There were no negative responses. (Refer Appendix A: Table A.3.57).

When the combined charts were analysed, the results show that 84.6% of all participants were of the opinion that the appointment of an independent third party assisted in the avoidance and/or resolution of disputes. (Refer Appendix A: Table A.3.60).

In terms of the ‘principle of remotivity’, 25 believed that the appointment of an architect was positive, 1 was neutral and there were no negative responses to this question. By contrast, 32 of all respondents believed that a project manager is an appropriate person to administer the contract. 2 had a negative and 3 had a neutral opinion.

Finally, the positive, neutral and negative responses from tables 6.1; 6.2 and 6.3 in chapter 6 and in particular, interview questions 10, 11 and 12 were analysed. The results were plotted on chart 7.1 (commercial) and chart 7.2 (residential).

The interview questions asked the following:

(i) Interview question 10:
If the answer to interview question 6 was ‘no’, (which asked if the contract was administered by an independent third party), in your opinion would the appointment of an independent third party administrator have assisted, in each case, in the avoidance or resolution of any of theses disputes?

(ii) Interview question 11:
If an independent third party was appointed, do you think that the appointment was directly beneficial in the avoidance and/or resolution of disputes?

(iii) Interview question 12:
If the answer to question 11 was ‘yes’, was the appointment of the independent third party, in terms of dispute avoidance and/or resolution, worthwhile?

Charts 7.1 and 7.2 were developed using this information. The level of positive responses provides further support for the precept that the appointment of an independent third party to administer a contract between a client and a builder assists in the avoidance and/or resolution of disputes. The results shown in charts 7.1 and 7.2 exhibit an average level of positive results at 66.6% support for commercial and 50% for residential. Conversely, the average negative results are 11% and 20.5% respectively. When the individual responses are considered, the commercial sector was generally positive in their response to all three questions posed. The same conclusion cannot be drawn from the residential responses and could be reflective of the opinions of residential contractors who question if the independent administration of contracts is beneficial.

By contrast, the average level of positive response from residential participants to questions 10, 11 and 12 was at 50%. That is, half of respondents were of the opinion that such an appointment would have been beneficial as opposed to 11% who considered that the appointment was negative. (Refer Appendix A: Table A.3.48 and Chart 7.2). It should be reiterated to that a larger proportion of residential projects surveyed resulted in disputes and that many of these were not independently administered.
The conclusion to be drawn from the results is that there were more commercial projects administered than residential projects and comparatively fewer disputes on commercial projects. Therefore, there is an acceptance of the benefits of the role of the independent administrator on commercial projects. The perception is, with respect to residential projects, that there is an attitude that supports the assertion in the literature review.
The appointment of an independent administrator of the contract is not mandatory and therefore, does not from the results of the survey seem to be an important consideration in the residential sector. The results provide additional support for the hypothesis and when the specific scope of this research is considered, the statistical analysis shows that support for the ‘principle of remotivity’ is conclusive. There is empirical evidence to show that the appointment of the architect (or designer) to independently administer the contract assists in the avoidance and/or resolution of disputes.
The results from the projects surveyed show that 84.6% of all respondents, together with support from the qualitative opinions solicited from both commercial and residential sectors, confirm that appointment of the architect (or designer) is appointed to independently administer the contract assists in the avoidance and/or resolution of disputes. (Refer Appendix A: Tables A.3.54, A.3.57 and A.3.60)
While these results show that there is a degree of acceptability of the ‘principle of remotivity’ further research of a larger and wider sample would assist to further substantiate this assertion.

7.4 Replication of research

The research undertaken for this thesis is conclusive and the hypothesis has been positively tested. The author is not aware of any other detailed research having been undertaken into any aspects of the construction industry in New Zealand. Investigation into a broad range of issues affecting the industry including considering the introduction of a range of targeted and comprehensive legislation, (perhaps similar to those that are already in existence in Australia and which are referred to in the literature review in chapter 2) are recommended. Their adoption could only be of benefit to this important contributor to the economy of New Zealand.

Contemplation should be given that future research be undertaken by academics into recommendations 3, 4 and 5 and that the construction industry, the professions and government would need to consider investigation into the remaining recommendations.

However, should further research including further testing of the ‘principle of remotivity’ be contemplated then the methodology adopted in described in chapter 5 and recorded in chapter 6 is further elucidated. Wild and Seber (2000) recommend that a determinant factor in establishing the numbers of projects to be surveyed
would be dependent upon the incidence of disputes that resulted from those projects.  

*The difficulty with this approach is that, until the survey is undertaken, the number of disputes is not known.* Wild and Seber (2000) recommend that the sample size shown in table 7.1 be considered. The number of projects surveyed is shown as ‘n’.

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<tr>
<td>Value of ‘p’</td>
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<td>0.7</td>
<td>0.6</td>
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**Table 7.1: Sample size for replication of survey**

Table 7.2 illustrates the ‘question bands’ in the commercial sector that were used to analyse research questions 3, 4, 5, 6, 10, 11 and 12. The results of projects where disputes arose were compared against those where disputes did not.

The residential sector analysis employs the same range of questions and the adoption of the same procedure for both commercial and residential projects provides results so that a comparative study can be undertaken. As indicated in table 7.1 if a large number of projects are surveyed that have a low incidence of disputes, then the Fisher Exact Test and/or Chi-square test could be used to analyse the data. If a similar number of projects are surveyed which show a higher incidence of disputes, then the Chi-square test in addition to the t-test can be used.
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<td>As above (amended)</td>
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<td>6</td>
<td>NZS 3910</td>
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<td>12</td>
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<td>16</td>
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<td>25</td>
<td>Other</td>
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<td>Other</td>
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<td>Standard of Work</td>
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<td>9. How resolved</td>
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<td>11. Appoint. Beneficial</td>
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<td>-ve</td>
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Table 7.2: SUMMARY: ‘Question bands’ for replication of survey

Where disputes arose versus those where no disputes arose
7.5 Epilogue

After completing the survey, analysing and discussing the data received for the research disputes involving a NZS 3915 (2000) contract became known. This contract specifically states that: ‘it is where no person is appointed to act as Engineer to the contract’. The project was a $4m multi-unit residential development in Auckland and the total amount in dispute was in excess of $1m.

An ‘expert’ was appointed under section 13.2.4 of the contract (Refer Appendix B: 1.5). It is believed that ‘while a building contract was in place’ the parties agreed no other details. Consequently, disputes were inevitable. The legal costs to settle the matters exceeded $20,000.

The ‘expert’ is of the opinion that the appointment of an independent third party to administer the contract would have certainly assisted to avoid and/or resolve any disputes. The fees paid to the various barristers, solicitors and expert to resolve the disputes would have gone, in a major way, to paying for the appointment of an architect, designer or engineer to administer the contract.

The expert also advises that the delay in the payment of the $1m being disputed was a significant factor in forcing the contractor to be placed into liquidation, which occurred prior to the resolution of the disputes.
This case provides further evidence that the appointment of an independent third party to administer building contracts is beneficial and provides additional support for the hypothesis promoted for this thesis as well as for many of the recommendations and suggestions made in this chapter.

The 19 (nineteen) recommendations and suggestions are made as a direct result of the analysis of the data received for this research and together with the authors’ own views and opinions provide a comprehensive list of measures. All are relevant to both the commercial and residential sectors of the construction industry in New Zealand. It is the opinion of the author that both sectors require consideration but that the residential requires to be given more attention than has been evident in the past. At the outset it was the intention of this research to identify the gaps in the literature and the knowledge in:

1. The types of building contracts used;
2. Who drew up those contracts;
3. The provision made in those contracts for the resolution of disputes;
4. Who was responsible for the independent administration of these contracts;
5. What was the incidence, nature and resolution of disputes that eventuated; and
6. Whether the construction would benefit from additional legislation and a requirement that all contracts are to be independently administered.

The survey of 100 commercial and 60 residential projects provided statistical evidence that there is a difference between the projects that had a dispute when compared to those that did not. Therefore, the hypothesis promoted for this thesis is supported. Additionally, there was qualitative confirmation from those interviewed and from the questionnaires received that there was support for the ‘principle of remotivity’.
That was the essence of this research.

The author believes that consideration should be given to the implementation of the range of recommendations and suggestions made in this thesis. Such measures would go some way to preventing:

1. The commercial construction company collapses similar to those referred to in chapter 1 and in this epilogue; and
2. The problems associated in the residential sector of the construction industry in New Zealand as a result of the ‘leaky buildings’ syndrome.

Finally, a recommendation is made that further research be conducted in the areas identified so that the body of knowledge in what is an important component of the culture and economy of New Zealand can be extended.

**REFERENCES**

The following are referred to within the thesis. Further writings on the subject but not directly referred to in the thesis are listed in the bibliography section.


Al-Derham, H.R.H. 1999. *The establishment of performance criteria for the evaluation of senior staff and private housing project in the State of Qatar*. Thesis for Doctor of Philosophy at Glamorgan University, United Kingdom.


*Arbitrators’ and Mediators’ Institute of New Zealand Inc*. P.O.Box 1477, Wellington, New Zealand. Tel. (64) 385-1478. Fax. (64 4) 385-7224. E-mail. Institute@arbmedinst.org.nz


*Auckland Regional Council*. [http://www.arc.govt.nz](http://www.arc.govt.nz)


Brooker, P. 1997. *Factors which impact on the choice of alternative dispute resolution in the construction industry*. Thesis for Doctor of Philosophy at Oxford Brookes University, United Kingdom


Fenn, P. 1999. *An etiology of construction disputes.* Thesis for Doctor of Philosophy at the University of Manchester Institute of Science and Technology (UMIST), United Kingdom


Development and Construction Economics, University of Natal, Durban, South Africa.


McQuitty, N. 1992. The role of the client in the U.K. construction industry. Thesis for Master of Science at Manchester University, United Kingdom


Standards New Zealand. 2000. NZS 3915: *Conditions of Contract for Building and Civil Engineering Contracts (where no person is appointed to act as Engineer to the contract)*. Standards New Zealand, Wellington, New Zealand.


Stephens, R.J. 2002. *Adjudication and Building Industry Consultants*. Unpublished undergraduate research project for the degree of Bachelor of Construction (Quantity


*The Living Bible*. 1972. Published by Tyndale House Publishers Inc. Wheaton, Illinois, USA.


LEGAL AUTHORITIES

Addis v Gramophone Co Ltd [1909] AC 488


Auto-Concrete Curb Ltd v South National River Conservation Authority [1992] 89 DLR (4th) 394

Bagot v. Stevens Scanlan & Co.Ltd. (1964) 3 All ER 577; (1964) 3 WLR 1162.

Batty v. Metropolitan Property Realisations Ltd. (1978) 2 WLR 500; (1978) 2 All ER 445.


Bevan Investments Ltd. v. Blackhall and Struthers. (1973) 2 NZLR 45 at pp 79, 80 and 81.

References and Bibliography

*Birch v Palmerston North City Council* (High Court, Wellington CP 116/92, 22 July 1998, Heron, J).

*Bliss v South East Thames Regional Health Authority* [1987] ICR 700 (CA).

*Bloxham v Robinson* [1996] 2 NZLR 664.

*Body Corporate No. 114424 v Glossop Chan Partnership Architects Ltd.* High Court, Auckland CP 612/93, 3 February 1998, Potter, J).


*Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA).

*Brown v Waterloo Regional Board of Commissioners of Police* (1982) 136 DLR (3d) 49; 39 OR (2d) 277 (Ont:HC)


*Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* 16 November 2000.

*Chesham Properties Ltd v Bucknall Austin Management Services Ltd.* (1996)

Coggs v Bernard (1703) 2 Ld Raym 909; 92 ER 107.


Cotton v Wallis [1955] 3 All ER 373, CA


Crummer v Benchmark Building Supplies Ltd (2000) 5 NZELC 98,661

Dancorp Developers Ltd. v Auckland City Council [1991] 3 NZLR 337.


Day v Mead [1987] 2 NZLR 443 (CA).

Delta Projects Ltd. v North Shore City Council [1996] 3 NZLR 446.

Demers v Dufresne [1979] SCR

Dodd Properties (Kent) Ltd v Canterbury City Council [1980] 1 WLR 433; [1980] 1 All ER 928 (CA)


Dutton v. Jalapen Pty. Ltd 10 BCL 338


Esso Australia Resources Ltd v Plowman. (1995). 183 CLR 10; 128 ALR 391; 69 AJLR 404 (HCA)

Esso Petroleum Co. Ltd. v. Mardon. (1976) 2 All ER 5 (CA).

Florida Hotels Pty Ltd v Mayo. 113 CLR 588.

Gabolinsky v Hamilton City Council [1975] 1 NZLR 150


Gillingham v Minister of Health. [1932] 1 Ch 86.


Graham v Commrs of Works (1902) Builder, 15 November.

Hadley v Baxendale (1854) 9 Exch 341; 156 ER 145.

Hayes v Dodd [1990] 2 All ER 815 (CA)


Jackson v Horizon Holidays Ltd [1975] 1 WLR 1468; [1975] 3 All ER 92 (CA).

Jameson v Simon (1899) 1 F (Ct of Sess) 1211


Kensington Area Health Authority v. Wettern Composites (1984) 31 BLR 57

Leicester Guardians v Trollope. (1911) 75 JP 197.
References and Bibliography

Lubenham Fidelities and Investment Co Ltd v South Pembrokeshire District Council and Anor. 33 BLR 39.


McLaren Maycroft & Co v Fletcher Development Co Ltd [1973] 2 NZLR 100 (CA)

Marlborough Properties Ltd v Marlborough Fibreglass Ltd. (Supreme Court, Blenheim, A 3/77, 26 October 1979, Jeffries J).


Milne Construction Ltd v Expandite Ltd. [1984] 2 NZLR 163.

Minister of Works and Planning v Henderson [1947] KB 91.


Mowlem v Young. High Court, Tauranga. AP 35/93, 20 September 1994, Roberston J.


Newell v Canadian Pacific Airlines Ltd. (1976) 74 DLR (3d) 474; 14 OR (2d) 752.


Nocton v Ashburton (Lord) [1914] AC 932.

NRMA Insurance Ltd v F R Coyle Pty Ltd.


Palermo Nominees Pty Ltd v Broad Construction Services Pty Ltd [1996] Unreported. Supreme Court of Western Australia, CIV 2439.

P & E Phontos Pty Ltd v McConnell Smith & Johnson Pty Ltd [1993] BCL 259. Supreme Court of New South Wales.


R v Architects’ Registration Tribunal, ex p Jagger [1945] 2 All ER 131.


Rogers v Whittaker (1992) 175 CLR 479.


R W Miller and Co v Krupp (Australia) Pty Ltd. (1992) 11 BCL 74. Supreme Court of New South Wales.

Rylands v. Fletcher (1868) LR1 Ex 265 at 279-280, [1861-73] All ER Rep 1 at 7E.

Scott v Scott [1913] AC 417.

Shui On Construction Co Ltd v Shui Kay Co Ltd (1985) 1 Const. LJ 305.

Sloper v WH Murray Ltd (High Court, Dunedin, A 31/85, 22 November 1988, Hardie Boys J).


Stiellar v Porirua City Council [1986] 1 NZLR 84 (CA).


Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80; [1985] 2 All ER 947

Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd. Full Court of the Supreme Court of Western Australia. Unreported. 14 April 2000.


Trident Construction Ltd v Wardrop [1979] 6 WWR 481.

Vaucluse Holdings Ltd v Lindsay (1997) 10 PRNZ 557 (CA) at p 559.

Vivian v Coca-Cola Export Corporation [1984] 2 NZLR 289

Voli v Inglewood Shire Council [1963] ALR 657


Warren & Mahoney v Dynes (Court of Appeal, Wellington, CA 49/88, 26 October 1988, Richardson, McMullin and Bisson JJ).

Wessex Regional Authority v. HLM Design Ltd. (1994) 10 Const LJ 165


Whelan v Waitaki Meats Ltd [1991] 2 NZLR 74

Wilson Neill Ltd. (1994) 7 NZLCLC 260,617, per Holland J.


Yanchep Sun City Pty Ltd v Enryb Pty Ltd and Kinhill Engineers Pty Ltd. Unreported. Supreme Court of Western Australia. Murray J. 7 November 1994.

Young v Tomlinson [1979] 2 NZLR 441.

LEGISLATION

All listed pertain to New Zealand. Those shown in (parenthesis) relate to another country of origin.

- Accident Insurance Act 1998
- Accident Compensation Act 1982
- Accident Rehabilitation and Compensation Insurance Act 1992
- Antiquities Act 1975
- Anzac Day Act 1966
- Apprenticeship Act 1983
- Arbitration Act 1908
- Arbitration Act 1938
- Arbitration Act 1996
- Architects Act 1963
- Boilers, Lifts and Cranes Act 1950
- Building Act 1991
- Building Research Levy Act 1969
- Building Services Authority Amendment Bill 1999. (Queensland, Australia).
- Building Services Corporation Legislation Amendment Act 1996. (New South Wales, Australia).
- Clean Air Act 1972
• Clerk of Works Act Repeal Act 1992
• Commerce Act 1986
• Commercial Arbitration Act 1984 (New South Wales and Victoria, Australia)
• Companies Act 1955
• Companies Act Repeal 1993
• Companies Registration Act 1993
• Conservation Act 1987
• Construction Act 1959
• Construction Contracts Act 2002
• Consumer Guarantees Act 1993
• Contracts (Privity) Act 1982
• Contracts Enforcement Act 1956
• Contractual Mistakes Act 1977
• Contractual Remedies Act 1979
• Contracts Review Act 1980 (Australia)
• Contracts (Rights Of Third Parties) Act 1999 (United Kingdom)
• Contributory Negligence Act 1947
• Copyright Act 1994
• Credit Contracts Act 1981
• Dangerous Goods Act 1974
• Designs Act 1953
• Disputes Tribunals Act 1988
• District Courts Act 1947
• District Court Rules 1992
• Domestic Building Contracts and Tribunal (Amendment) Act 1996. (Victoria, Australia).
• Earthquake Commission Act 1993
• Earthquake and War Damage Act 1944
• Economic Stabilisation Repeal Act 1987
• Electricity Act 1992
• Employment Contracts Act 1991
• Employment Relations Act 2000
• Engineers Registration Act 1924
• Engineers Registration Amendment Act 1944
• Engineering Associates Act 1961
• Environment Act 1986
• Explosives Act 1957
• Fair Trading Act 1986
• Fencing Act 1978
• Fencing of Swimming Pools Act 1987
• Fire Services Act 1975
• Frustrated Contracts Act 1944
• Gas Supply Act 1908
• Goods and Services Tax Act 1985
• Health and Safety in Employment Act 1992
• Historic Places Act 1993
• Holidays Act 1981
• Housing Act 1955
• Housing Grants, Construction and Regeneration Act 1996. (United Kingdom)
  incorporating: Construction Contracts ‘The Scheme for Construction Contracts
  (England and Wales) Regulations 1998’ No. 649 and Construction Contracts
  ‘The Scheme for Construction Contracts (Scotland) Regulations 1998’ No.687
  (s.34).
• Illegal Contracts Act 1970
• Industry Training Act 1992
• Insolvency Act 1967
• Integrated Planning Act 1997. (Queensland, Australia).
• Judicature Act 1908
• Labour Relations Act 1987
• Land Act 1948
• Land Tax Act 1948
• Land Transfer Act 1952
• Law Commission Act 1985
• Legislature Act 1908
• Limitation Act 1950
• Local Government Act 1974
• Minimum Wage Act 1983
• Mining Act 1971
• Noise Control Act 1982
• Partnership Act 1908
• Plumbers, Gasfitters and Drainlayers Act 1976
• Privacy Act 1993
• Professional Standards Act 1994 (New South Wales, Australia).
• Property Law Act 1952
• Public Bodies Contracts Act 1959
• Public Works Act 1993
• Quantity Surveyors Repeal Act 1992
• Quarries and Tunnels Act 1982
• Real Estate Agents Act 1976
• Receiverships Act 1993
• Resource Management Act 1991
• Sale of Goods Act 1908
• Secret Commissions Act 1910
• Securities Act 1978
• Standards Act 1988
• Supreme Court Act 2002
• Survey Act 1986
• The Contracts (Rights of Third Parties) Act 1999. (United Kingdom).
• Trespass Act 1980
• Unit Titles Act 1972
• Valuers Act 1948
• Wages Protection Act 1983
• Wages Protection and Contractors’ Liens Repeal Act 1987
• Waitangi Day Act 1976
• Water and Soil Conservation Act 1967
• Weathertight Homes Resolution Services Act 2002

BIBLIOGRAPHY

The following are related to the topic area of this thesis but are not directly referred to within the thesis. Those directly referred to are listed in the references section.


Alperson, C.A. 1990. *Control versus Coordination on contract (negotiation)*. Thesis for Doctor of Philosophy at Duke University, USA.

Al-Tubayyeb, S.A. 1989. *Improving construction contract administration utilizing multi-attribute statistical analysis on bid stage information*. Thesis for Doctor of Philosophy at the University of California (Berkeley), USA.


Bennett, J. & Jayes, J. 1995. *Trusting the Team.* Reading Construction Forum, Centre for Strategic Studies in Construction, University of Reading, United Kingdom.


Chow, D.P. 1993. *Conflicts of values in law and morality*. Thesis for Doctor of Philosophy at Harvard University, USA.


Levin, E.W. 1982. *A study to aid churches to receive effective services from their architects and constructors.* Thesis for D.Min. at the Eastern Baptist Theological Seminary, USA.


Mulhorn, W.L. 1987. *Sources of Conflict as perceived by Architects and New Jersey public school officials when involved in a building project*. Thesis for Doctor of Philosophy at Temple University, USA.

Nanakorn, P. 1996. *The general rule for the control of unfair terms in contracts; justifications and operational contents*. Thesis for Doctor of Philosophy at Bristol University, United Kingdom


Onaran, B.E. 1996. *The construction of professional identity in architecture and landscape architecture: convictions about skills, knowledge, and professional roles in design (environmental design).* Thesis for Doctor of Education at Temple University, USA.


Romeyn, J.L. 1982. *The role of specialised tribunals within the Australian arbitration system*. Thesis for Doctor of Philosophy at the University of New South Wales, Australia.


