ADJUDICATION UNDER THE CONSTRUCTION CONTRACTS ACT

AMINZ SEMINARS

AUCKLAND TUESDAY 19 APRIL 2005

CHRISTCHURCH WEDNESDAY 20 APRIL 2005

PRACTICAL ISSUES – SOME RANDOM THOUGHTS

Derek S Firth
Barrister, Arbitrator, Mediator & Adjudicator
Level 17, 209 Queen Street, Auckland
P O Box 105392 Auckland City
Telephone: +64 9 307 9129
Facsimile: +64 9 307 9130
Email: dsfirth@ihug.co.nz

1. Appointment and Security for Costs

- Note the suggested letters. I have taken the view there can be conditional acceptance, conditional upon security being given by a certain time. However, to be on the safe side, I make the deadline for security (and therefore conditional acceptance) the end of two working days after receiving the request (see section 35 (1).) To make this procedure effective, it is necessary to get out the conditional acceptance almost immediately the request is received. Others have a different view on the efficacy of this procedure. All I can say is that it has worked in practice every time.

- I make it clear that the full security amount is required for my acceptance to become effective. I urge the parties to confer and urge them to pay half each; but I point out that it is essential that the full amount is paid in time even if it has to be paid by the claimant. I have found that on most occasions the parties pay 50:50, but on some occasions the claimant has paid the full amount.

- I also explain that while the amount required is calculated to include GST, it is inappropriate to issue a GST invoice at that point in time because I do not know in what proportions it will be paid. Also, some may have to be refunded if there is a settlement, or more may be required before the decision is made available. For these reasons it is better for the GST invoice or invoices to be issued later. If both sides indicate they will pay equally and want GST invoices then there is no problem. But it is worth raising the issue at the outset because many organisations become paralysed in the absence of a GST invoice unless a clear reason is given.

- I believe it is also important to set out in the acceptance (or conditional acceptance) the timetable which is likely to apply and the nature of the process. The parties can immediately see the pathway in front of them – not a black hole.

- Because of the speed at which these things tend to move, I believe it is essential to latch on to the email addresses of the parties and their counsel or advocates or, at the very least, their fax numbers. The regulations expressly permit the use of both and if those concerned have email addresses then I do not give them an option, but point out that that form of communication is expressly permitted by regulation 9 of the Construction Contracts Regulations 2003.

2. Explaining the Timetable and the Process

- I go to great lengths to point out that the procedure will be quite unlike any other legal procedure the parties or their advisors are likely to have experienced before. This is because some deadlines are fixed by statute and are not moveable (eg the five working day period within which the adjudication claim must be presented) and that some time

limits do have some discretionary flexibility. I point out that there is no right to a hearing and not even a right to a conference and that the parties should assume that everything they might ever want to say must be included within the adjudication claim and the response. I describe those steps as being possibly the only "one shot" either side will ever have before a decision is given. In relation to a conference, I say that I will make a decision about that, in consultation with the parties, when the response has been received; that if there is a conference then the purpose of it is not to produce further evidence or cross-question witnesses, but to ensure that I fully understand the full nature of the claim and response which have been delivered; and I point out that I may well take the lead in questioning both sides for the purpose of such clarification.

- I am finding that with the greatest care in the world it is almost impossible to get the message across. After having put all of the above points to the parties in writing at the outset, I conducted a conference recently where only the lawyers turned up. At the end of my probing and questioning and the various comments which they made, it became obvious that both of them thought the conference was intended to be similar to a High Court conference and that they would be able to follow up with further extensive evidence and submissions. They looked fairly shaken when I said the next they would hear from me would be the decision! One muttered something about natural justice and I politely retorted by saying that if they had read the legislation and my correspondence, there was no possible room for misunderstanding.

3. Disputes about Jurisdiction of the Adjudicator

- These can arise for many reasons. For example, whether there is a construction contract or not, whether or not it was entered into before 1 April 2003, and for many other reasons.

- The critical point to remember is that the statutory timetable continues to apply. An adjudicator therefore has the option of requesting the arguments for and against to be included in the adjudication claim and the response (or as supplementary submissions) and then to deal with the jurisdiction issue as part of the determination within 20 working days from the delivery of the response, or, to effectively have a "hearing within a hearing" to determine the question of jurisdiction as a preliminary issue. Bearing in mind that the timetable cannot be allowed to slip, this may mean giving the respondent (who will be questioning jurisdiction) say two working days to put forward its grounds, and then a further two working days to the claimant to respond, with a view to giving a decision on jurisdiction within say two working days after that. This will then leave plenty of time to give a determination on the merits (within the balance of the 20 or 30 working days including time for a conference with the parties on the substantive issues) if the determination is to the effect that there is jurisdiction. I am not sure

what such a decision can be called because the Act permits only one determination for an adjudication. Presumably, it is a procedural ruling or an indication that the case will be fully heard out and determined on its merits. Fortunately, there is English authority for the preposition that even if there is no jurisdiction, the adjudicator can still be paid!

- Of great importance is the fact (clearly established by English case law) that the scope of the dispute over which an adjudicator has jurisdiction is determined not by an adjudication claim which is delivered after the adjudicator has accepted appointment, but by the Notice of Adjudication which originally kicked off the process and led to the appointment of the adjudicator. It seems clear that an adjudicator, in the absence of the consent of the parties, has no jurisdiction to determine any dispute which was not notified in the Notice of Adjudication.

- Wise advisors to claimants tend to follow the overseas practice in the UK and Australia of ensuring that the Adjudication Claim (the "one shot" dossier) is prepared at the same time as the Notice of Adjudication is finalised. There are two very good reasons for this. The first is that the jurisdiction of the adjudicator is confined to the terms of the Notice of Adjudication, not just the Adjudication Claim (and, obviously, comparing the two documents together provides an essential crosscheck to ensure that the scope of adjudication is correctly stated in the Notice of Adjudication); and the second is that with a drop-dead time limit of only five working days from the notice of acceptance by an adjudicator, it is simply not practical to prepare the Adjudication Claim in any significant case within the five working day limit from the notice of acceptance.

4. Time Limits

- It is essential to ensure meticulous observance. The results of failure to do so can be onerous. I had one situation where a claimant had to issue a Notice of Adjudication three times because on the first two occasions counsel failed to deliver the Adjudication Claim within five working days of the acceptance of appointment by the adjudicator! There has been another occasion where an adjudicator has had to go without payment for failing to meet the statutory deadline for issuing a determination.

- The definition of working day is extensive and deserves careful study. It also contains a real trap in that for certain purposes the definition excludes the period 24 December to 5 January and for other purposes it excludes the period 25 December to 15 January!

- I think most adjudicators (including myself) have taken the view, rightly or wrongly, that any problem can be cured by consent. Even if that is so, it would be foolish to assume consent will be forthcoming. One has

to assume the opposite and not rely on the consent of either or both parties to cure a timing difficulty.

5. Charging Orders

- Obviously, it is essential to follow the terms of the statute carefully. In this regard, it is essential that "approval for the issue of a charging order in respect of a construction site owned by a respondent" is claimed in the Notice of Adjudication – section 29. Also, that "a determination under section 50 that an owner who is not a respondent is jointly and severally liable with the respondent to make a payment to the claimant and approval for the issue of a charging order in respect of the construction site, is claimed in the Notice of Adjudication – section 30.

- The terminology used in sections dealing with charging orders is important.

- The link to liability of an owner who is not a respondent, in other words the statutory deeming of joint and several liability of such a person together with the respondent turns on the meaning of "associate" in section 7. This is a most tortuous statutory provision.

- It is important to accept that there is a statutory definition of associate, and there is a statutory deeming of joint and several liability, but only for the purpose of this legislation including the issuing of a charging order.

- I have a serious personal concern about the issue of a charging order because it could trigger a default under the owner's loan facility, and there is no right to order paying security into a trust account in the alternative (being a procedure available under the old Wages Protection and Contractors' Liens Act where there could be payment into court in lieu of the registration of a charging order).

  This means that a strict application of the Act could bring about the financial collapse of a large developer, being the very mischief the Act is designed to avoid. All of this was drawn to the attention of the government and its departmental advisors at the time the legislation was drafted and presented to Parliament and it wasn't until near midnight when the Bill was about to be enacted pursuant to its third reading that the penny finally dropped with one or two Government Ministers giving bleary-eyed assurances to the Opposition that the problem would be corrected as soon as possible. I have no idea if anything appropriate is yet in the pipeline.

- Clearly, there has to be proper evidence of ownership (along with all the other prerequisites) and this is normally done via a recent computer printout of ownership.

7. Counterclaim and Set-off

- It seems clear there cannot be a counterclaim (unless it can also constitute a set-off). If the respondent wishes to bring a claim in the nature of a counterclaim (and it arises under a construction contract) then the respondent has to issue its own Notice of Adjudication and pursue its own procedure. I have had this on one occasion and I persuaded the parties to agree to a parallel timetable so that I did not have an obligation to give a determination in one before the other. Procedurally that worked well, but it had to be by agreement. Interestingly, the parties did not agree to consolidation under section 40. They preferred to stop short of consolidation, but cooperate with the timetabling.

- However, it does seem clear that a set-off can be allowed or at least addressed, provided the respondent has, in its communications with the claimant, given as a reason for non payment the matter or matters giving rise to the claim for set-off.

- The two texts on the Act do not appear to be totally unanimous on this issue and in a particular adjudication I dealt with the matter in the following way:

> … *This is not an easy issue. It is addressed in A Guide to the Construction Act (Rawlinsons) Geoff Bayley and Tómas Kennedy-Grant (pages 110, 111, 113 and 132), and Progress Payments and Adjudication (Lexus Nexus) Hon Robert Smellie QC (pages 99 to 101).*
>
> *In a way, it is easier to work backwards. The position appears to be:*
>
> - *No set-off or counterclaim is permitted in proceedings for recovery of a debt based on section 23 (not paying claimed amount where no payment schedule provided), section 24 (not paying a scheduled amount in the manner indicated by a payment schedule), or section 59 (not complying with an adjudicator's determination) – see section 79.*
>
> - *When determining an amount payable (whether pursuant to a payment claim or otherwise) it is clear from sections 17 (3), 21 (3) and 25 (2) of the Act that counterclaims, set-offs and cross-claims can be raised and presumed before the adjudicator – Smellie page 101.* [Note: I presume the author is referring only to counterclaims which can also constitute a set-off.]
>
> - *A slightly more conservative approach is adopted in Bayley and Kennedy-Grant where, in the commentary dealing with consolidation under section 40 (page 133) it is stated, "Consolidation is particularly helpful in*

construction disputes where an employer withholds payment to a head contractor, due to allegations of performance or substandard workmanship of the head contractor's subcontractor." I would have thought it is certainly arguable that matters of that kind can legitimately be taken into account in any event under section 25 (2) where there is a statutory power to resolve a dispute which includes "… the reasons given for non-payment of that amount."

- *[Respondent] has articulated in its response its reasons for non-payment of the amounts claimed and it seems to me to be quite clear that I am entitled to take those reasons into account under section 25 (2). I don't think those reasons become less applicable if they relate to a set-off.*

- It would be interesting to hear the views of others, particularly the authors of the texts!

8. Format of the Determination

- The legislation requires the determination to be in a particular form which is set out in the regulations. My view is that it is appropriate to follow the form meticulously to the extent where I have it in memory as a template and simply fill it out for each determination. In other words, I leave in the headings which are not relevant and simply say "Not applicable" and I leave in the instructions in italics which are in the form.

- Bearing in mind that the whole point of issuing a determination (or, at least, one which is favourable to the claimant) is the need for enforceability, the determination should be expressed in terms which are unambiguous and therefore enforceable by summary judgement.

- In the case of charging orders, it is important to use the appropriate language, following exactly the statutory wording of what has to be made out (if, of course, it has been made out).

Derek S Firth
19 and 20 April 2005