NZIQS ANNUAL CONFERENCE

CONSTRUCTION CONTRACTS UPDATE

SOME PRACTICAL POINTERS

17 June 2010

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INTRODUCTION

I propose to address the topic from the perspective of an adjudicator in the hope of providing some practical advice for bringing or defending claims under the Construction Contracts Act 2002.

GETTING THE PROCESS UNDERWAY

Scope of the Act

It is important to remember that the dispute or payment claim must arise under a construction contract entered into after 1 April 2003 (now a matter of diminishing practical importance).

It must relate to construction work as defined in section 6.

The importance of understanding the two broad types of Claim which can be made

There are really two completely separate opportunities under the Act to address two completely different types of claims.

The first is the equivalent of a default judgement procedure based on the claimant having issued a valid Payment Claim (section 20) to which there has not been a timely and compliant Payment Schedule (section 21). If a Payment Claim is made which meets the requirements of section 20 and it is not responded to either in time or with a compliant Payment Schedule then the claimant is entitled to be paid irrespective of the merits of the Payment Claim and it is then up to the respondent to make payment and challenge the merits through arbitration (or the Courts if there is no arbitration clause).

A claimant in this fortunate situation appears to have the option of applying directly to the Court for summary judgement or bringing an adjudication under the Act. An application direct to the Court is a safe alternative only if the claimant is in such a strong position that it almost certainly cannot lose. If there is any doubt about the claimant's entitlement, then it will be wiser to make the claim in an adjudication and, in the alternative, seek the same or similar relief "on the merits".

The statutory provisions in this regard (sections 19 to 24 inclusive) are discrete. That is how you should think about them.

The second and quite independent and different opportunity is to refer a "dispute" to adjudication under section 25. The meaning of dispute is driven by a dictionary definition and is therefore very wide.

The procedure and other provisions covered in section 28 onwards apply to both categories of claim.

Most claims are for the payment of money (by a builder) or for the recovery of remedial costs (by an owner), but the Act is wide enough to cover virtually anything.

The importance of the Notice of Adjudication

While any claim brought must be within the terms of the Act, it is even more important to remember that the jurisdiction of an adjudicator is constrained by the scope of the claim described in the Notice of Adjudication which is the very first step taken by a claimant to kick off the statutory procedure.

The desirability of preparing the Adjudication Claim first, even before issuing a Notice of Adjudication

A wise claimant will therefore virtually prepare in full its Adjudication Claim (ie the material which is delivered after an adjudicator is appointed) before finalising the Notice of Adjudication because that is the only way to ensure something will not be overlooked. For example, if the Notice of Adjudication is simply a claim for money then no other claim can be introduced a week or two later when the Adjudication Claim is presented after the adjudicator has been appointed. For example, it is too late to add other money claims and it is too late to claim anything else, for example an extension of time claim or a claim for a Charging Order. It is even arguable that it is too late to claim costs and interest if they are not claimed in the Notice of Adjudication.

There is another good reason to do this, in addition to the need to get the Notice of Adjudication right.

That is, that when the adjudicator is appointed, the Adjudication Claim must be delivered within 5 working days and that is a statutory period which cannot be extended (except by consent which is usually not forthcoming!) (See section 36.)

Charging Orders

An adjudicator cannot issue a Charging Order. An adjudicator can only give approval for the issue of a Charging Order (section 49). The Charging Order itself must be issued by the District Court (section 76).

You will need to look carefully at the provisions dealing with the liability of an owner who is not the respondent but who is an “associate” of the owner (as defined obtusely in section 7).

THE CONTENTS OF THE CLAIMS AND RESPONSES

A legal right to one shot and no legal right to a hearing

The claim must be delivered within 5 working days of the adjudicator being appointed. The response must be delivered within a further 5 working days, but there is a statutory discretion to extend that time.

That might be it.

Certainly, section 42 (1) permits an adjudicator to require (inter alia) further written submission and to call a conference of the parties. But those things might not happen.

Accordingly, when presenting a claim or a response, you must assume you may never be allowed to say another word.

Each document must say everything you want to say about the claim or your defence and everything else, including such matters as interest and costs.

Certainly, adjudicators are obliged to observe the rules of natural justice (an express statutory provision in New Zealand and imported by the common law in the UK), but it is quite clear that what might otherwise be natural justice has to be tempered in order that statutory time limits are observed.

You would be wise to completely put out of your minds normal court procedures; or what you might get away with in court by doing replies to replies to replies ...

Of course, replies will be permitted if natural justice requires it, but very tight time limits will be imposed (usually of only two to four days).

Challenges to jurisdiction

If there is to be a challenge to jurisdiction that should be raised immediately and the adjudicator may address it as a preliminary issue (still leaving time to meet the statutory deadlines if jurisdiction is sustained) or, if the factual and legal issues relevant to jurisdiction are significantly interwoven with the facts and legal issues relating to the merits, then an adjudicator is likely to reserve the question of jurisdiction and decide it at the same time as issuing the main Determination.

Contents of claims and responses generally

For the above reasons the claims and responses should be presented like dossiers (as in all of the Civil Law jurisdictions) comprising a narrative of what the party is on about (which may or may not be in the form of a pleading), statements of evidence, documents relied upon, legal submissions, and anything else to be referred.

Defences, counterclaims and set-offs

A true counterclaim cannot be brought. The correct procedure is for the respondent to issue its own Notice of Adjudication so that the counterclaim is dealt with in parallel.

A set-off can be considered because of the very brief provisions of section 25 (2) which, I believe, are most important. It provides:

> **(2) An example of a dispute is a disagreement between the parties to a construction contract about whether or not an amount is payable under the contract (for example, a progress payment) *or the reasons given for non-payment of that amount*. (Emphasis added).**

CONFERENCE

The conference, if one is held, is not a hearing. It is not an opportunity to produce further evidence (as of right) and it is not an opportunity to cross-question each side.

I understand that the practice of adjudicators differs considerably and that some permit cross-examination.

My practice is to make it clear at the outset (when accepting appointment) that whether or not there is a conference will be decided in consultation with the parties

after the response is delivered and that if there is a conference I will come to it having read all of the material and the purpose of the conference will be to enable me to ask questions of those present for the purpose of enabling me to better understand the written material already produced. That is what happens, and it works very well.

OTHER DISCRETIONARY PROCEDURES PERMITTED BY SECTION 42

The list is long, but many powers are rarely used (other than setting deadlines for further submissions and convening a conference).

THE DETERMINATION

It seems to be fairly clear from the Act that only one Determination can be issued. Not an Interim Determination nor a Partial Determination or anything else.

I think, to be conservative, one must assume that (ironically) the adjudicator gets only one shot at it!

For this reason, if it looks as if it is going to be desirable to call for subsequent submissions on interest and costs, an adjudicator probably has to get the consent of all parties to do so before the Determination is issued. Otherwise he or she must do the best that can be done on the material available.

QUICK AND DIRTY OR, HOPEFULLY, FINAL?

Some commentators take the view that adjudication is not intended to be anything more than a quick and dirty approach to preserve cash flow, where that is justified, and for the real merits to be sorted out subsequently in the formal dispute procedures under the contract. There may be occasions when that approach is justified, but I take the view that if an adjudicator focuses conscientiously on all of the issues and does his or her best to anticipate what an arbitrator might do then the Determination is more likely to be treated by the parties as final. Also, there is the very important point that the amounts involved in some disputes may not justify a subsequent formal round and that is another good reason why I believe an adjudicator should try and get it right.

RECALCITRANT RESPONDENTS

While most respondents cooperate fully and appreciate that they may have to live with the Determination (either because the amount is small or the adjudicator probably got it right) there are a minority who will try “every trick in the book” to put off the dreadful day.

Fortunately, the Act shuts the door on most avenues which might otherwise be available and firmness on the part of the adjudicator will close the rest.

Obviously, there can be occasions when the most obstinate respondent also appears to be in the right, but respondents in that position seldom do themselves good service by acting like a defendant on a criminal charge (some of whom are also sometimes in the right!)

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17 June 2010