CONSTRUCTION LAW UPDATE – MAY 2017

By Nick Gillies

22 May 2017

This note summaries recent construction law decisions and developments in New Zealand.

Law	Issues	Decision / Principle
Amendments to the Construction Contracts Act 2002 For our previous updates on CCA amendments, see: February 2015 August 2016 October 2016	**Retentions** Trust requirements	From 31 March 2017 retentions under any new or renewed commercial construction contracts are deemed to be held on trust. Consequently, they can no longer be used as working capital, and are not available to other creditors if the payer becomes insolvent. At this stage, there is no *de minimis* threshold, meaning the trust status arises regardless of the size of the contract / retentions. It also applies to both principals and contractors who hold retentions. Retentions must be held as cash or "*other liquid assets that are readily converted into cash*". Alternatively, a "*complying instrument*" (eg an insurance policy or bond issued by a registered bank or licenced insurer and which complies with other criteria) can be put in place instead. Payment of retentions held on trust cannot be conditional on anything other than performance of the payee's obligations under the construction contract, nor can it be later than the date those obligations are performed. Payers must maintain proper accounting records of retentions held on trust (which the payee can inspect), and pay interest on late payment.

Law	Issues	Decision / Principle
		The payer can keep any investment interest but must also bear any losses. No fees or costs can be charged by the payer for administering the trust or instrument. Curiously, there are no statutory fines or penalties for non-compliance, although there would be a risk of civil liability for breach of the Act, as well as potential exposure under the Trustee Act 1956. Our observations to date indicate the sector is still grappling with these requirements and looking at range of approaches, from separate accounting facilities, to bonds or abandoning retentions altogether. The 'solution' will depend heavily on the size of the entities and the project in each case. There is still a long way to go before this change 'beds in' and before alternative instruments become readily available.
Auckland Electrical Solutions Ltd v The Warrington Group Ltd [2017] NZHC 366	**Res judicata** Set off Construction Contracts Act 2002	The High Court dismissed an application to set aside a statutory demand. The substantive merits had already been determined by the Disputes Tribunal, meaning it was too late to claim set off. The applicant (a contractor) had engaged the respondent (a subcontractor) to provide electrical services. The applicant alleged the respondent failed to issue payment schedules in response to certain payment claims. It originally sought summary judgment of the amounts claimed, which was refused, resulting in a costs order in favour of the applicant. Unusually, the applicant then began a Disputes Tribunal action seeking a declaration that it was not liable for a debt alleged by the respondent. The applicant chose not to appear at the Disputes Tribunal hearing, asserting (incorrectly) that it did not have jurisdiction to hear matters under the CCA.

Law	Issues	Decision / Principle
		Following the Disputes Tribunal decision in its favour, the respondent issued a statutory demand for the outstanding costs. It was too late for the applicant to claim set off or assert rights under the CCA. The fact it did not attend the Disputes Tribunal hearing was irrelevant. As there is a final court decision on the matter, that prevails and the applicant is prevented from re-litigating those issues (*res judicata*).
CJ Parker Construction Ltd (in liq) v Ketan [2017] NZCA 3	**Payment claim requirements** Insufficient explanation of amount claimed Construction Contracts Act 2002, s20(2)(e)	The Court of Appeal dismissed an application for summary judgment. The applicant (payee) had not issued a valid payment claim, and so could not enforce this as a debt due under the CCA. The respondent (the principal) had engaged the applicant (a contractor) to renovate a motel. Although a price was negotiated, payment terms were not, and no contract was executed. The parties fell out over payment. The applicant had issued an invoice, which purported to be a payment claim. The respondent disputed this in an email, which he later asserted was a payment schedule. The Court affirmed that, to be compliant under the CCA, "*a payment claim must be sufficiently detailed and comprehensible to enable the payee to understand [how the amount claimed was calculated]*". Only then can a payer decide whether to accept or dispute this in a payment schedule. As a general rule, that obligation (ie to explain how the sum claimed was calculated) is more onerous where pricing / payment terms are not agreed. In this case, setting out general figures without reference to consumables, rates, hours worked, etc was not sufficient to comply with s20(2)(e) of the CCA. It is not an answer to say the payer could have sought clarification; the obligation is on the payee.

Law	Issues	Decision / Principle
Dimension Data New Zealand Ltd v Commit Services Ltd [2017] NZHC 546	**Payment claim requirements** Set off Construction Contracts Act 2002, ss20 and 79	The High Court set aside a statutory demand for potential non-compliance with CCA payment claim requirements. Dimension Data entered into a master subcontract with Commit to install IT hardware/infrastructure and carry out incidental construction work on University of Otago projects. Commit issued a statutory demand for outstanding invoices, which Dimension Data disputed and claimed a set off for overpayments. Dimension Data did not issue payment schedules in response to the invoices, which Commit contended were payment claims. There was a genuine dispute about whether Commit's invoices were compliant payment claims under the CCA and whether s79 of the CCA prohibited Dimension Data raising a set off, which were not resolvable in an application to set aside a statutory demand. While the substantive compliance question was not determined, the decision illustrates the risks of falling into an informal course of dealing and losing sight of the strict CCA requirements.
Eltek Australia Pty Ltd v Firth and Hawkins Construction NI Ltd [2017] NZHC 480	**Adjudication where international arbitration clause** SA-2009 Judicial review of adjudicator's jurisdiction decision Construction Contracts Act 2002, s25(3)	Where a construction contract specifies international arbitration, s25(3) of the CCA precludes adjudication unless the parties consent. Hawkins subcontracted Eltek, based on the common SA-2009 standard form, to supply and install a power system for a data centre. The subcontract contained an international arbitration clause, but also provided (clause 13.2.1) that: "*Disputes may be dealt with by adjudication as provided for in the Construction Contracts Act 2002*". After a dispute arose over a system failure, Hawkins commenced adjudication. Eltek then sought a judicial review challenging the adjudicator's own decision that he had jurisdiction to hear the dispute on the basis that clause 13.2.1 constituted "consent" for the

Law	Issues	Decision / Principle
		purpose of s25(3). The Court concluded the adjudicator had jurisdiction: clause 13.2.1 permitted adjudication and conferred advance consent to this. The Court acknowledged that ordinarily, in a domestic context (ie no international arbitration and no requirement for consent), the same standard form clause (ie 13.2.1) simply recognises a statutory right of adjudication. However, this did not preclude a different interpretation of the same clause where there is international arbitration based on 'commercial common sense' grounds.

For more information, or to discuss any aspect of construction law, please contact:

Nick Gillies nick.gillies@heskethhenry.co.nz or +64 9 375 8767

Christina Bryant Christina.bryant@heskethhenry.co.nz or +64 9 375 8789

Helen MacFarlane helen.macfarlane@heskethhenry.co.nz or +64 9 375 8711