

Claiming interest in construction contract disputes

By Belinda Green

As readers will know, disputes arising under construction contracts are often resolved by reference to adjudication under the Construction Contracts Act 2002. A claimant will have various reasons for making a claim. But what a claimant wants out of the adjudication is almost always the same: they want the adjudicator to make a determination that the other party has to pay the claimant a sum of money. Because the money is overdue, most claimants will claim interest on that sum as well.

So, what is the basis for claiming interest when a dispute is before an adjudicator?

Interest under the contract

The starting point is always the terms of the contract. If the claimant can point to a particular clause in the contract that allows them to claim interest on overdue sums, then the adjudicator can make a determination that interest is payable at the contract rate as a debt due under the terms of the contract.

The respondent can raise the usual range of arguments to defeat a claim for interest. For example, the respondent might argue that the terms of the interest clause have not been met. Or if the interest rate under the contract is particularly high, a respondent might argue that it is a penalty and so unenforceable – although the scope of the law on penalties may be less wide than we previously thought, given the Supreme Court's decision in *127 Hobson Street Limited v Honey Bees Preschool Limited*.¹

Where the contract does not have an interest clause

If there is no contractual entitlement, ie where there is an applicable clause in the contract that allows the claimant to charge interest on an amount due, then all is not lost. A claimant may still be able to obtain a determination that the other party is liable to pay interest on the basis of a common law damages claim.

Interest as a common law damages claim

If there was any doubt before, the 2020 High Court decision in *Haskell Construction Limited v Ashcroft*² has confirmed that an adjudicator has the power to award damages for breach of contract. A claim for interest where there is no contractual right to claim interest is an example of a claim for common law damages.

In any claim for damages, the claimant needs to prove that it has suffered a loss.

In the case of an interest claim, the claimant might provide evidence that they themselves had to pay interest, for instance bank statements confirming the overdraft rate(s) applied on the overdue amount. Alternatively, a claimant might be able to show that they suffered some kind of opportunity loss in terms of the use that the money might otherwise have been put to. Once again, evidence of the loss claimed would need to be provided. This would usually be in the form of a letter from the claimant's banker confirming the rate(s) of interest that the claimant would have received on monies deposited in an interest bearing bank account over the period of the debt.

If sufficient evidence is put to the adjudicator to establish that the claimant has suffered a loss, the adjudicator has the power to make a determination that the respondent pay interest on the sum owed.

No ability to claim interest under the Interest on Money Claims Act 2016 damages claim

We sometimes see parties ask an adjudicator to award interest under the Interest on Money Claims Act 2016 (**IMC Act**).

The IMC Act provides for awards of interest as compensation for delays in payment of debts, damages, or other money claims.³ It applies to civil proceedings, such as contract-based claims.

However, the IMC Act only applies to *money judgments*, which are judgments or orders made by a *court*. The interpretation section of the IMC Act specifically provides that *court* does not include a tribunal or an arbitral award.⁴

This means that there is no statutory right to interest, and that an adjudicator does not have the

power to make an award of interest under the IMC Act. Any claim for an adjudicator to award interest under the IMC Act will therefore fail. Instead, the claimant needs to provide evidence of loss to establish a damages claim.

Read more

Want to know more?

The *Honey Bees* case and its effect on the law of penalties in our recent edition of ReSolution. We discussed the case of *Haskell* and the power of a Construction Contracts Act adjudicator to make awards for common law damages in our last issue of BuildLaw.

End Notes

¹ [2020] NZSC 53.

² [2020] NZHC 772.

³ Section 3 of the Interest on Money Claims Act 2016.

⁴ Section 6 of the Interest on Money Claims Act 2016.

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