

New and noteworthy Construction Contracts Act case law

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In this article, we review some noteworthy recent Construction Contracts Act 2002 (CCA) cases and provide key takeaways on the implications of these cases.

What you need to know

- A payment claim is not valid if it is not in “substantial compliance” with the requirement to include Form 1.
- An adjudicator has jurisdiction to award damages under a statutory remedy.
- Issue estoppel applies in respect of CCA adjudications - the same issues cannot be re-litigated in different adjudications.
- The grounds of dispute in a notice of adjudication may be superseded by the adjudication claim.

***Poly Wealth Trustee Ltd v Van Vlerken* [2020] NZHC 634**

“Substantial compliance” test includes whether prescribed Form 1 has been included with payment claim

In *Poly Wealth Trustee Ltd*, the High Court granted an application to set aside a statutory demand on the basis that the underlying payment claim was not valid due to it not being in substantial compliance with the requirements of s 20 (3) and (4) of the CCA. In particular, the payment claim was not accompanied by an adequate outline of the process for responding to the claim (as set out in the prescribed Form 1), and such failure could not be regarded as “trifling” or a mere technical quibble.

This case confirms that the “substantial compliance” test, which the Court has adopted in relation to other CCA requirements for payment claims (and payment schedules), extends to the requirement to have “Form 1” accompany a payment claim.

In our view best practice for contractors and subcontractors remains to ensure that their payment claims are accompanied by Form 1, exactly as prescribed by the CCA. Failure to provide Form 1 may invalidate the payment claim, depending on the extent of the departures from the prescribed form, and mean that the rights and remedies under the CCA in respect of payment claims are not available.



Haskell Construction v Ashcroft and Alpine Prime Properties Ltd [2020] NZHC 772

Adjudicators have jurisdiction to award damages under a statutory remedy

Haskell Construction Limited v Ashcroft concerned an application for judicial review of an adjudicator's acceptance of an adjudication, where the parties had been through two prior adjudications. In the third adjudication, damages were claimed for breach of implied warranties under the Building Act. The High Court held that an award of these damages was within the adjudicator's jurisdiction. The Court also confirmed that issue estoppel applies to CCA adjudications, although it did not arise on the facts of this case.

Both points considered by the Court have important practical implications. All parties should be alive to the possibility of claims under statute, and statutory damages, being made in an adjudication. Claimants also need to know that they get "one shot" at an adjudication on an issue. Issues cannot be re-litigated in subsequent adjudications, albeit the contractual dispute processes will still remain available for a party unhappy with an adjudication outcome.



***Alaska Construction and Interiors Auckland Ltd v Lahatte* [2020] NZH1056**

Grounds of dispute in a notice of adjudication may be superseded by the adjudication claim

In *Alaska Construction and Interiors Auckland Ltd v Lahatte*, the Court held that the grounds of dispute in a notice of adjudication may be superseded by the adjudication claim. In this case a "default" payment claim was sought in the adjudication claim but had not been raised in the notice of adjudication. In fact, the date for issue of the payment schedule had not even expired at the date of the notice of adjudication. Woolford J referred to s 36(2)(a) of the CCA which contains the words "to the extent that it remains relevant" as an indication that the dispute set out in the notice of adjudication may be superseded by the adjudication claim. He also noted that section 45(c) of the CCA does not require the adjudicator to consider the notice.

It has been widely accepted in the industry that the notice of adjudication sets the bounds of an adjudication, and a claimant is confined to the dispute as framed in the notice of adjudication. That view may not be correct in light of *Alaska*.

In *Alaska*, the remedy sought in the notice of adjudication (payment of a specified sum of money) broadly matched the remedy sought in the adjudication claim, albeit that the legal grounds for the claim changed to add the "default" claim which arose in the period after issue of the notice. It is not clear whether the Court's reasoning would apply if the remedy sought in the adjudication claim was entirely different to that sought in the notice. In our view it would still be prudent for a claimant to "match" the adjudication claim to the notice of adjudication, to avoid jurisdictional arguments like those that arose in *Alaska*. In practice, this means being largely prepared with the adjudication claim before issuing the notice of adjudication. This is often prudent in any event to ensure a claimant is sufficiently prepared for the adjudication before issuing the notice.

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