

# What sets jurisdiction in construction disputes?

By Janine Stewart and Mariam Baho

**The issue of how an adjudicator's jurisdiction is set under the Construction Contracts Act 2002 (CCA) has long vexed parties to construction disputes, not least the adjudicators themselves. While it would be helpful to have clear authority on this point, a recent court decision further muddies the waters.**

It is commonly understood that a CCA adjudication requires an adjudicator to determine a dispute on the papers. This process is triggered by an adjudication notice, followed closely by an adjudication claim. But which of these documents sets the adjudicator's jurisdiction? And are the dispute parameters set in stone at the outset?

The recent decision of *Alaska Construction + Interiors Auckland Limited v Lahatte & Anor* [2020] NZHC 1056 is contrary to previous authority, *Spark It Up Limited v Dimac Contractors Limited* [2009] BCL 498, and current industry practice.

John Walton of Bankside Chambers explored this issue in his article *Is jurisdiction limited by the notice of adjudication?* Walton noted that while the claimant does not have carte blanche to depart from the notice, it is clear from s 36 that the notice is superseded by the claim.

In this article, we advance the approach that jurisdiction is set in the adjudication notice.

## What sets jurisdiction?

Several factors in the CCA indicate the adjudicator's jurisdiction is set in the adjudication notice:

- In initiating an adjudication (s 28), the adjudication notice must state the nature and a brief description of the dispute and the parties involved, and where and when the dispute arose. The notice is the starting point of the process that defines the dispute.
- The provision governing selection of an adjudicator (s 33) states that a request for a person to act as an adjudicator must accompany the notice (s 33(5)(b)). Accordingly, the adjudication notice is the only substantive document presented to a person requested to act as an adjudicator before deciding whether to accept appointment.

- The existing dispute in writing (the adjudication claim) is then referred to the adjudicator (s 36). The role of the adjudication claim is to specify the nature or the grounds of the dispute, thereby crystallising the dispute. It is not an opportunity for the claimant to vary the dispute, changing the adjudicator's jurisdiction.
- The jurisdiction of adjudicators (s 38) is defined in terms of the dispute that has been referred, and the first outline of the dispute is contained in the adjudication notice. It follows that the dispute referred to adjudication – and therefore the jurisdiction of the adjudicator – is set in the adjudication notice, being the first document to identify the dispute.

## The Spark It Up decision

Prior to *Alaska Construction*, the *Spark It Up* decision held the adjudication notice set the adjudicator's jurisdiction, so long as it complied with the s 28 requirements. *Spark It Up* followed the line of reasoning in *Horizon Investments v Parker Construction Management* with a focus on the scope of the dispute, which is first outlined in the adjudication notice.

In *Spark It Up*, the principal applied for judicial review of the determination. The adjudicator had found in favour of Dimac Contractors Limited (**Dimac**), relying on invoices which were not the subject of the adjudication notice and came to light only after the claim was filed. Dimac notified the adjudicator that it had referred to the wrong invoices in the adjudication notice and, as a result, the adjudicator requested an amended claim (which Dimac then filed).

The court found the adjudicator did not have jurisdiction to base his determination on invoices that did not form the basis of the adjudication notice. The invoices were not within his jurisdiction, as they were not part of the dispute referred to him. This is consistent with the interpretation



that the document defining the dispute, and accordingly jurisdiction, is the adjudication notice.

## Impact of Alaska Construction

Contrary to *Spark It Up*, the *Alaska Construction* decision found the adjudication notice may be superseded by the adjudication claim.

In that case, the head contractor Alaska Construction + Interiors Auckland Limited applied for judicial review of the adjudicator's determination in favour of subcontractor Lovich Floors Limited.

Alaska argued that the adjudicator had acted beyond the scope of his jurisdiction by basing his decision on a payment claim which was first mentioned by Lovich only in the adjudication claim. Alaska alleged Lovich unilaterally modified the dispute by leaving the later payment claim out of the adjudication notice and only later including it in the adjudication claim.

In deciding that jurisdiction is set by the adjudication claim (rather than the notice), the court found that:

- the adjudication notice is the document which initiates the adjudication and has no further relevance or significance;
- s 36(2) states the document which specifies the nature or grounds of the dispute is the adjudication claim and not the adjudication notice;
- the words "to the extent that it remains relevant" in s 36(2)(a) clearly indicate that the adjudication notice may be superseded by the adjudication claim; and
- the matters an adjudicator must consider

(s45(c)) do not include a requirement for an adjudicator to consider the adjudication notice.

However, like any statute, the CCA must be read as a whole. The reasoning in *Alaska Construction* should be tested, as undue focus appears to have been placed on ss 36 and 45 in deciding that jurisdiction is set in the adjudication claim without clear appreciation that the dispute is defined by the adjudication notice in the first instance.

## Where to from here?

The CCA contains ambiguous wording and the conflicting case law reflects this. *Spark It Up* adopts the previously settled view that the dispute that has been referred must be in the adjudication notice. On the other hand, *Alaska Construction* places more emphasis on the document that "refers" the dispute to the adjudicator rather than the notice which initiates the process and defines the parameters of the dispute.

The *Alaska Construction* approach is contrary to current industry practice and leads to further uncertainty about an adjudicator's jurisdiction. This is a frequent point of contention in both the adjudication itself and when opposing the enforcement of determinations.

It is yet to be seen how the courts and adjudicators will deal with this issue and whether *Alaska Construction* will be applied or overturned. Legislative intervention may be required to clarify the question of how jurisdiction is set.

In the interim, parties should exercise caution and are advised to proceed as though jurisdiction is set in the notice.

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