Are you being served? Service of payment claims under the CCA

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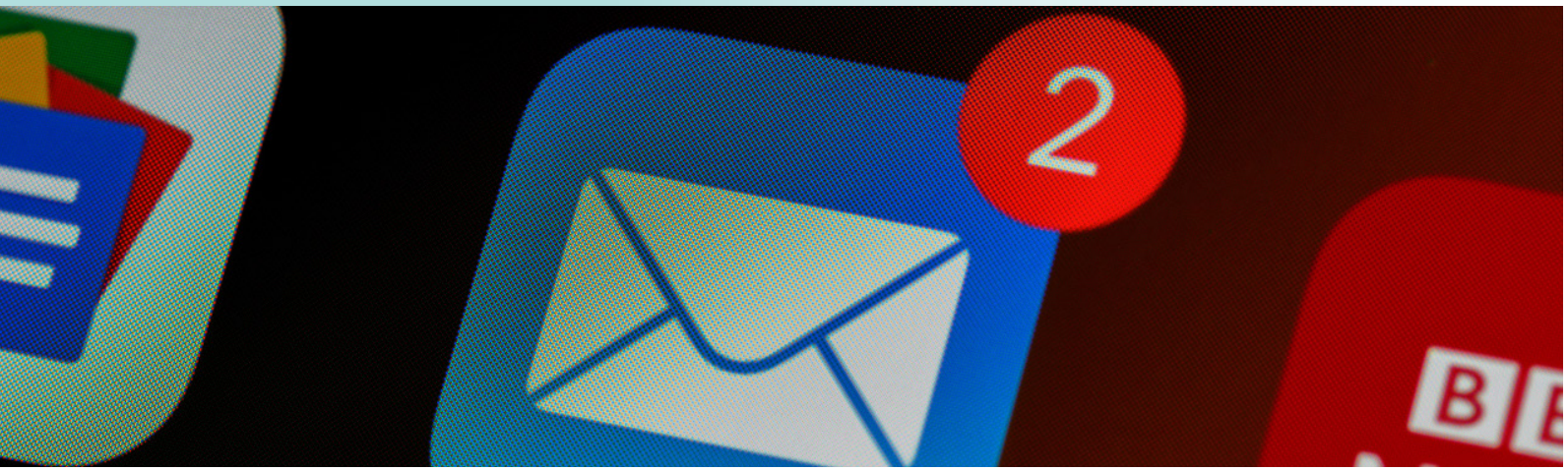

When the Construction Contracts Act 2002 (CCA) was introduced, email communication was not nearly as prevalent as it is now, generally being the preferred means of communication.

Two recent decisions highlight the importance of ensuring that construction contracts adequately deal with the process for achieving service by email, and that correct procedure is followed throughout the whole project. In the absence of clarity and strict compliance, recipients of payment claims may (and frequently do) raise service issues to avoid the sudden death payment regime under the CCA.

Service of Payment Claims

Section 20 CCA provides for the service of payment claims.

Service under the CCA is governed by s 80, which provides that service is sufficiently effected if a notice or document is delivered to that person, it is left at or posted to the person's last know place of residence or business, or if it is sent in the manner prescribed by regulations.

Regulation 9(1)(b) of the Construction Contracts Regulations permits service by email if regulation 10 is complied with. Regulation 10 provides that a person must consent to receiving information by electronic communication (Regulation 10(1)(b)), but also notes that consent *may be inferred from a person's conduct*.

Dempsey Wood Civil Ltd v Concrete Structures (NZ) Ltd [2022] NZHC 168

Dempsey Wood Civil Ltd (**DWC**) subcontracted Concrete Structures (NZ) Ltd (**CSL**) for the construction of the Whau Bridge, in New Lynn. The contract stated that DWC must pay the amount specified in a payment claim or issue a payment schedule in response by the 20th of the following month. Notices were deemed to be given if sent by post, fax, email, or delivered to the address in the contract or as subsequently advised in writing. No email address was given for service in the contract itself.

Part way through the project, DWC sent an email to suppliers requesting that all invoices and statements be sent to a nominated email address for its accounts department.

CSL's first eight payment claims were emailed to both DWC's accounts department and to DWC's

project manager. The ninth payment claim (**PC9**) was sent only to the project manager by email on 29 January 2021. The project manager gave evidence that he had not seen the email until 1 April, at which point a payment schedule was promptly issued on 6 April containing deductions from PC9.

CSL served a statutory demand on DWC for the balance of PC9 on the basis that DWC had not provided a valid payment schedule within the required timeframe, and the balance was enforceable as a debt due. DWC applied to set aside the demand on the basis that it was reasonably arguable that either PC9 was not served properly, or, in the alternative, that service only occurred on 1 April, when the project manager actually became aware of CSL's email.

The Court found it was reasonably arguable that the Contract allowed for service by email. The question then became to which email address/es. Two emails had been sent by DWC to its suppliers including CSL well prior to PC9 stating that invoices were to be sent to DWC's accounts' email address. The Court considered it was reasonably arguable that a direction in respect of invoices included payment claims. CSL had sent all of its previous payment claims both to the accounts' address and to the project manager.

The Court considered that if it was required to determine whether consent could be inferred, DWC's consent to receiving payment claims by email to the project manager could be inferred on the basis the email was also copied to the accounts team. CSL's evidence was that it had made a mistake by not emailing the accounts' address when it came to PC9, casting doubt on the assertion DWC consented to PC9 being served only on the project manager. As a result, the statutory demand was set aside on the basis PC9 was not properly served.

This case illustrates the importance of ensuring specified email addresses are set out as being acceptable for service (and that these are kept up to date) and followed during a project.

Melbourne Ltd v Bartlett Concrete Placing Ltd [2022] NZHC 1786

Melbourne Ltd (**Melbourne**), itself a construction company, contracted Bartlett Concrete Placing (**BCP**) to undertake certain construction works.

BCP issued monthly payment claims throughout the course of the project. All payment claims were issued by email and were paid in full, with the exception of the final to payment claims. Melbourne did not issue a payment schedule in response to the final two payment claims, or make payment. BCP issued a statutory demand seeking payment as a debt due.

The contract did not address service by email.

Melbourne claimed that despite actually receiving and having notice of the payment claims, they were not validly served because Melbourne had not consented to service by email and strict compliance with Regulations 9 and 10 were required. Melbourne claimed that if a document had legal consequences it was required to be delivered in person, and there was no consent to service of documents with legal implications by email.

The Court was satisfied that Melbourne's consent could be inferred from its conduct. It was influenced by the following factors:

- The parties were commercial parties, both experienced in the construction industry;
- There had been a regular course of dealings conducted by email;
- Negotiation of the contract had been carried out by email;
- Previous payment claims had been received by email and paid without complaint;
- The payment claims had clearly stated they were payment claims and complied with all requirements for issuing a payment claim.

The Court considered it was inconceivable that an experienced contractor such as Melbourne was not familiar with the way the CCA operates or did not understand the consequences of a payment claim. The Court was also influenced by the fact that Melbourne had actual notice of the payment claim.

Melbourne raised several other matters in support of its application to set aside the statutory demand. It asserted it was solvent and funds had been transferred into a solicitor's trust account, pending resolution of the dispute. The Court rejected this argument, noting that solvency alone is not a ground to resist a statutory demand, or the "pay now, argue later" regime under the CCA. This rationale equally applied to funds being paid into a solicitors trust account. In any event, Melbourne had not proved that it was solvent. The application to set aside the statutory demand was dismissed.

*Hesketh Henry acted for the successful respondent (payment claim issuer) in this proceeding.

Our comment

Parties to a construction contract should carefully check their general conditions of contract for service of notices, and ensure the provisions are strictly adhered to. Failure to do so can lead to unnecessary and costly disputes, including by parties seeking to avoid the sudden death regime under the CCA.

Section 388 of the Companies Act 1993 permits service of documents (other than documents in legal proceeding) by email to a company at an email address that is used by the company. It would be sensible for the CCA to be updated to reflect this, where companies are concerned, or for parties to consider incorporating s 388 Companies Act into their contract.

If you have any questions about payment claims, payment schedules, or this judgment, please get in touch with our Construction Team.

Disclaimer: The information contained in this article is current at the date of publishing and is of a general nature. It should be used as a guide only and not as a substitute for obtaining legal advice. Specific legal advice should be sought where required.

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