



It's not all about payment – broadening the scope of the Construction Contracts Act

**Presentation to Nelson Chamber of
Commerce members**

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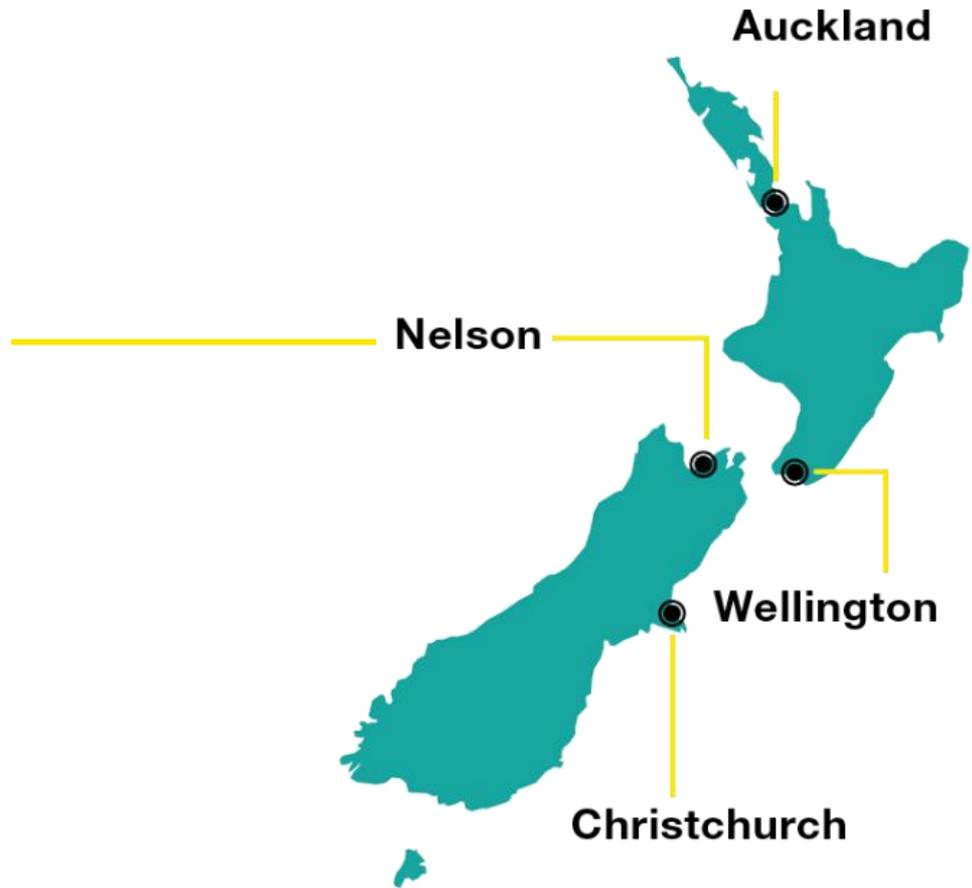
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Purpose of the Construction Contracts Amendment Bill 2013

- Introduced January 2013 to amend the Construction Contracts Act 2002 (**CCA**) to:
 - extends the scope of the CCA to apply to design, engineering, and quantity surveying work from 1 September 2016;
 - refine the adjudication procedures;
 - Remove most distinctions between residential and commercial contracts

- New subpart 2A of Part 2 inserted by supplementary order paper in March 2015 to provide a new regime for the treatment of retention money, to come into force 31 March 2017

Related services – the impact of designers coming under the Act

A broader definition of “construction work”

- Includes “related services” – design, engineering, quantity surveying work
- Operations that “directly affected the quality of the building work”:
Commerce Committee
- Amendment Bill introduces section 6(1A):

*(1A) **Construction work** includes—*

(a) design or engineering work carried out in New Zealand in respect of work of the kind referred to in subsection (1)(a) to (d) and (f):

(b) quantity surveying work carried out in New Zealand in respect of work of the kind referred to in subsection (1)(a) to (g).

New definition for “construction site”

- To ensure design, engineering work, and quantity surveying work is covered by the CCA, the definition of “construction site” has also been amended:

“construction site” means—

- (a) the land on which the claimant has been carrying out construction work under the relevant construction contract;*
- (b) in relation to related services, means the land or premises that are the subject of the contract.*

Concerns for designers, engineers, quantity surveyors

- Disputes between clients and designers, engineers or quantity surveyors are “inherently different” to types of disputes CCA designed to resolve.
- Is “rough and ready” justice and a “pay now, argue later” dispute resolution service best suited to claims akin to tortious claims?
- Adjudicators’ determinations on rights and obligations under contracts will be enforceable in the District Court under the amended CCA.
- Limited grounds to oppose entry into judgment of adjudicator’s determination.
- Do current invoices meet the high standard required under section 20(2)(c) of the CCA for them to be relied on as payment claims?

Changes to the adjudication process

Old time frames and steps (before these amendments)

Timeframe	Step
Anytime	Claimant serves notice of adjudication
As soon as practicable	Appointment of adjudicator...
Within 5 working days	If the parties can agree on an adjudicator
Within 5 working days	If the parties can agree on a nominating body to nominate an adjudicator
Within 5 working days	If the parties can't agree on anything and the claimant requests an authorised nominating authority to nominate an adjudicator
Within a further 2 working days	Person requested to act as adjudicator must serve notice of acceptance
Within a further 5 working days	Claimant must serve adjudication claim and supporting documents
Within a further 5 working days	Respondent may serve a written response and any supporting documents
Within a further 20 working days	Arbitrator must issue a determination

Key change 1: What can be referred to adjudication

- “Dispute” has been clarified.

Section 25(2):

*“An example of a **dispute** is a disagreement between the parties to a construction contract about –*

- (a) Whether an amount is payable under the contract (for example a progress payment) or the reasons given for non-payment of that amount; or*
- (b) Whether there has been a breach of a term of the contract (including a term implied into the contract under the Building Act 2004 or any other enactment”*



- And, all adjudicator’s determinations can now be enforced in the District Court

Key change 2: Notice of Adjudication

- New prescribed content ((Construction Contracts Amendment Regulations 2015, Schedule 1, form 2)
- Must now include:
 - Statement of the rights and obligations of the parties
 - Explanation of the adjudication process
- Whether or not the recipient is residential/commercial

“Important notice

“This is a notice of adjudication under the Construction Contracts Act 2002 (the **Act**).

“The person who sent the notice (the **claimant**) has a dispute with you and is giving you notice that they are going to refer the dispute for adjudication.

“**What should I do with this notice of adjudication?**

“You should read the notice thoroughly. This notice provides a brief explanation of the adjudication process and your rights and obligations in the adjudication.

“This notice summarises the Act, but is not a substitute for the Act.

“**Important: If there is anything in this notice that you do not understand or if you want further advice about what to do, you should consult a lawyer immediately.**

Key change 3: Time frames

- Extending the timeframe for selecting an adjudicator to “2 to 5 working days” (to pause the process so claimants can’t rush adjudication for tactical reasons)
- Respondents may be allowed extra time to respond if:
 - Adjudicator considers it necessary, given size and complexity of claim
 - adjudicator considers the claim was served with “undue haste” (to avoid ‘ambush’ claims)
- BUT, they must apply for extra time, before the usual deadline.



Key change 4: Adjudicator's notice of acceptance

- New prescribed form (Construction Contracts Amendment Regulations 2015, Schedule 1, form 2A). Will need to include:
 - A statement that the adjudicator has accepted the appointment;
 - If the adjudicator has been appointed through a nominating body, a statement that this is because the parties were unable to agree on who to appoint;
 - **Confirmation the adjudicator meets the eligibility criteria under section 34 of the CCA;**
 - All timeframes for adjudication clearly set out and a statement as to which of them have already commenced;
 - An indication of which timeframes the respondent can ask the adjudicator to extend if necessary;
 - An estimated cost of the adjudication process; and
 - A statement that the parties have alternative options for seeking redress (including mediation and the courts), if they do not wish to continue the adjudication process.

Key change 5: “Reply” and “rejoinder”

- Claimants will now have a right to reply to an adjudication response, within a further 5 working days
- But, the adjudicator can:
 - Refuse to consider any new materials or issues in a reply
 - Allow the respondent up to 2 working days to serve a “rejoinder”



Key change 6: Owners now able to challenge adjudicator's decision

Owners, who are not respondents, will now be able to apply to the District Court to review an adjudicator's determination in two circumstances:

- Where the adjudicator has made a determination that the owner is jointly and severally liable with the respondent to make a payment to the claimant;
- Where the adjudicator has approved the issuing of a charging order in respect of the construction site.

Applications for review must be filed within 20 working days after the date of determination (unless extended by the Court).

Opposing determination being entered as a judgment – s 74(2)



Grounds:

- That the amount payable under the adjudicator's determination has been paid to the plaintiff by the defendant;
- That the contract to which the adjudicator's determination relates is not a construction contract to which the CCA applies;
- That a condition imposed by the adjudicator in his or her determination has not been met;
- NEW: That due to a change in circumstances, which was not caused in any part by the defendant, it is not possible to comply with the adjudicator's determination;
- NEW: That the date (if any) specified in the adjudicator's determination for compliance has not yet passed.

NOTE: Time frame for opposing has been reduced from 15 working days to 5.

Time frames and steps, following amendments

Timeframe	Step
Anytime	Claimant serves notice of adjudication [On new prescribed form. Same for residential and commercial.] [Now clearer what disputes are allowed]
As soon as practicable	Appointment of adjudicator
Within 5 working days	If the parties can agree on an adjudicator
Within <u>2-5</u> working days	If the parties can agree on a nominating body to nominate an adjudicator
	If the parties can't agree on anything and the claimant requests an authorised nominating authority to nominate an adjudicator
Within a further 2 working days	Person requested to act as adjudicator must serve notice of acceptance [On new prescribed form]
Within a further 5 working days	Claimant must serve adjudication claim and supporting documents
Within a further 5 working days <u>[or longer if you apply for extra time before that 5 days is up]</u>	Respondent may serve a written response and any supporting documents
Within a further 5 working days	<u>Respondent's written reply and any supporting documents</u>
Within 1-2 further working days (as allowed by adjudicator)	<u>Claimant's written rejoinder (if allowed by adjudicator)</u>
Within a 20 working days of the respondent's response	Arbitrator must issue a determination

Retention trusts – the New Zealand proposal placed in an international perspective

What are retentions?

- In their purest form, a performance security for
 - late completion (ie, to pay liquidated damages);
 - non-compliant / defective work;
 - non-completion due to insolvency of contracting party.
- Used instead of bank guarantees, performance bonds, default insurance (the latter is not common in New Zealand)
- No statutory limits on the amounts that may be retained in New Zealand (*California & Queensland, for example, have a 5% cap (some restrictions)*) – in New Zealand, this is purely a matter of contract:
 - Typically, a sliding scale for head contractors 10% to 1.75%, with a maximum \$200,000 cap.
 - But, frequently, 10% flat retention rate for subcontractors

The problem

- Gap between the retentions deducted from the head contractor, and those from the subcontractors meant retentions have been used as cash flow financing



- In the Mainzeal receivership, Mainzeal had \$11m owing as retentions by its clients, but owed \$18m in retentions to subcontractors. Subcontractors had an unsecured claim for this \$7m gap

The proposed changes

- In force from 31 March 2017
 - *But query this date given that the 1 July 2015 start date for other changes has passed*

- “Commercial construction contracts” only
 - *Note the difference between this definition & new Building Act residential / commercial distinction*
 - *Residential developers, investors, trusts could be caught*

- Amount of retention money to be more than a *de minimis* amount prescribed by regulation

The proposed changes

- Retentions must be held “on trust” for the benefit of the payee
 - *Does not need to pay into a separate trust account*
 - *May commingle with other money*

But is it wise to do so?

- Payer must keep “proper accounting records” of all retention money

- Payer must not appropriate any retention money to a use other than to “remedy defects in the performance” of the payee
 - *Late performance (ie, application to liquidated damages) / non-performance (ie, insolvency) caught by this?*

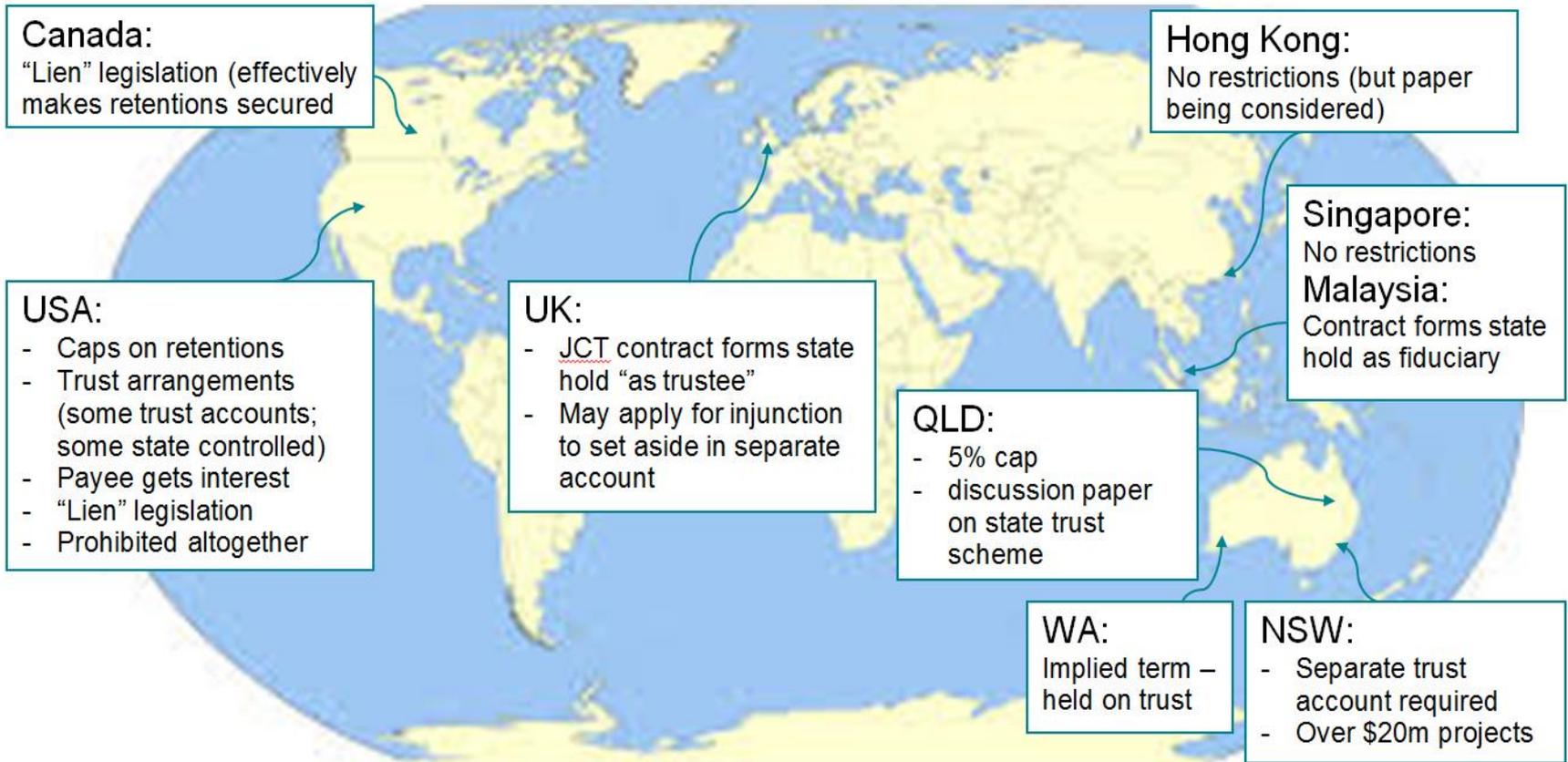
The proposed changes

- Payer keeps interest earned while on trust, but late payment interest default mechanism included

- Prohibited to have a contract term that:
 - Makes the payment of retention money conditional on anything other than payee's performance;
 - Makes the date for payment later than the date the payee has performed its obligations;
 - Requires any fees or costs for administration.

So, no longer possible to link retentions under a subcontract to completion of the head contract.

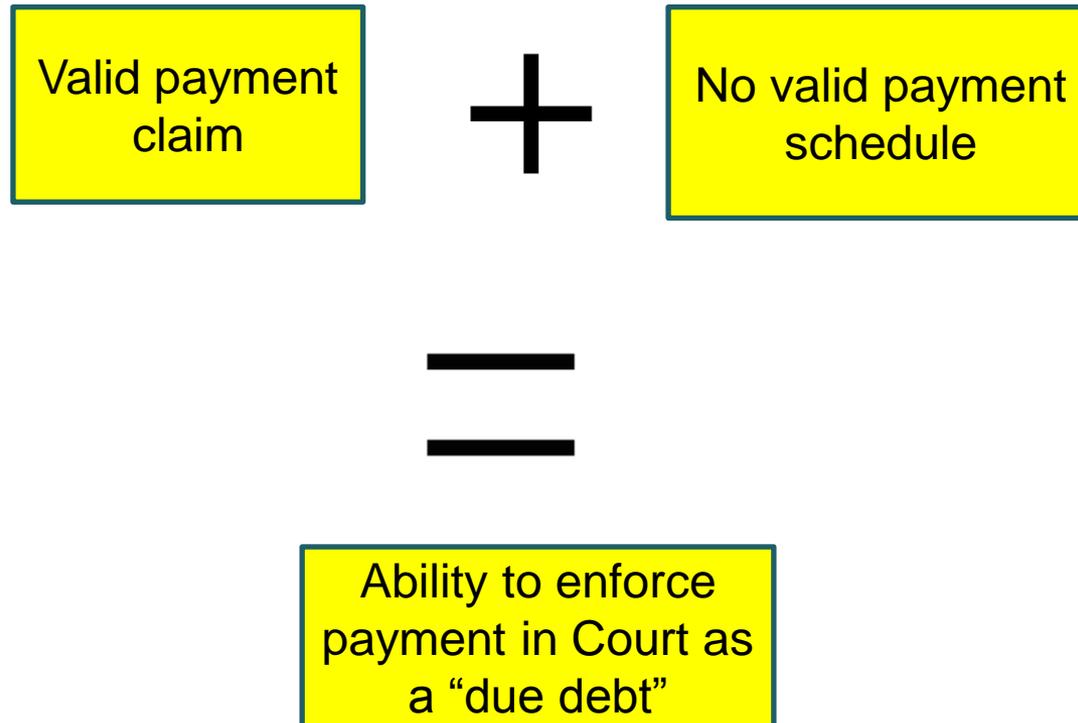
International comparisons



Case law update – invalid payment claims

Payment claims and payment schedules - recap

- “Pay now argue later” regime under the Construction Contracts Act



Section 20(2)(c) of the CCA – what makes a payment claim valid?

- Section 20(2)(c) of the Act provides:
 - (2) *A payment claim must —*
 - (a) *be in writing; and*
 - (b) *contain sufficient details to identify the construction contract to which the progress payment relates; and*
 - (c) *identify the construction work and the relevant period to which the progress payment relates; and*
 - (d) *indicate a claimed amount and the due date for payment; and*
 - (e) *indicate the manner in which the payee calculated the claimed amount; and*
 - (f) *state that it is made under this Act.*
 - (3) *Be accompanied by an outline of the consequences of not responding or not paying the amount:*
- New prescribed form (Construction Contracts Amendment Regulations 2015, Schedule 1, form 1)

“Identifying the construction work”

Bussell Construction Limited v Manchester Industrial Holdings Limited
[2015] NZHC 858

- Liquidation proceedings stayed while adjudicator’s decision reviewed – issue raised over validity of payment claim

- High Court found:
 - That the fact that a respondent may be able to produce a payment schedule detailing the work carried out by the claimant does not relieve a claimant from complying with obligation to “identify the construction work” for which each progress claim is made

 - That the mere identification of individual workmen, hourly rates, and hours worked did not identify any particular construction work.

“Identifying the construction work”

Can Build Limited v Kirkpatrick and Purvis as trustees of the Laura Kirkpatrick Family Trust [2015] NZHC 1161

- Summary judgment proceedings dismissed as documents relied on by CBL were not payment claims

Labour		
Quantity	Rate	Total
1184.75	\$55	\$65,161.31
Material		
		\$34,772.37

Can Build Limited v Kirkpatrick and Purvis as trustees of the Laura Kirkpatrick Family Trust [2015] NZHC 1161 cont...

- High Court found:
 - Technical quibbles cannot be allowed to vitiate a payment claim that substantively complied with section 20(2)(c) of the Act.
 - Bald statements of hours worked by various persons and materials used will not be sufficient to identify the construction work undertaken

Defects in payment claims cannot be cured after the fact



Defects in payment claims cannot be cured:

- by serving a subsequent or substituted payment claim: *Loveridge Ltd v Watts & Hughes Construction Ltd* (HC Tauranga, CIV-2011-470-275, 29 September 2011); or
- by the later provision of information which should have been provided with the defective payment claim: *Can Build Limited*

“The attempted bolstering of a defective payment claim can only cause unnecessary confusion. Apart from any other difficulty it might cause, there would be an immediate difficulty in deciding the deadline for the filing of a payment schedule.” (Associate Judge Matthews in Can Build Limited).

Questions?