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Construction Contracts Act to be strengthened

The Construction Contracts Act 2002 (CCA) will have a longer reach and a stronger punch as a result of proposed changes introduced to the House earlier this year.

The CCA Amendment Bill, now awaiting its first reading, will bring more people within the CCA's scope, establish consistency between commercial and residential construction contracts and expand the adjudication and enforcement process to apply to non-monetary disputes.

The changes are intended to apply from 1 November 2013

Key changes

The three key changes:

- broaden the definition of "construction work" to include design, engineering and quantity surveying
- largely remove the distinction between residential and commercial contracts, and
- expand the adjudication and enforcement process to apply to non-monetary disputes.

Definition of "construction work"

Currently, only those parties actually involved in the physical construction of a building are subject to the CCA. This means there is one process for resolving disputes with building contractors and a different process for resolving disputes with consultants (e.g. architects).

The proposal in the Bill is to expand the application of the CCA to design, engineering and/or quantity surveying functions. The hope is that binding all parties involved in the construction process to the CCA will deliver quicker and more consistent outcomes, enabling construction to get back on track faster.

However, introducing the prospect of more parties also triggers the prospect of multiple adjudications on the same project and with it the potential for inconsistent outcomes on overlapping issues. And there is no definition of “design, engineering or quantity surveying” in the Bill, potentially giving it wide application. Without defined boundaries, there is the potential for squabbles over what is intended to be covered by the CCA. We think clarification of this point is required.

Removal of the distinction between residential and commercial contracts

The CCA currently treats residential contracts differently to commercial contracts. The Bill would remove this distinction so that:

- the default provisions for progress payments apply to all construction contracts, including residential contracts
- contractors on residential jobs can suspend work for non-payment
- adjudication determinations given in respect of residential contracts can be enforced as judgments, and
- the information sheet explaining the adjudication process and consequences of failing to pay is served on all payers.

The one difference to remain is that contractors cannot put a charging order over a residential property constructed for its owner or over a residential property constructed for a family trust in which a beneficiary of the trust is to live.

Extended and streamlined adjudication and enforcement process

The Bill would:

- reduce to five days (from 15) the time a defendant has to oppose an application to have an adjudication determination entered, and
- make all adjudicators’ determinations enforceable, including non-monetary disputes about the rights and obligations of a contracting party (now only those determinations which trigger a financial liability can be registered and enforced in the High Court).

We have no issue with the first change but question the wisdom of the second. Specifically, have all the practicalities of enforcing non-monetary judgements, on a basis which is binding but not final, been thought through and how strongly has the industry called for this change?

Rights and obligations issues can be very important and involve difficult disputes about such things as site access, the scope of the work, non-compensable delays, work quality, fitness for purpose, compliance issues (e.g. relating to bonds and guarantees) and even more importantly, rights to terminate.

The original purpose of the CCA was to secure cash flow, not to provide a short form dispute resolution process for **all** construction contract disputes. It is not clear in the Bill how adjudicators’ decisions on non-monetary issues, which are not final, are to be enforced and to mesh with normal contract administration and physical practicalities.

Cash can be repaid if an arbitral tribunal or court ultimately reaches a different view to the adjudicator (absent solvency issues). However, work carried out based on an adjudicator’s determination about rights and obligations may be much more difficult to deal with and to unravel if that determination is later found to be wrong.

The bigger picture

The review of the CCA sits alongside a suite of proposed amendments to the Building Act 2004 aimed at delivering a productive, efficient and accountable building sector. It also follows a Law Commission review into joint and several liability after a decade of leaky building litigation has shown that insolvency puts many one-man-band operations beyond the reach of liability claims, leaving the “last man standing” to pay the full share.

Against this background, the proposed amended CCA is going to be very important for what it does to enable homeowners and contractors to hold others to account through written contracts. In particular, it will be interesting to see whether the new enforcement provisions really do see successful claimants paid out in a timely fashion.

Another hope is that the dispute resolution procedure available under the Act will encourage participants to resolve disputes under contract rather than through lengthy litigation in court, where the problems with joint and several liability are encountered.

| Next steps

The Bill is expected to follow normal processes, which means that there will be an opportunity to make submissions. We look forward to seeing the Bill's final shape and will keep you updated on progress.

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