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Guiding reform of adjudication in NZ

Access to justice is a fundamental tenet of the rule of law.

The New Zealand construction industry is an economic powerhouse. According to the Infometrics *2022 Regional Economic Profile* report, the industry was the third-largest contributor to New Zealand's GDP in 2022, accounting for 6.9% or $24.6 billion.

The problem for this powerhouse industry is that building contracts have traditionally been a fertile source of dispute, which affects its economic efficiency and financial stability.

Until the very latter part of the last century, laissez-faire and freedom of contract between "men of full age and competent understanding" were sacrosanct. Neither Parliament nor the Courts would have presumed to interfere in the contractual arrangements between parties and would hold parties to bargains freely entered into and untainted by vitiating factors.

However, during the 1990s, abuse of payment and cashflow

problems became significant issues for the construction industry in Aotearoa New Zealand. Payments were typically made in arrears and protections for contractors were few. There was no common law right to progress payments or to suspend work for non-payment. In that setting, contractors were starved of cashflow and required to keep working while still exposed to downstream payment obligations to suppliers and subcontractors, and so on down the contracting chain. Contractors and subcontractors became, by default, unsecured financiers for many building and construction projects.

In February 2001, Hartner Construction, one of New Zealand's then-largest construction companies, collapsed, taking many subcontractors, employees, and clients in its wake, with debts totalling more than $30 million and no funds available for unsecured creditors and subcontractors.

Into that milieu came the Construction Contracts Act 2002 (the Act) with the stated purpose of facilitating regular and timely payments, providing for the speedy resolution of disputes, and providing remedies for recovery of payments under a construction contract.

The Act was radical and overturned long-established principles. The prohibition against pay-when-paid/pay-if-paid clauses was seen by some as an interference with the freedom of contract. Most fair-minded observers today, however, would agree that the reform was long overdue, as was the right to progress payments and suspension of work if progress payments were withheld.

When the Act came into force in April 2003, it reformed the law relating to construction contracts, heralding a new payment morality, and dramatically changed the face of dispute resolution in the construction industry in New Zealand.

Although the general success of adjudication is regarded as an accepted fact, the basis for that view has been largely anecdotal. The confidential nature of adjudication as an alternative dispute resolution method has made it difficult to know how often and how

effectively it is used in New Zealand, until now.

Disputes

The Building Disputes Tribunal | Te Taraipiunara Tautohe Hanga Whare (BDT) has dealt with thousands of building and construction disputes. Having established itself as the leading ‘authorised nominating authority’ for adjudication services, BDT has garnered this knowledge and the data it has collected to publish a report that tracks adjudication trends over the past 20 years, offering fascinating insights.

It shows that adjudication is a credible and effective dispute resolution process in its own right. Claims dealt with to date range from as little as $1310 to $106m. Nearly one-third of all cases have been brought under BDT’s fixed-fee, low-value (LVC) scheme. Almost half of all claimants are main contractors.

Notwithstanding the short time periods for responding to adjudication claims, the process is fair and it is fit for large and complex matters – 15% of all claims are for amounts greater than

$1m and the most complex claim to date involved the determination of 500 issues. And, unlike litigation in the courts or arbitration, claims are determined in a matter of weeks, not months or years.

Adjudication as a mainstream dispute resolution mechanism has received endorsement and support from the UK judiciary at the highest levels. Recently, Lord Briggs observed that “[Adjudication] was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right.”

And Lord Justice Coulson said: “[Adjudication] is not an alternative to anything; for most construction disputes it is the only game in town.”

The comments are apposite and reflect our own experience in Aotearoa. Adjudication is now the most commonly used dispute resolution process in New Zealand for resolving building and construction disputes, offering a unique, fast and relatively straightforward statutory process for resolving the myriad of disputes that arise under construction contracts.

Adjudication is respected and thrives in this jurisdiction as a matter of a statutorily mandated dispute resolution process within a tolerant, light-touch statutory supervisory regime and with the assistance of a supportive court system. To the best of our knowledge, less than 1% of all BDT determinations have been challenged in the courts or arbitration – the vast majority with no appreciably different outcome.

The BDT review on adjudication provides valuable data to help inform the business community about the efficacy of adjudication as a credible and effective dispute resolution process and to make sure that adjudication fulfils its potential to address the barriers to access to justice beyond just the construction sector.

Access to justice

John Green.

Access to justice is a fundamental tenet of the rule of law. The current pressure on the civil justice system will no doubt test its foundations. Based on the success of statutory adjudication and the current domestic access to justice crisis with its attendant delays, unaffordable costs, and unsustainable risks, the New Zealand Dispute Resolution Centre (NZDRC) and the New Zealand International Arbitration Centre (NZIAC) both recently launched contractual adjudication schemes to resolve all types of civil/commercial disputes.

It is about reforming the approach to civil procedure and getting cases solved fairly, promptly, and cost effectively. The time is right – adjudication has proved to be a mainstream dispute resolution process in its own right. Adjudication is the solution to delivering accessible justice and is a logical adjunct to a well-functioning court system. Earlier resolution translates into cost savings for parties and major cost savings for the court system. As Lord Dyson said in *Gilbert-Ash:* "'Cashflow' is the lifeblood of the village grocer too."

What of the next decade? There is still much to be done. Legislative reform is a slow process. But we have in statutory and now contractual adjudication, an exemplary and robust mechanism for enabling and providing access to justice, facilitating cashflow across all sectors of the business community, and supporting and strengthening the civil justice system.

After 20 years, adjudication has firmly claimed its proper place as a mainstream dispute resolution mechanism in Aotearoa New Zealand.

John Green is the director of the Building Disputes Tribunal.

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