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LawTalk

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Adjudications, unfair contracts and much more…

as seen by Registered Adjudicator, Michael Cope of McKays

Workshop opportunity – learn all about it

Date Monday 17th July
Time starting at 10am to 12.30pm
at Carina Leagues Club, 1390 Creek Rd, Carina QLD 4152
RSVP by reply to email or contact
ebernhardsson@mckays.com.au
Morning tea and workshop material will be provided.

I am a Registered Adjudicator under the Security of Payment Act. I have decided dozens of adjudication applications.

One of the things that never ceases to astound me is how poorly prepared adjudication applications often are, even when prepared by lawyers. Although coming to the workshop I talk about at the end of this article should improve your skills, not just for adjudications but also other areas of contract administration, here are a couple of things for you to think about in the meantime.

Why many adjudication applications fail

Some adjudication applications are outstandingly bad. I have dealt with an application where the applicant, even though they had a lawyer, didn't include a copy of the contract in the application.

In a number of other adjudication applications I have decided, the applicants have seemingly thought that all they had to do was put in the contract, their invoices and a statement that they have done the work. In any contested adjudication application, particularly where the other party has a lawyer, that will more often than not mean you will lose. If you do not give me actual evidence proving that you have done the work for example, I cannot find in your favour. Nor could any adjudicator.

A simple system?

When introduced, it was intended that the Security of Payment system would be so simple that legal advice would not be needed. However, since the legislation is different in every State and Territory, contractors operating in different parts of the country find it quite confusing, given different requirements, different time frames and entirely different procedures.

On top of that, the Courts have laid down a number of technical rules, which again can differ from jurisdiction to jurisdiction so lawyers inevitably become a necessary evil.

And many adjudication applications involve hundreds of thousands and even millions of dollars, vast quantities of documents and complex and confusing contracts with all sorts of "get out" clauses in favour of the principals or builders.

Very few clients have the necessary knowledge to be able to deal with these type of cases and even if they do, they almost always try to improve their prospects by using a lawyer with expertise in this area.

Reference dates – a big problem in some jurisdictions

As those of you familiar with the payment claim systems in Queensland, NSW and the ACT will know, before you can send a payment claim you must have a reference date. (Not all jurisdictions have a requirement for a reference date.) In a contract which provides that you can deliver a progress claim (e.g. on the 25th day of the month), the date on which you can deliver the progress claim is the reference date. In all other cases the reference date is the last day of the month.

Last year the High Court confirmed that there cannot be a valid adjudication if there is no valid reference date. Over the years builders and principals have written into their "standard contracts" clauses which restrict the number of reference dates. Many of those attempts have been rejected by the Courts, but not all.

A common tactic used by builders recently has been to insert a clause which provides that once practical completion has been achieved only two more reference dates can occur - one after PC is achieved and one for the final claim after the defects liability period.

Such a clause was considered recently by the Supreme Court of New South Wales and upheld. In that case practical completion was claimed. A payment claim was made after that date but the subcontractor did not follow through with an adjudication application. They did however deliver another payment claim the next month, including the work in the early payment claim. It was held that the contractor could not do this as it had used the only reference date available, being on practical completion. The contractor had to wait until the end of the defects liability period to serve a new payment claim - meaning he went without his money for almost 12 months.

It has also been held, that no new reference date can arise after a contract has been terminated. This means that once a contract has been terminated contractors can no longer use the Security of Payment Act. Builders now commonly insert a termination for convenience clause then rely on that clause to terminate the contract for any reason or don't even give a reason with the result that the contractor can't use the Security of Payment Act no matter how much money is owing to them.

Unfair contract laws to the rescue (sometimes)

Last year the Commonwealth Parliament passed legislation which deems "unfair contract terms" unenforceable in certain circumstances. That legislation applies where one of the parties employs fewer than 20 people and the upfront price under the contract is less than $300,000 (including GST) or $1 million if the contract is to last more than 12 months. Given that almost all contracts for over a $1 million will have a defects liability period of 12 months, they will be contracts which have a period of more than 12 months so the unfair contracts provisions will apply.

Judges, Tribunal Members and adjudicators can now be asked to rule that a particular clause in the contract is "unfair" and unenforceable.

Bigger contractors can be caught in a very difficult position where the contract they have with the builder or principal has all sorts of unfair terms in it which they are bound by because the unfair contract legislation does not apply to that contract, yet in the sub-contracts they have with their own subcontractors, any such unfair terms would be unenforceable.

Project Bank Accounts

A number of states have introduced Project Bank Accounts or are planning to do so. At this stage, the PBA systems in place and even those which are proposed to be introduced in other jurisdictions such as Queensland, are quite limited but they might ultimately really help subcontractors and prevent builders from withholding payment without justification. The Master Builders Association is vehemently opposed to Project Bank accounts. This is not surprising given most of their members are builders who have become quite used to using other people's money to cash-flow their businesses.

Workshop opportunity – learn all about it

Clearly contractors now need to know a lot more than just the payment claim system.

Among other things, you also need to have an understanding of how the unfair contract laws will apply, what this will mean in terms of payment claims, how you might be able to use them in adjudications and what they mean for your contracts generally.

You also need to know how Project Bank Accounts will affect your business and how they will interact with the payment claim system and the contractual arrangements between subcontractors and builders in a more general sense.

McKays will be running a free seminar in Brisbane for members of the AMCA, MEA, MPA, MPAQ, MRIAQ and NFIAQ at which we will provide practical guidance for a host of important legal matters you need to understand in order to minimise your contractual risks and maximise your prospects of getting paid.

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Free consultations with experienced construction lawyers

Members of AMCA, MEA, MPA, MPAQ, MRIAQ and NFIAQ who cannot make it to the workshop are entitled to 20 minutes of free advice. So take the opportunity to come along to the workshop or give the team at McKays a call.

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Ian Heathwood
P (07) 3223 5942
E iheathwood@mckays.com.au

Michael Cope
P (07) 3223 5939
E mcope@mckays.com.au