



# Construction Contracts Act 2002

Public Act 2002 No 46  
Date of assent 26 November 2002  
Commencement see section 2

## Contents

1	Title	
2	Commencement	
	<b>Part 1</b>	
	<b>Preliminary provisions</b>	
	<i>Purpose</i>	
3	Purpose	
	<i>Overview</i>	
4	Overview	
	<i>Interpretation</i>	
5	Interpretation	
6	Meaning of construction work	
7	Meaning of associate	
	<i>Application</i>	
8	Act binds the Crown	
9	When Act applies: general	
10	When Act applies: residential construction contracts	
11	When Act does not apply	
	<i>No contracting out</i>	
12	No contracting out of Act	
	<b>Part 2</b>	
	<b>Payments</b>	
	Subpart 1—Prohibition of conditional payment provisions of construction contracts	
13	Conditional payment provisions ineffective	
	Subpart 2—Progress payments	
	<i>Parties may agree on express terms for progress payments</i>	
14	Parties free to agree on progress payment provisions in construction contract	
	<i>Default provisions for progress payments in absence of express terms</i>	
15	Application of sections 16 to 18	
16	Right to progress payments	
17	Amount of progress payment	
18	Due date for payment	
	Subpart 3—Procedure for making and responding to payment claims	
19	Interpretation	
20	Payment claims	
21	Payment schedules	
22	Liability for paying claimed amount	
23	Consequences of not paying claimed amount where no payment schedule provided	
24	Consequences of not paying scheduled amount in manner indicated by payment schedule	
	<b>Part 3</b>	
	<b>Adjudication of disputes</b>	
	Subpart 1—Preliminary	
25	Right to refer disputes to adjudication	
26	Relationship between Part and other dispute resolution procedures	
27	Effect of Part on civil proceedings	
	Subpart 2—Procedure for initiating adjudication and appointing adjudicator	
28	How to initiate adjudication	
29	Claimant may seek approval for issue of charging order in respect of construction site owned by respondent	
30	Claimant may seek determination of liability of owner who is not respondent	

31	When claimant may not seek approval for issue of charging order		
32	Owner who is not respondent is party to adjudication proceedings	58	Enforceability of adjudicator's determination
33	Selection of adjudicator	59	Consequences of not complying with adjudicator's determination under section 48(1)(a)
34	Eligibility criteria for adjudicators	60	Effect of review or other proceeding on adjudicator's determination under section 48(1)(a)
35	Appointment of adjudicator	61	Consequence of not complying with adjudicator's determination under section 48(1)(b) or (2)
36	Referral of dispute to adjudicator		
37	Response to adjudication claim		
	Subpart 3—Conduct of adjudication proceedings		
38	Jurisdiction of adjudicators		
39	Withdrawal of adjudication proceedings		
40	Consolidation of adjudication proceedings		
41	Duties of adjudicator		
42	Powers of adjudicator		
43	When adjudicator's powers not affected		
44	Adjudicator may draw inferences and determine dispute based on available information		
	Subpart 4—Adjudicator's determination		
45	Adjudicator's determination: matters to be considered	62	Special provisions for residential construction contracts
46	Adjudicator's determination: timing	63	Special provisions for adjudication if approval for charging order is sought by claimant
47	Adjudicator's determination: form	64	Compliance with requirements of Act relating to supply of certain information
48	Adjudicator's determination: substance	65	Nominating authorities
49	Approval for issue of charging order over construction site owned by respondent	66	Claimant may seek fresh adjudication if no adjudicator's notice of acceptance received or dispute not determined
50	Determination of liability of owner who is not respondent and approval of charging order over construction site owned by that owner	67	Parties may be represented at adjudication proceedings
51	Owner who is not respondent may discharge liability and recover amount from respondent	68	Confidentiality of adjudication proceedings
	<i>Review of adjudicator's determination in respect of owner who is not respondent</i>	69	Adjudicators not compellable witnesses
52	Owner who is not respondent may apply to District Court for review of adjudicator's determination	70	Exclusion of liability
53	Procedure for seeking review	71	Application of other enactments to adjudications
54	Powers of District Court on review		
55	Effect of review on adjudicator's determination		
	<i>Costs of adjudication proceedings</i>		
56	Costs of adjudication proceedings		
	<i>Adjudicator's fees</i>		
57	Adjudicator's fees		
			Subpart 5—Effect of adjudicator's determination
			Subpart 6—Miscellaneous matters relating to adjudication
			Part 4
			Other measures for securing payment under this Act
			Subpart 1—Suspension of work
			Subpart 2—Enforcement of adjudicator's determination
			<i>Enforcement of adjudicator's determination generally</i>
			Enforcement of adjudicator's determination
			Defendant may oppose entry as judgment
			Entry as judgment if defendant takes no steps

<i>Enforcement of adjudicator's determination involving charging order in respect of construction site</i>		<b>Part 5</b>
		<b>Miscellaneous provisions</b>
76 Enforcement of adjudicator's determination involving charging order in respect of construction site	79	Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand
<i>Miscellaneous</i>	80	Service of notices
77 Effect of entry of judgment	81	Rules of Court
78 Application of rules relating to charging orders	82	Regulations

**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Construction Contracts Act 2002.

**2 Commencement**

- (1) This Act comes into force on 1 April 2003, except for sections 65, 81, and 82.
- (2) Sections 65, 81, and 82 come into force on the day after the date on which this Act receives the Royal assent.

**Part 1**  
**Preliminary provisions**

*Purpose*

**3 Purpose**

The purpose of this Act is to reform the law relating to construction contracts and, in particular,—

- (a) to facilitate regular and timely payments between the parties to a construction contract; and
- (b) to provide for the speedy resolution of disputes arising under a construction contract; and
- (c) to provide remedies for the recovery of payments under a construction contract.

*Overview*

**4 Overview**

In this Act,—

- (a) preliminary matters (for example, the interpretation and application of the Act) are set out in sections 5 to 12:

- (b) provisions invalidating any contractual clause that makes payment to any party to a construction contract conditional on the payer first receiving payment from someone else are set out in section 13:
- (c) provisions confirming that parties are free to agree on a mechanism for determining progress payments are set out in section 14:
- (d) default provisions granting an entitlement to progress payments, and setting out a statutory mechanism for determining the amount of, and the due date for, those payments, in circumstances where the relevant construction contract is silent on any of those matters are set out in sections 15 to 18:
- (e) provisions establishing a procedure that allows a party to a construction contract to recover a progress payment by making a payment claim, and the party who is liable for that payment to respond by means of a payment schedule, are set out in sections 19 to 24:
- (f) provisions relating to the adjudication of disputes are set out in sections 25 to 71:
- (g) provisions granting a party to a construction contract who is owed money under the contract a statutory right to suspend the carrying out of construction work until payment is made are set out in section 72:
- (h) provisions enabling an adjudicator's determination to be enforced by entry as a judgment on application to a District Court are set out in sections 73 to 78:
- (i) miscellaneous matters (for example, the method of service of notices) are set out in sections 79 to 82.

### *Interpretation*

#### **5 Interpretation**

In this Act, unless the context otherwise requires,—

**adjudication** means an adjudication under this Act

**adjudicator** means an individual appointed in accordance with this Act to determine a dispute that has been referred to adjudication

**arbitral tribunal** has the meaning given it by section 2(1) of the Arbitration Act 1996

**associate** has the meaning set out in section 7

**authorised nominating authority** means a person authorised by the Minister under section 65 to nominate an adjudicator

**civil proceedings** includes—

- (a) arbitral proceedings; and
- (b) for the purposes of sections 13 and 69, proceedings before an adjudicator under this Act

**claimant** means a party to a construction contract who refers a dispute to adjudication

**claimed amount** has the meaning set out in section 19

**commercial construction contract** means a contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract

**construction contract**—

- (a) means a commercial construction contract or a residential construction contract; and
- (b) includes any variation to the construction contract; but
- (c) does not include a lease or licence under which a party undertakes to fit out, alter, repair, or reinstate the leased or licensed premises unless the principal purpose of the lease or licence is the carrying out of construction work

**construction site** means the land on which the claimant has been carrying out construction work under the relevant construction contract

**construction work** or **work** has the meaning set out in section 6

**contract price**, in relation to a construction contract,—

- (a) means the total amount payable under the contract for carrying out the construction work to which the contract relates; and
- (b) includes, for the avoidance of doubt, any variations to that amount agreed to between the parties to the contract

**court** means—

- (a) the High Court; or
- (b) a District Court in any proceeding in which the amount claimed or in issue does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases

**customised components**, in relation to a building or structure, means components that are specifically designed or modified for that particular building or structure

**defendant** means a party—

- (a) against whom an adjudication determination is made; and
- (b) who is liable, or will be liable if certain conditions are met, to pay an amount of money under the determination; and
- (c) against whom enforcement of the determination is sought

**dispute** means a dispute or difference that arises under a construction contract

**dwellinghouse**—

- (a) means any building that is occupied as a residence; and
- (b) includes any fence, gate, path, garage, shed, or other structure, amenity, or improvement that is an accessory to, and used wholly or mainly for the purposes of, the residence

**land** includes any estate or interest in land

**Minister** means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act

**nominating body** means a person (whether incorporated or not) who nominates adjudicators for the purposes of this Act

**notice of adjudication** means the notice referred to in section 28

**owner** means an owner of a construction site

**payee** has the meaning set out in section 19

**payer** has the meaning set out in section 19

**payment claim** is the claim referred to in section 20

**payment schedule** is the schedule referred to in section 21

**plaintiff** means a party—

- (a) in whose favour an adjudication determination is made; and
- (b) to whom an amount of money is payable, or will be payable if certain conditions are met, under the determination; and

- (c) who seeks enforcement of the determination

**progress payment—**

- (a) means a payment for construction work carried out under a construction contract that is in the nature of an instalment (whether or not of equal value) of the contract price for the contract (other than an amount that is, or is in the nature of, a deposit under the contract); and
- (b) includes any final payment under the contract

**residential construction contract** means a contract for carrying out construction work in which one of the parties is the residential occupier of the premises that are the subject of the contract

**residential occupier** means an individual who is occupying, or intends to occupy, the premises that are the subject of a construction contract wholly or mainly as a dwellinghouse

**respondent** means a party to a construction contract against whom a claim is made in an adjudication

**scheduled amount** has the meaning set out in section 19

**tribunal** means—

- (a) an arbitral tribunal; or
- (b) a Disputes Tribunal established under section 4 of the Disputes Tribunals Act 1988

**working day** means a day of the week (irrespective of whether or not work is actually carried out on that day) other than—

- (a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, Labour Day, and Waitangi Day; and
- (b) the day observed in the appropriate area as the anniversary of the province of which the area forms a part; and
- (c) for the purposes of sections 18, 22, 33, 35 to 37, 46, 59, 66, and 72, a day in the period commencing on 24 December in any year and ending with the close of 5 January in the following year; and
- (d) for the purposes of sections 53, 74, and 75, a day in the period commencing on 25 December in any year and ending with the close of 15 January in the following year.

## 6 Meaning of construction work

- (1) In this Act, unless the context otherwise requires, **construction work** means any of the following work:
- (a) the construction, erection, installation, carrying out, alteration, repair, restoration, renewal, maintenance, extension, demolition, removal, or dismantling of any building, erection, edifice, or structure forming, or to form, part of land (whether permanent or not and whether constructed wholly or partly on, above, or below ground level):
  - (b) the construction, erection, installation, carrying out, alteration, repair, restoration, renewal, maintenance, extension, demolition, removal, or dismantling of any works forming, or to form, part of land; including—
    - (i) any road, motorway, aircraft runway, wharf, docks, harbour works, railway, cableway, or tramway:
    - (ii) any canal, inland waterway, pipeline, reservoir, aqueduct, water main, well, or sewer:
    - (iii) any electricity, water, gas, or telephone reticulation:
    - (iv) any telecommunication apparatus or industrial plant:
    - (v) any installation for the purposes of land drainage or coast protection:
  - (c) the installation in any building or structure of fittings forming, or to form, part of land; including heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, security, and communications systems:
  - (d) the alteration, repair, maintenance, extension, demolition, or dismantling of the systems mentioned in paragraph (c):
  - (e) the external or internal cleaning of buildings and structures, so far as it is carried out in the course of their construction, erection, alteration, repair, restoration, or extension:
  - (f) any operation that forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraphs (a) to (d); including—
    - (i) site clearance, earthmoving, excavation, tunnelling, and boring; and

- (ii) laying foundations; and
  - (iii) erecting, maintaining, or dismantling scaffolding or cranes; and
  - (iv) prefabricating customised components of any building or structure, whether carried out on the construction site or elsewhere; and
  - (v) site restoration, landscaping, and the provision of roadways and other access works:
- (g) the painting or decorating of the internal or external surfaces of any building or structure.
- (2) Despite subsection (1), **construction work** does not include any of the following work:
- (a) drilling for or extracting oil or natural gas;
  - (b) extracting (whether by underground or surface working) minerals, including tunnelling or boring, or constructing underground works, for that purpose.

## 7 Meaning of associate

- (1) In this Act, person A is an **associate** of person B (and vice versa) if—
- (a) person A is a body corporate and person B is—
    - (i) a director of that body corporate; or
    - (ii) a related body corporate of that body corporate (within the meaning of section 5(7) of the Securities Markets Act 1988); or
    - (iii) a director of a related body corporate of that body corporate (within that same meaning); or
  - (b) person A is a spouse, child, or parent of person B; or
  - (c) person A is a person living together in a relationship in the nature of marriage with person B, although they are not married to each other; or
  - (d) person A is a partner, to whom the Partnership Act 1908 applies, of person B; or
  - (e) person A is a nominee or trustee for person B; or
  - (f) person A is a director of a company, or person A holds more than 10% of the control rights in the company, and person A and person B are parties to an agreement or arrangement relating to—
    - (i) the control of that company; or
    - (ii) more than 20% of the control rights in that company; or

- (g) person A holds more than 20% of the control rights, or more than 20% of the equity return rights, in person B:
- (h) person A and person B are bodies corporate, and another person holds more than 20% of the control rights, or more than 20% of the equity return rights, in each of person A and person B; or
- (i) person B is the trustee of a trust acting in that capacity and person A is a settlor, beneficiary, or trustee, of that trust; or
- (j) person A is a body corporate and person C holds more than 20% of the control rights, or more than 20% of the equity return rights, in person A and person B is the trustee of a trust acting in that capacity and person C is a settlor, beneficiary, or trustee, of that trust.

(2) In subsection (1),—

**business** means any undertaking that is carried on whether for gain or reward or not

**control right** means a voting right attaching to a voting security

**director**, in relation to a body corporate, means a person occupying the position of director of the body corporate by whatever name called

**equity return rights**, in relation to a business, means that a person has a right or entitlement or expectancy to receive equity returns, directly or indirectly, of the business

**equity returns** means—

- (a) profits of the business; or
- (b) distributions from the business; or
- (c) other equity returns from the business

**expectancy** means, in relation to a business or any other person,—

- (a) an expectancy or a contingent or unvested right to equity returns of the business or person; or
- (b) a right to equity returns of the business or person that does not confer on the holder a certain or defined share of the equity returns available to all or to any class of persons having equity return rights in the business or person

**person** includes the trustees of a trust acting in that capacity.

- (3) For the purposes of this section, a person has a control right if the person would have a relevant interest, under section 5 of the Securities Markets Act 1988, in the voting securities that confer that right,—
- (a) if **voting security**, in relation to a body, meant a security of the body that confers a right to vote at meetings of members (whether or not there is any restriction or limitation on the number of votes that may be cast by, or on behalf of, the holder of the security); and includes a security that, in accordance with the terms of the security, is convertible into a security of that kind; and
  - (b) if references in that section to a number or percentage of voting securities were a reference to the number or percentage of the votes conferred by those securities.

### *Application*

#### **8 Act binds the Crown**

This Act binds the Crown.

#### **9 When Act applies: general**

Subject to sections 10 and 11, this Act applies to every construction contract (whether or not governed by New Zealand law) that—

- (a) relates to carrying out construction work in New Zealand; and
- (b) is either—
  - (i) entered into on or after the date of commencement of this Act; or
  - (ii) entered into before the date of commencement of this Act and that is renewed for a further term on or after that date (except that this Act has effect only in relation to obligations that are incurred or undertaken on or after that date); and
- (c) is written or oral, or partly written and partly oral.

#### **10 When Act applies: residential construction contracts**

To avoid doubt, this Act applies to residential construction contracts, except for the following provisions:

- (a) sections 15 to 18 (which set out default provisions that relate to progress payments); and

- (b) sections 23(2)(b), 24(2)(b), and 59(2)(b) (which relate to the serving of a notice to suspend the carrying out of construction work under a construction contract); and
- (c) sections 29, 30, 32, and 49 to 55 (which relate to the issue of charging orders in respect of construction sites); and
- (d) Part 4 (which relates to other measures for securing payment under this Act).

## 11 When Act does not apply

This Act does not apply to—

- (a) a construction contract under which a party undertakes to carry out construction work as an employee (within the meaning of section 6 of the Employment Relations Act 2000) of the party for whom the work is to be carried out;
- (b) a construction contract to the extent that it contains—
  - (i) provisions under which a party undertakes to carry out construction work as a condition of a loan agreement with any person; or
  - (ii) provisions under which a party undertakes—
    - (A) to lend money or to repay money lent; or
    - (B) to guarantee payment of money owing or repayment of money lent; or
    - (C) to provide an indemnity for construction work carried out under the construction contract.

### *No contracting out*

## 12 No contracting out of Act

This Act has effect despite any provision to the contrary in any agreement or contract.

## Part 2

### Payments

#### Subpart 1—Prohibition of conditional payment provisions of construction contracts

#### 13 Conditional payment provisions ineffective

- (1) A conditional payment provision of a construction contract has no legal effect and accordingly—
  - (a) is not enforceable in any civil proceedings; and
  - (b) may not be used as a basis for withholding progress payments that are due and payable under the contract.
- (2) In this section,—

**amount owed**, in relation to a construction contract, means either the whole or part of any amount of money owing for construction work that has already been carried out under the contract

**conditional payment provision of a construction contract** means a provision of the contract—

- (a) that makes the obligation of one party (**party A**) to pay an amount owed to another party (**party B**) conditional on party A receiving payment from a further party (**party C**); or
- (b) that makes the due date for payment of an amount owed by party A to party B contingent on the date on which party A receives payment from party C; or
- (c) that is commonly referred to in the construction industry as a “pay when paid” or “pay if paid” clause of a construction contract; or
- (d) that is of a prescribed kind (if any).

#### Subpart 2—Progress payments

*Parties may agree on express terms for progress payments*

#### 14 Parties free to agree on progress payment provisions in construction contract

The parties to a construction contract are free to agree between themselves on a mechanism for determining—

- (a) the number of progress payments under the contract;
- (b) the interval between those payments;
- (c) the amount of each of those payments:

- (d) the date when each of those payments becomes due.

*Default provisions for progress payments in absence of express terms*

**15 Application of sections 16 to 18**

If the parties to a construction contract fail to agree on a mechanism for determining any of the matters referred to in section 14, the relevant provisions of sections 16 to 18 apply to the extent that those provisions relate to any matter for which a mechanism has not been agreed on between the parties.

**16 Right to progress payments**

A party who has agreed to carry out construction work under a construction contract has the right to progress payments calculated in accordance with section 17.

**17 Amount of progress payment**

- (1) The amount of a progress payment must be calculated by reference to—
- (a) the relevant period for that payment; and
  - (b) the value of the construction work carried out, or to be carried out, during that period; and
  - (c) any relevant provisions in the construction contract (including, without limitation, provisions relating to the retention of money or liquidated damages).
- (2) For the purposes of subsection (1)(a), the relevant period for a progress payment under a construction contract is—
- (a) the period commencing on the day of the month on which construction work was first carried out under the contract and ending on the last day of that month (the **first period**); and
  - (b) each month after the first period.
- (3) For the purposes of subsection (1)(b), the value of construction work must be calculated with regard to—
- (a) the contract price for the work; and
  - (b) any other rates or prices set out in the contract; and
  - (c) any variation to the construction work authorised under the contract; and
  - (d) if any work is defective, the estimated cost of rectifying the defect.

- (4) If the contract does not expressly provide for the matters referred to in subsection (3)(a) and (b), the value of construction work must be calculated with regard to—
- (a) the reasonable value of the work; and
  - (b) the reasonable value of any variation to the construction work authorised under the contract; and
  - (c) if any work is defective, the estimated cost of rectifying the defect.

## 18 Due date for payment

A progress payment under a construction contract becomes due and payable on the date occurring 20 working days after a payment claim is served under section 20 in relation to the payment.

### Subpart 3—Procedure for making and responding to payment claims

## 19 Interpretation

In this subpart, unless the context otherwise requires,—

**claimed amount** means an amount of progress payment specified in a payment claim that the payee claims to be due for construction work carried out

**payee** means the party to a construction contract who is entitled to a progress payment

**payer** means the party to a construction contract who is liable for that payment

**scheduled amount** means an amount of progress payment specified in a payment schedule that the payer proposes to pay to the payee in response to a payment claim.

## 20 Payment claims

- (1) A payee may serve a payment claim on the payer for each progress payment,—
- (a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or
  - (b) if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).
- (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) If a payment claim is served on a residential occupier, it must be accompanied by—
- (a) an outline of the process for responding to that claim; and
  - (b) an explanation of the consequences of—
    - (i) not responding to a payment claim; and
    - (ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).
- (4) The matters referred to in subsection (3)(a) and (b) must—
- (a) be in writing; and
  - (b) be in the prescribed form (if any).

## **21 Payment schedules**

- (1) A payer may respond to a payment claim by providing a payment schedule to the payee.
- (2) A payment schedule must—
- (a) be in writing; and
  - (b) identify the payment claim to which it relates; and
  - (c) indicate a scheduled amount.
- (3) If the scheduled amount is less than the claimed amount, the payment schedule must indicate—
- (a) the manner in which the payer calculated the scheduled amount; and
  - (b) the payer's reason or reasons for the difference between the scheduled amount and the claimed amount; and
  - (c) in a case where the difference is because the payer is withholding payment on any basis, the payer's reason or reasons for withholding payment.

**22 Liability for paying claimed amount**

A payer becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates if—

- (a) a payee serves a payment claim on a payer; and
- (b) the payer does not provide a payment schedule to the payee within—
  - (i) the time required by the relevant construction contract; or
  - (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.

**23 Consequences of not paying claimed amount where no payment schedule provided**

- (1) The consequences specified in subsection (2) apply if the payer—
  - (a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and
  - (b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) The consequences are that the payee—
  - (a) may recover from the payer, as a debt due to the payee, in any court,—
    - (i) the unpaid portion of the claimed amount; and
    - (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
  - (b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state—
  - (a) the ground or grounds on which the proposed suspension is based; and
  - (b) that the notice is given under this Act.
- (4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

**24 Consequences of not paying scheduled amount in manner indicated by payment schedule**

- (1) The consequences specified in subsection (2) apply if—
  - (a) a payee serves a payment claim on a payer; and
  - (b) the payer provides a payment schedule to the payee within the time allowed by section 22(b); and
  - (c) the payment schedule indicates a scheduled amount that the payer proposes to pay to the payee; and
  - (d) the payer fails to pay the whole, or any part, of the scheduled amount on or before the due date for the progress payment to which the payment claim relates.
- (2) The consequences are that the payee—
  - (a) may recover from the payer, as a debt due to the payee, in any court,—
    - (i) the unpaid portion of the scheduled amount; and
    - (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
  - (b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state—
  - (a) the ground or grounds on which the proposed suspension is based; and
  - (b) that the notice is given under this Act.
- (4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

## **Part 3 Adjudication of disputes**

### **Subpart 1—Preliminary**

**25 Right to refer disputes to adjudication**

- (1) Any party to a construction contract—
  - (a) has the right to refer a dispute to adjudication; and
  - (b) may exercise that right even though the dispute is the subject of proceedings between the same parties in a court or tribunal.

- (2) An example of a dispute is a disagreement between the parties to a construction contract about whether or not an amount is payable under the contract (for example, a progress payment) or the reasons given for non-payment of that amount.
- (3) A dispute may not be referred to adjudication without the consent of the parties to the dispute if—
  - (a) the parties to the relevant construction contract have agreed to refer disputes between them to arbitration; and
  - (b) the arbitration is—
    - (i) an international arbitration as defined in article 1(3) of the First Schedule of the Arbitration Act 1996; or
    - (ii) covered by the provisions of the Protocol on Arbitration Clauses (1923); or
    - (iii) covered by the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and is an arbitration to which the Arbitration (International Investment Disputes) Act 1979 applies.
- (4) Subsection (3) prevails over subsection (1).

## **26 Relationship between Part and other dispute resolution procedures**

- (1) To avoid doubt, nothing in this Part prevents the parties to a construction contract from submitting a dispute to another dispute resolution procedure (for example, to a court or tribunal, or to mediation), whether or not the proceedings for the other dispute resolution procedure take place concurrently with an adjudication.
- (2) If a party to a construction contract submits a dispute to another dispute resolution procedure while the dispute is the subject of an adjudication, the submission to that other dispute resolution procedure does not—
  - (a) bring to an end the adjudication proceedings; or
  - (b) otherwise affect the adjudication.
- (3) However, an adjudicator must terminate the adjudication proceedings on a dispute if, before the adjudicator determines the dispute, that dispute is determined under another dispute resolution procedure.

- (4) Nothing in any other enactment or rule of law or any contract affects the application of this Part.

## **27 Effect of Part on civil proceedings**

- (1) Except as provided in this section and section 61(2), nothing done under, or for the purposes of, this Part affects any civil proceedings arising under a construction contract.
- (2) In any proceedings before a court or tribunal, or before an adjudicator under the Weathertight Homes Resolution Services Act 2002, in relation to any matter arising under a construction contract, the court or tribunal or adjudicator—
- (a) must allow for any amount paid to a party to the contract under, or for the purposes of, this Part in any order or award the court, tribunal, or adjudicator makes in those proceedings; and
  - (b) may make any orders that the court, tribunal, or adjudicator considers appropriate, having regard to any steps taken by a party to the contract in good faith and in reliance on an adjudicator's determination under this Part (including an order requiring a party to the contract to pay for goods and services supplied by another party to that contract in good faith and in reliance on an adjudicator's determination).

## **Subpart 2—Procedure for initiating adjudication and appointing adjudicator**

### **28 How to initiate adjudication**

- (1) Adjudication is initiated by a claimant serving written notice of the claimant's intention to refer a dispute for adjudication (the **notice of adjudication**) on—
- (a) the other party or parties to the construction contract; and
  - (b) the owner if—
    - (i) a determination of an owner's liability is sought under section 30(a); and
    - (ii) an approval for the issue of a charging order is sought under section 30(b).
- (2) The notice of adjudication must state—
- (a) the date of the notice;
  - (b) the nature and a brief description of the dispute and of the parties involved;

- (c) details of where and when the dispute arose:
- (d) the relief or remedy that is sought:
- (e) whether approval for the issue of a charging order under section 29 is being sought:
- (f) whether a determination of an owner's liability under section 30(a) and an approval for the issue of a charging order under section 30(b) are being sought:
- (g) details sufficient to identify the construction contract to which the dispute relates, including—
  - (i) the names and addresses of the parties to the contract; and
  - (ii) if available, the addresses that the parties have specified for the service of notices.

**29 Claimant may seek approval for issue of charging order in respect of construction site owned by respondent**

A claimant may, in the notice of adjudication, seek the adjudicator's approval for the issue of a charging order in respect of a construction site owned by a respondent.

**30 Claimant may seek determination of liability of owner who is not respondent**

A claimant may, in the notice of adjudication, seek—

- (a) a determination under section 50 that an owner who is not a respondent is jointly and severally liable with the respondent to make a payment to the claimant; and
- (b) approval for the issue of a charging order in respect of the construction site.

**31 When claimant may not seek approval for issue of charging order**

A claimant may not seek any of the matters referred to in section 29 or section 30 against an owner who is a residential occupier of the construction site.

**32 Owner who is not respondent is party to adjudication proceedings**

- (1) An owner who is not a respondent—
  - (a) is a party to adjudication proceedings in which the claimant seeks—

- (i) a determination of that owner's liability under section 30(a); and
    - (ii) approval for the issue of a charging order under section 30(b); and
  - (b) has all the rights of a party, including (without limitation),—
    - (i) the right to be present at the adjudication proceedings; and
    - (ii) the right to present that owner's case and be heard at those proceedings.
- (2) Unless the context otherwise requires, the following references must be treated as including references to the owner of a construction site (whether or not the owner is also the respondent):
  - (a) a reference to a respondent in sections 37, 39, 43, 45, 46, and 57; and
  - (b) a reference to a party, or the parties, to an, or the, adjudication in this Part or in section 73.

### **33 Selection of adjudicator**

- (1) The claimant must, within the time required under subsection (2),—
  - (a) request the person (if any) chosen by agreement between the relevant parties to act as adjudicator; or
  - (b) if the person referred to in paragraph (a) has already indicated that he or she is unwilling or unable to act, request any other person chosen by agreement between the relevant parties to act as adjudicator; or
  - (c) if no person is agreed on, request a nominating body chosen by agreement between the relevant parties to select a person to act as adjudicator; or
  - (d) if the persons referred to in paragraphs (a) and (b) are unwilling or unable to act, and paragraph (c) does not apply, request an authorised nominating authority chosen by the claimant to select a person to act as adjudicator.
- (2) The time required is,—
  - (a) for the purposes of subsection (1)(a) and (b), as soon as practicable after the notice of adjudication has been served; and

- (b) for the purposes of subsection (1)(c) and (d), 5 working days after the notice of adjudication has been served or any further period that the parties may agree.
- (3) An agreement about the choice of an adjudicator or a nominating body or an authorised nominating authority is not binding on the parties to the adjudication if that agreement was made (whether under the relevant construction contract or otherwise) before the dispute between them arose.
- (4) It is the duty of a nominating body or, as the case may be, an authorised nominating authority to select a person and to request that person to act as adjudicator as soon as practicable.
- (5) A request made under this section must—
  - (a) be in writing; and
  - (b) be accompanied by a copy of the notice of adjudication; and
  - (c) state that it is made under this Act.

### **34 Eligibility criteria for adjudicators**

- (1) A person is eligible to be an adjudicator in relation to a construction contract if the person meets the requirements relating to qualifications, expertise, and experience as may be prescribed (if any).
- (2) A person is not eligible to be an adjudicator in relation to a construction contract to which the person is a party.
- (3) A person—
  - (a) must disclose to the parties to the adjudication and, as the case may be, the nominating body or the authorised nominating authority, any conflict of interest (whether financial or otherwise); and
  - (b) must not act as an adjudicator in that dispute unless all of the parties to the adjudication agree.

### **35 Appointment of adjudicator**

- (1) A person requested to act as an adjudicator in accordance with section 33 must, within 2 working days of receiving the request, indicate whether he or she is willing and able to act in that capacity.
- (2) If the person is willing and able to act as an adjudicator, he or she must serve a notice of acceptance on the parties to the

adjudication and, as the case may be, the nominating body or the authorised nominating authority.

- (3) However, if the person has a conflict of interest, he or she must not serve a notice of acceptance under subsection (2) until the parties have confirmed (whether orally or in writing) that they agree to the person acting as an adjudicator.
- (4) The notice of acceptance must confirm that the person meets the eligibility criteria for adjudicators under section 34.
- (5) A notice of acceptance that fails to confirm that the person meets the eligibility criteria for adjudicators under section 34 has no effect.
- (6) A person is appointed as an adjudicator to determine the dispute on serving a notice of acceptance that confirms the person meets the eligibility criteria for adjudicators under section 34.

### **36 Referral of dispute to adjudicator**

- (1) After an adjudicator has been appointed, the claimant must, *within 5 working days of receiving the adjudicator's notice of acceptance*, refer the dispute in writing (the **adjudication claim**) to the adjudicator.
- (2) The adjudication claim—
  - (a) must specify the nature or the grounds of the dispute and, to the extent that it remains relevant, be accompanied by a copy of the notice of adjudication; and
  - (b) may be accompanied by any other documents.
- (3) The claimant must serve a copy of the adjudication claim and any accompanying documents on every other party to the adjudication either before or immediately after they are served on the adjudicator.

### **37 Response to adjudication claim**

- (1) A respondent may serve on the adjudicator a written response to the adjudication claim—
  - (a) within 5 working days after receiving that claim; or
  - (b) within any further time that the parties to the adjudication agree; or
  - (c) within any further time that the adjudicator may allow if the adjudicator considers that, in the circumstances, the

additional time is reasonably required to enable the respondent to complete the written response.

- (2) The response may be accompanied by any other documents.
- (3) The respondent must serve a copy of the response and any accompanying documents on the claimant and every other party to the adjudication either before or immediately after they are served on the adjudicator.

### Subpart 3—Conduct of adjudication proceedings

#### **38 Jurisdiction of adjudicators**

- (1) An adjudicator's jurisdiction in relation to any dispute that has been referred to adjudication is limited to determining—
  - (a) the matters referred to in sections 48, 49(1)(c), and 50(1)(c); and
  - (b) any other matters that are of a consequential or ancillary nature necessary to exercise or complete the exercise of the jurisdiction conferred by paragraph (a).
- (2) However, the parties to an adjudication may, at any time, by written agreement, extend the jurisdiction of an adjudicator to determine any matters in addition to those mentioned in subsection (1).

#### **39 Withdrawal of adjudication proceedings**

An adjudication claim may be withdrawn if—

- (a) the claimant serves written notice of withdrawal on the adjudicator, unless the respondent objects to the withdrawal and the adjudicator recognises a legitimate interest on the respondent's part in obtaining a determination in respect of the dispute; or
- (b) the parties agree on the withdrawal.

#### **40 Consolidation of adjudication proceedings**

If 2 or more adjudication proceedings are pending, the adjudicator may, with the written consent of all of the parties to those adjudication proceedings, determine those adjudication proceedings at the same time.

**41 Duties of adjudicator**

An adjudicator must—

- (a) act independently, impartially, and in a timely manner; and
- (b) avoid incurring unnecessary expense; and
- (c) comply with the principles of natural justice; and
- (d) disclose any conflict of interest to the parties to an adjudication; and
- (e) if paragraph (d) applies, resign from office unless those parties agree otherwise.

**42 Powers of adjudicator**

(1) An adjudicator may—

- (a) conduct the adjudication in any manner that he or she thinks fit; and
- (b) request further written submissions from the parties to the adjudication, but must give the relevant parties an opportunity to comment on those submissions; and
- (c) request the parties to the adjudication to provide copies of any documents that he or she may reasonably require; and
- (d) set deadlines for further submissions and comments by the parties; and
- (e) appoint an expert adviser to report on specific issues (as long as the parties are notified before the appointment is made); and
- (f) call a conference of the parties; and
- (g) carry out an inspection of any construction work or any other thing to which the dispute relates (as long as the consent of the owner or occupier is obtained before entry to any land or premises is made and, if the owner or occupier is a party to the adjudication, that party's consent must not be unreasonably withheld); and
- (h) request the parties to do any other thing during the course of an adjudication that he or she considers may reasonably be required to enable the effective and complete determination of the questions that have arisen in the adjudication; and
- (i) issue any other reasonable directions that relate to the conduct of the adjudication.

- (2) The parties to the adjudication must comply with any request or direction of the adjudicator made or given in accordance with this section.

#### **43 When adjudicator's powers not affected**

The adjudicator's power to determine a dispute is not affected by the failure of—

- (a) the respondent to serve a response on the claimant under section 37; or
- (b) any of the parties to—
  - (i) make a submission or comment within the time allowed; or
  - (ii) provide specified information within the time allowed; or
  - (iii) comply with the adjudicator's call for a conference of the parties; or
  - (iv) do any other thing that the adjudicator requests or directs.

#### **44 Adjudicator may draw inferences and determine dispute based on available information**

If any failure of the kind referred to in section 43 occurs in an adjudication, the adjudicator may—

- (a) draw any inferences from that failure that he or she thinks fit; and
- (b) determine the dispute on the basis of the information available to him or her; and
- (c) give any weight that he or she thinks fit to any information provided outside any period that he or she requested or directed.

### Subpart 4—Adjudicator's determination

#### **45 Adjudicator's determination: matters to be considered**

In determining a dispute, an adjudicator must consider only the following matters:

- (a) the provisions of this Act;
- (b) the provisions of the construction contract to which the dispute relates;
- (c) the adjudication claim referred to in section 36, together with all submissions (including relevant documentation) that have been made by the claimant:

- (d) the respondent's response (if any) referred to in section 37, together with all submissions (including relevant documentation) that have been made by the respondent:
- (e) the report of the experts appointed to advise on specific issues (if any):
- (f) the results of any inspection carried out by the adjudicator:
- (g) any other matters that the adjudicator reasonably considers to be relevant.

#### **46 Adjudicator's determination: timing**

- (1) An adjudicator—
  - (a) must not determine a dispute until after the end of the period referred to in section 37(1) within which the respondent may serve on the adjudicator a written response to an adjudication claim; and
  - (b) must not determine a dispute having regard to that response unless it was served on the adjudicator before the end of that period.
- (2) An adjudicator must determine a dispute—
  - (a) *within 20 working days after the end of the period referred to in section 37(1) during which the respondent may serve on the adjudicator a written response to an adjudication claim; or*
  - (b) *within 30 working days after the end of the period referred to in that section if the adjudicator considers that, even though the parties to the adjudication do not agree, further time for the determination of the dispute is reasonably required; or*
  - (c) *within any further time that the parties to the adjudication agree.*
- (3) An adjudicator must give a copy of the determination to every party to the adjudication as soon as practicable after making a determination.
- (4) Subsection (3) is subject to section 57(6).

#### **47 Adjudicator's determination: form**

- (1) An adjudicator's determination—
  - (a) must be in the prescribed form (if any); or
  - (b) if there is no prescribed form,—

- (i) must be in writing; and
  - (ii) must contain the reasons for the determination (unless the parties to the adjudication, by written agreement, indicate that the requirement for the adjudicator to give reasons may be dispensed with); and
  - (iii) in a case where the adjudicator determines that a party to the adjudication is liable to make a payment, must include a statement setting out the consequences for the defendant if the defendant takes no steps in relation to an application from the plaintiff to enforce the adjudicator's determination by entry as a judgment.
- (2) A failure to comply with subsection (1) does not affect the validity of an adjudicator's determination.
- (3) Within 2 working days after the date on which a copy of the determination is given to the parties to the adjudication under section 46(3), an adjudicator may, on his or her own initiative, correct in the determination any errors in computation or any clerical or typographical errors or any errors of a similar nature.

#### **48 Adjudicator's determination: substance**

- (1) If an amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine—
- (a) whether or not any of the parties to the adjudication are liable, or will be liable if certain conditions are met, to make a payment under that contract; and
  - (b) any questions in dispute about the rights and obligations of the parties under that contract.
- (2) If no amount of money under the relevant construction contract is claimed in an adjudication, the adjudicator must determine any questions in dispute about the rights and obligations of the parties under that contract.
- (3) If an adjudicator determines under subsection (1)(a) that a party to the adjudication is liable, or will be liable if certain conditions are met, to make a payment, the adjudicator—
- (a) must also determine—
    - (i) the amount payable or conditionally payable; and

- (ii) the date on which that amount became or becomes payable; and
  - (b) may determine that the liability of a party to the adjudication to make a payment depends on certain conditions being met.
- (4) Despite subsections (1) and (2), an adjudicator is not required to determine a dispute that has been withdrawn in accordance with section 39.
- (5) If a dispute is settled by agreement between the parties before the adjudicator's determination is given, the adjudicator—
- (a) must terminate the adjudication proceedings; and
  - (b) if requested by the parties, may record the settlement in the form of a determination on agreed terms.

#### **49 Approval for issue of charging order over construction site owned by respondent**

- (1) This section applies if—
- (a) a claimant has referred to adjudication a dispute about whether an amount is payable by a respondent under the construction contract; and
  - (b) the claimant has sought, in the notice of adjudication, the adjudicator's approval for the issue of a charging order in respect of a construction site owned by the respondent; and
  - (c) the adjudicator has determined that the respondent—
    - (i) is liable to pay (whether in whole or in part) the amount claimed in the adjudication; and
    - (ii) is the owner of the construction site.
- (2) If this section applies, the adjudicator must—
- (a) approve the issue of a charging order in respect of the construction site owned by the respondent; and
  - (b) record that approval in his or her determination accordingly; and
  - (c) include in his or her determination sufficient particulars to identify the construction site to which the approval for the issue of a charging order relates.

#### **50 Determination of liability of owner who is not respondent and approval of charging order over construction site owned by that owner**

- (1) This section applies if—

- (a) a claimant has referred to adjudication a dispute about whether an amount is payable by a respondent under a construction contract; and
  - (b) the claimant has sought, in the notice of adjudication,—
    - (i) a determination of the owner’s liability under section 30(a); and
    - (ii) approval for the issue of a charging order in respect of the construction site under section 30(b); and
  - (c) the adjudicator has determined that the respondent—
    - (i) is liable to pay (whether in whole or in part) the amount claimed in the adjudication; and
    - (ii) is an associate of the owner.
- (2) If this section applies, the adjudicator must—
- (a) determine that the owner is jointly and severally liable, with the respondent, to pay (whether in whole or in part) the amount claimed in the adjudication; and
  - (b) record in his or her determination that the owner is so liable and the amount of the owner’s liability; and
  - (c) approve the issue of a charging order in respect of the construction site, and record that approval in his or her determination accordingly; and
  - (d) include in his or her determination sufficient particulars to identify the construction site to which the approval for the issue of a charging order relates.
- (3) The liability of an owner under subsection (2)(a) must not exceed the reasonable value of all of the construction work carried out on the construction site by, or on behalf of, the respondent (including construction work carried out by another party for, or on behalf of, the respondent), less all amounts actually paid by the owner in respect of that work.
- (4) To avoid doubt, the owner’s liability—
- (a) is satisfied to the extent that the respondent has paid the amount determined by the adjudicator under subsection (1)(c); or
  - (b) is discharged if the respondent’s liability is set aside or otherwise discharged.

**51 Owner who is not respondent may discharge liability and recover amount from respondent**

- (1) An owner who is not a respondent may discharge that owner's liability under section 50(2)(a) by paying the amount determined by the adjudicator to the claimant.
- (2) Any payment made by an owner under subsection (1)—
  - (a) may be treated by the owner as a payment to the respondent in reduction of any amount that the owner owes, or may in future owe, to the respondent in connection with the construction work; or
  - (b) may be recovered by the owner as a debt due from the respondent.
- (3) If the owner has paid an amount determined by the adjudicator, the subsequent setting aside of the adjudicator's determination does not affect any rights conferred on the owner under this section.

*Review of adjudicator's determination in respect of owner who is not respondent*

**52 Owner who is not respondent may apply to District Court for review of adjudicator's determination**

- (1) An owner who is not a respondent may apply to a District Court for a review of—
  - (a) an adjudicator's determination that the owner is jointly and severally liable with the respondent to make a payment to the claimant; and
  - (b) an adjudicator's approval for the issue of a charging order in respect of the construction site.
- (2) A District Court has the jurisdiction to hear and determine an application for review under this section despite any limits imposed on District Courts in their ordinary civil jurisdiction by sections 29 to 34 of the District Courts Act 1947.

**53 Procedure for seeking review**

- (1) An application for review under section 52 must be made by filing a notice, in the prescribed form (if any), in the District Court nearest to the place at which the adjudication proceedings to which the application for review relates were held.
- (2) The notice must be filed—

- (a) within 20 working days after the date of the determination to which the application for review relates; or
- (b) within any further time that the District Court may allow on application made before or after the expiration of the period referred to in paragraph (a).

#### **54 Powers of District Court on review**

- (1) For the purpose of hearing the application for review, the District Court—
  - (a) must conduct the review as a hearing de novo of the relevant dispute; and
  - (b) has all the powers, duties, functions, and discretions of the adjudicator in making the determination to which the application for review relates; and
  - (c) has all the powers vested in a District Court in its civil jurisdiction.
- (2) On hearing the application for review, the District Court may—
  - (a) quash the determination, and substitute for it any other determination that the adjudicator could have made in respect of the original proceedings; or
  - (b) refuse the application.
- (3) A District Court's determination under subsection (2)(a)—
  - (a) has effect as if it were a determination made by an adjudicator for the purposes of this Act; and
  - (b) is not a final determination of the dispute between the claimant and respondent to the adjudication under review.
- (4) Subsection (3)(b) does not prevent any proceedings between the claimant and respondent to the adjudication under review from being heard and determined at the same time as the application for review under this section.

#### **55 Effect of review on adjudicator's determination**

An application for review under section 52 does not operate as a stay of the adjudicator's determination unless a District Court Judge, on application, so determines.

*Costs of adjudication proceedings***56 Costs of adjudication proceedings**

- (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by—
  - (a) bad faith on the part of that party; or
  - (b) allegations or objections by that party that are without substantial merit.
- (2) If the adjudicator does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.
- (3) An agreement about how the costs and expenses in adjudication proceedings are to be apportioned (including an agreement that a party is to indemnify another party in relation to those costs and expenses) is not binding on the parties to the adjudication if that agreement was made before the dispute arose.

*Adjudicator's fees***57 Adjudicator's fees**

- (1) An adjudicator is entitled to be paid, by way of fees and expenses, an amount—
  - (a) that is agreed between the adjudicator and the parties to the adjudication; or
  - (b) if there is no agreement, that is reasonable, having regard to the work done and expenses incurred by the adjudicator.
- (2) The parties to the adjudication are jointly and severally liable to pay the adjudicator's fees and expenses.
- (3) The parties to the adjudication are each liable to contribute to the adjudicator's fees and expenses in—
  - (a) equal proportions; or
  - (b) the proportions that the adjudicator may determine.
- (4) An adjudicator may make a determination under subsection (3)(b) if, in the adjudicator's view,—
  - (a) the claimant's adjudication claim, or the respondent's response, was without substantial merit; or

- (b) a party to the adjudication acted in a contemptuous or improper manner during the adjudication.
- (5) An adjudicator is not entitled to be paid any fees and expenses in connection with an adjudication if he or she fails to determine the dispute within the time allowed by section 46(2).
- (6) Despite subsection (5), an adjudicator may require payment of his or her fees and expenses before communicating his or her determination on a dispute to the parties to the adjudication.
- (7) If an adjudication claim is withdrawn or terminated, or the dispute between the parties is resolved, an adjudicator is entitled to be paid the fees and expenses incurred in the adjudication up to, and including, as the case may be, the date on which—
  - (a) the adjudication claim was withdrawn or terminated; or
  - (b) the adjudicator was notified that the dispute had been resolved.

### Subpart 5—Effect of adjudicator’s determination

#### **58 Enforceability of adjudicator’s determination**

- (1) An adjudicator’s determination under section 48(1)(a) is enforceable in accordance with section 59.
- (2) An adjudicator’s determination under section 48(1)(b) or (2) about the parties’ rights and obligations under the construction contract is not enforceable.
- (3) However, section 61 applies if the determination referred to in subsection (2) is not complied with.

#### **59 Consequences of not complying with adjudicator’s determination under section 48(1)(a)**

- (1) The consequences specified in subsection (2) apply if a party to the adjudication fails, before the close of the relevant date, to pay the whole or part of the amount determined by an adjudicator.
- (2) The consequences are that the party who is owed the amount (**party A**) may do all or any of the following:
  - (a) recover from the party who is liable to make the payment (**party B**), as a debt due to party A, in any court,—
    - (i) the unpaid portion of the amount; and
    - (ii) the actual and reasonable costs of recovery awarded against party B by that court:

- (b) if party A is a party who carries out construction work under a construction contract, serve notice on party B of party A's intention to suspend the carrying out of construction work under the contract:
  - (c) apply for the adjudicator's determination to be enforced by entry as a judgment in accordance with subpart 2 of Part 4.
- (3) A notice referred to in subsection (2)(b) must state—
- (a) the ground or grounds on which the proposed suspension is based; and
  - (b) that the notice is given under this Act.
- (4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of a party unless it is satisfied that the circumstances referred to in subsection (1) exist.
- (5) In this section, **relevant date** means—
- (a) the date that occurs 2 working days after the date on which a copy of the relevant determination is given to the parties to the adjudication under section 46(3); or
  - (b) if the adjudicator determines a later date under section 48(3)(a)(ii), that later date.

**60 Effect of review or other proceeding on adjudicator's determination under section 48(1)(a)**

An adjudicator's determination under section 48(1)(a) is binding on the parties to the adjudication and continues to be of full effect even though—

- (a) a party has applied for judicial review of the determination; or
- (b) any other proceeding relating to the dispute between the parties has been commenced.

**61 Consequence of not complying with adjudicator's determination under section 48(1)(b) or (2)**

- (1) If a party to an adjudication fails to comply fully with the adjudicator's determination under section 48(1)(b) or (2) about the parties' rights and obligations under the relevant construction contract, any other party to the adjudication may bring proceedings in any court to enforce that other party's rights under that contract.

- (2) In any proceedings under subsection (1), the court must have regard to, but is not bound by, the adjudicator's determination.

### Subpart 6—Miscellaneous matters relating to adjudication

#### **62 Special provisions for residential construction contracts**

- (1) A notice of adjudication to be served on a residential occupier in a dispute under a residential construction contract must, in addition to the matters in section 28(2), set out prominently—
  - (a) a statement of the residential occupier's rights and obligations in the adjudication; and
  - (b) a brief explanation of the adjudication process.
- (2) The matters referred to in subsection (1) must be in the prescribed form (if any).
- (3) A notice of adjudication that fails to comply with subsection (1) has no effect.
- (4) If subsection (3) applies,—
  - (a) the claimant may serve on a residential occupier a new notice of adjudication that complies with subsection (1); and
  - (b) this Part applies as if no notice of adjudication had been served previously.

#### **63 Special provisions for adjudication if approval for charging order is sought by claimant**

An adjudication in which the claimant seeks approval for the issue of a charging order in respect of a construction site must be conducted—

- (a) by an adjudicator nominated for the purpose by an authorised nominating authority; and
- (b) by an adjudicator who has the specific additional qualifications, expertise, and experience that may be prescribed for the purposes of this section (if any).

#### **64 Compliance with requirements of Act relating to supply of certain information**

- (1) No notice of adjudication is invalid for any failure to comply strictly with the requirements of section 28(2)(a) to (d) and (g) as long as—
  - (a) the notice is in writing; and

- (b) the nature of the dispute and the names of the parties involved are stated clearly in the notice; and
  - (c) any non-compliance does not mislead or unjustly affect the interests of the recipient.
- (2) To avoid doubt, subsection (1) does not limit section 62.
- (3) If a notice of adjudication fails to state, in accordance with section 28(2)(e) or (f), whether approval for the issue of a charging order is being sought, that approval may not be given.
- (4) If a party to an adjudication wishes to provide another party or the adjudicator with copies of, or extracts from, the construction contract but is for any reason unable to do so (for example, in a case where the contract is oral), it is sufficient if that party gives the missing information in the form of a statutory declaration together with any supporting documents that are available.

## **65 Nominating authorities**

- (1) The Minister may, on application made by any person in accordance with subsection (2), authorise the applicant to nominate adjudicators for the purposes of this Act.
- (2) Every application for an authority must—
  - (a) be in writing; and
  - (b) be accompanied by the prescribed information (if any).
- (3) The Minister may withdraw any authority given under this section.

## **66 Claimant may seek fresh adjudication if no adjudicator's notice of acceptance received or dispute not determined**

- (1) A claimant may take the actions set out in subsection (2) if either—
  - (a) the claimant has not received any notice of acceptance from an adjudicator within 5 working days of the person referred to in section 33 receiving a request to act as an adjudicator; or
  - (b) an adjudicator who accepts an adjudication—
    - (i) dies or becomes seriously ill or is otherwise unavailable for any reason; or

- (ii) fails to determine the dispute within the time allowed by section 46(2).
- (2) The actions are—
  - (a) the claimant may withdraw the notice of adjudication, by notice in writing served on every other party to the adjudication and, as the case may be, the nominating body or the authorised nominating authority; and
  - (b) the claimant may serve a new notice of adjudication under section 28.
- (3) If a new notice of adjudication is served in accordance with this section, this Part applies as if no notice of adjudication had been served previously.

### **67 Parties may be represented at adjudication proceedings**

- (1) Any party to a dispute that has been referred to adjudication may be represented by the representatives (whether legally qualified or not) that the party considers appropriate.
- (2) Subsection (1) is subject to the adjudicator's power to direct that the number of representatives present at a conference of the parties is to be limited to allow for the efficient conduct of proceedings.

### **68 Confidentiality of adjudication proceedings**

- (1) This section applies to the following information:
  - (a) any statement, admission, or document created or made for the purposes of an adjudication; and
  - (b) any information (whether written or oral) that, for the purposes of the adjudication, is disclosed in the course of the adjudication.
- (2) The adjudicator and any party to a dispute must not disclose to another person any of the information to which this section applies except—
  - (a) with the consent of the relevant party; or
  - (b) to the extent that the information is already in the public domain; or
  - (c) to the extent that disclosure is necessary for the purposes of, or in connection with, the adjudication or the enforcement of the adjudicator's determination; or

- (d) in statistical or summary form arranged in a manner that prevents any information disclosed from being identified by any person as relating to any particular person; or
- (e) if the information is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify any particular person.

### **69 Adjudicators not compellable witnesses**

An adjudicator may not be required to give evidence in any civil proceedings on anything connected with an adjudication that has come to his or her knowledge in the course of adjudication proceedings.

### **70 Exclusion of liability**

- (1) Neither an adjudicator nor an expert adviser appointed under section 42(1)(e) is under any civil or criminal liability for anything done, or omitted to be done, in the course of the exercise or intended exercise of,—
  - (a) in the case of an adjudicator, any of the adjudicator's functions, duties, or powers under this Act; or
  - (b) in the case of an expert adviser, any of the expert adviser's functions under this Act.
- (2) Subsection (1) does not exclude the liability of an adjudicator or expert adviser for anything done or omitted to be done in bad faith.

### **71 Application of other enactments to adjudications**

- (1) The Limitation Act 1950 applies to adjudications as it applies to actions (as that term is defined in section 2(1) of that Act).
- (2) Adjudications must be treated as—
  - (a) proceedings for the purposes of section 24 of the Insolvency Act 1967; and
  - (b) actions or proceedings for the purposes of section 42 of the Corporations (Investigation and Management) Act 1989; and
  - (c) legal proceedings for the purposes of section 248 of the Companies Act 1993.

## Part 4

### Other measures for securing payment under this Act

#### Subpart 1—Suspension of work

#### 72 Suspension of construction work

- (1) A party who carries out construction work under a construction contract (**party A**) has the right to suspend work under that contract if—
  - (a) any of the following circumstances applies:
    - (i) a claimed amount is not paid in full by the due date for its payment and no payment schedule has been provided by the party who it is claimed is liable for the payment (**party B**):
    - (ii) a scheduled amount is not paid in full by the due date for its payment even though a payment schedule given by party B indicates a scheduled amount that party B proposes to pay to party A:
    - (iii) party B has not complied with an adjudicator's determination that party B must pay an amount to party A by a particular date; and
  - (b) party A has served on party B a notice under section 23(2)(b) or section 24(2)(b) or section 59(2)(b), as the case may be; and
  - (c) the amount mentioned in subsection (1)(a)(i) or subsection (1)(a)(ii) is not paid, or the determination mentioned in subsection (1)(a)(iii) is not complied with, within 5 working days after the date of that notice.
- (2) If party A exercises the right conferred by subsection (1), party A—
  - (a) is not in breach of the construction contract; and
  - (b) is not liable for any loss or damage suffered by party B, or by any person claiming through party B; and
  - (c) is entitled to an extension of time to complete the contract, but is not entitled solely by reason of this Act to recover any costs incurred as a consequence of the extension of time; and
  - (d) keeps party A's rights under the contract, including any right to terminate the contract; and
  - (e) may at any time lift the suspension, even if the amount has not been paid or the determination has not been complied with.

- (3) To avoid doubt, subsection (2)(c) does not affect party A's rights to recover (whether in an adjudication or otherwise) any costs incurred as a consequence of the extension of time that exist other than solely by reason of this Act, nor does it add anything to those rights.
- (4) If party A exercises the right conferred by subsection (1), the exercise of that right does not—
  - (a) affect any rights that would otherwise have been available to party A under the Contractual Remedies Act 1979; or
  - (b) enable party B to exercise any rights that may otherwise have been available to party B under that Act as a direct consequence of party A exercising the right conferred by subsection (1).
- (5) The right to suspend work under a construction contract ceases when party B pays the amount in full or complies with the determination.

## Subpart 2—Enforcement of adjudicator's determination

### *Enforcement of adjudicator's determination generally*

#### **73 Enforcement of adjudicator's determination**

- (1) This section applies if an adjudicator determines that a party to the adjudication is liable, or will be liable if certain conditions are met, to pay another party either or both of the following:
  - (a) an amount of money under the construction contract:
  - (b) any costs and expenses incurred in the adjudication (including any amount of contribution to the adjudicator's fees and expenses that the adjudicator has determined is payable by one party but that has been paid by another party).
- (2) If this section applies, a plaintiff may apply for the adjudicator's determination in respect of the matters referred to in subsection (1) to be enforced by entry as a judgment in accordance with this subpart.
- (3) The application—
  - (a) may be made to a District Court; and
  - (b) must be made in the manner provided by the rules of that court (if any).

- (4) Either before or immediately after making the application, the plaintiff must serve on the defendant—
  - (a) a copy of the application; and
  - (b) a statement setting out the consequences for the defendant if the defendant takes no steps in relation to the application.
- (5) Despite subsection (2), a plaintiff (to whom an amount of money will be payable under an adjudicator's determination if certain conditions are met) may only apply for that determination to be enforced by entry as a judgment after those conditions have been met.

#### **74 Defendant may oppose entry as judgment**

- (1) If the defendant wishes to oppose the application under section 73, the defendant must, within 15 working days after the date on which the defendant is served a copy of the application, apply to the District Court for an order that entry of the adjudicator's determination as a judgment be refused.
- (2) The application for an order referred to in subsection (1) may be made only on the following grounds:
  - (a) that the amount payable under the adjudicator's determination has been paid to the plaintiff by the defendant;
  - (b) that the contract to which the adjudicator's determination relates is not a construction contract to which this Act applies;
  - (c) that a condition imposed by the adjudicator in his or her determination has not been met.
- (3) If the District Court is satisfied that any of the grounds set out in subsection (2) applies, the District Court must—
  - (a) refuse the application under section 73 to enforce the adjudicator's determination by entry as a judgment; and
  - (b) make an order accordingly.
- (4) If the District Court is not satisfied that 1 or more of the grounds set out in subsection (2) applies, the District Court must—
  - (a) accept the application under section 73 to enforce the adjudicator's determination by entry as a judgment; and
  - (b) enter the adjudicator's determination as a judgment accordingly.

**75 Entry as judgment if defendant takes no steps**

If the defendant takes no steps within 15 working days after the date on which a copy of the application under section 73 to enforce the adjudicator's determination is served on the defendant, the District Court must, at the request of the plaintiff, enter the adjudicator's determination as a judgment as soon as practicable.

*Enforcement of adjudicator's determination involving charging order in respect of construction site*

**76 Enforcement of adjudicator's determination involving charging order in respect of construction site**

- (1) This section applies if an adjudicator has recorded in his or her determination the adjudicator's approval for the issue of a charging order in respect of a construction site.
- (2) If this section applies,—
  - (a) the plaintiff may, in the application under section 73, also apply for the issue of a charging order in respect of the construction site; and
  - (b) if the adjudicator's determination is entered as a judgment under section 74(4) or section 75, the Registrar of the District Court must immediately issue a charging order in respect of the construction site.

*Miscellaneous*

**77 Effect of entry of judgment**

To avoid doubt, an adjudicator's determination entered as a judgment may be enforced by execution in accordance with the District Courts Rules 1992.

**78 Application of rules relating to charging orders**

To avoid doubt, the provisions of the District Courts Rules 1992 relating to charging orders apply to charging orders issued in accordance with this Act.

## **Part 5**

### **Miscellaneous provisions**

#### **79 Proceedings for recovery of debt not affected by counterclaim, set-off, or cross-demand**

In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counterclaim, set-off, or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if—

- (a) judgment has been entered for that amount; or
- (b) there is not in fact any dispute between the parties in relation to the claim for that amount.

#### **80 Service of notices**

Any notice or any other document required to be served on, or given to, any person under this Act, or any regulation made under this Act, is sufficiently served if—

- (a) the notice or document is delivered to that person; or
- (b) the notice or document is left at that person's usual or last known place of residence or business in New Zealand; or
- (c) the notice or document is posted in a letter addressed to the person at that person's place of residence or business in New Zealand; or
- (d) the notice or document is sent in the prescribed manner (if any).

#### **81 Rules of court**

- (1) In addition to all other powers conferred by the District Courts Act 1947, the Governor-General may, by Order in Council, make rules regulating the practice and procedure of District Courts in proceedings under this Act.
- (2) Rules may be made under subsection (1) only with the concurrence of—
  - (a) the Chief District Court Judge; and
  - (b) 2 or more members of the Rules Committee established under section 51B of the Judicature Act 1908 of whom at least 1 is a District Court Judge.
- (3) In the absence of any rules under this section, or in any situation not covered by any of those rules, the rules in relation to civil proceedings for the time being in force under the

District Courts Act 1947 apply, with all necessary modifications, to proceedings under this Act.

## 82 Regulations

The Governor-General may, by Order in Council, make regulations providing for any matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.

---

### Legislative history

15 May 2001	Introduction (Bill 128-1)
27 June 2001	First reading and referral to Finance and Expenditure Committee
21 December 2001	Reported from Finance and Expenditure Committee (Bill 128-2)
19 November 2002	Second reading, committee of the whole House, third reading
26 November 2002	Royal assent

---

This Act is administered in the Ministry of Economic Development.

---