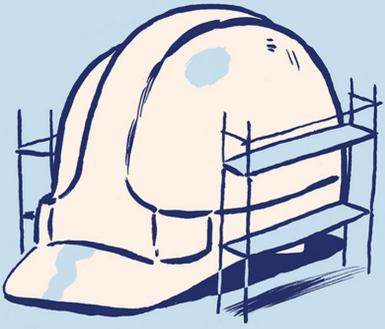


Insights / Construction

Construction update: payment claims for deposits – are they allowed?



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The Construction Contracts Act 2002 provides a system of making and responding to payment claims in construction contracts. There are unforgiving consequences for failing to respond to a payment claim under the Act because the claimed amount becomes payable immediately and no disputes can be raised. However, does the payment claim regime under the Construction Contracts Act 2002 allow a contractor to make a payment claim for a deposit?

What are deposits?

The parties to a construction contract will commonly come to an arrangement where the principal will need to make a payment to the contractor before any work is undertaken. That is, the principal must pay a deposit or security. The same is also true as between contractor and subcontractor.

These deposits allow the contractor to immediately cover the cost of whatever is being produced, including any payment it has to make to subcontractors or suppliers. They also provide some protection in the event of the principal failing to make payment upon delivery.

Does the Construction Contracts Act 2002 (Act) apply?

The Act provides a system of making and responding to payment claims in construction contracts. There are unforgiving consequences for failing to respond to a payment claim under the Act because the claimed amount becomes payable immediately and no disputes can be raised. However, does the payment claim regime under the Construction Contracts Act 2002 allow a contractor to make a payment claim for a deposit?

This issue was recently considered by the High Court in *NMHB Limited v Concrete Structures (NZ) Limited*.^[1] In that case NMHB had been contracted to undertake building work in Henderson, Auckland. In order to complete that building work, it engaged Concrete Structures to manufacture and supply precast concrete panels. It was agreed between NMHB and Concrete Structures that 50% of the contract price was payable upfront upon invoice and before delivery of the concrete panels. On 25 September 2017 Concrete Structures issued an invoice for \$150,698.88 being the sum payable prior to delivery. The parties' relationship deteriorated, and Concrete Structures remained unpaid. In February 2018 it served NMHB with a statutory demand for \$206,391.94 (it having rendered further invoices / payment claims that were unpaid).

NMHB's argument against the payment claim

NMHB applied to set aside the statutory demand. NMHB acknowledged that on its face there had been a valid payment claim that was not responded to with a payment schedule (as required under the Act). However, NMHB argued that a payment claim for a security payment or deposit could not be a valid payment claim under the Act.

This was based on the wording in section 20 of the Act and the definition of "construction work". For a payment claim to be valid it must comply with the requirements under section 20 of the Act. One of these requirements is that it must "identify the construction work... to which the payment relates."^[2]

NMHB argued that payment claims for a deposit or security cannot be valid because no construction work had yet occurred. It also pointed to the definition of construction work in the Act, which it said describes *actual work*.

The Court's findings

The Court disagreed with NMHB. Associate Judge Sargisson found that the payment claim only had to relate to the construction work and that there was nothing prohibiting future construction work being the subject of a payment claim.

Associate Judge Sargisson also noted that security payments were common in the industry and to refuse to allow valid payment claims, for these payments would run counter to the purpose of the Act and frustrate its operation.

What can you take from this?

The case was yet another example of the consequences of failing to respond to a valid payment claim with a payment schedule. Despite the harsh consequences it is still common for parties to a construction contract not to understand the process.

The case also confirms that valid payment claims can be made for construction work not yet completed if the terms of the contract between the parties allows for it. In making this finding Associate Judge Sargisson cited the Court of Appeal, which stated:^[3]

as long as the construction contract provides for the payee to be paid the claimed amount in consideration for its performance of construction work... the payee is entitled to make a claim for the payment in a payment claim.

While not a surprising result it is good for contractors to now have confirmation that deposits or security payments due under a construction contract can be validly claimed in a payment claim under the Act.

If you have any questions about the contents of this article or the Construction Contracts Act 2002 in general, please contact us.

[1] *NMHB Limited v Concrete Structures (NZ) Limited* [2018] NZHC 2436.

[2] Act, s 20(2)(c).

[3] *George Developments Ltd v Can Construction Ltd* [2006] 1 NZLR 117 (CA) at [55]



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