

Now more than ever, it is crucial to correctly prepare payment claims and payment schedules

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The Construction Contracts Act 2002 (CCA) contains a regime for facilitating the regular and timely payment between parties to a construction contract. Parties to a construction contract need to comply faithfully with the payment procedures contained in the CCA to avoid a payee's payment claim being deemed to be invalid or, alternatively, entitling the payee to payment if the amount it is claiming is not disputed by the payer within the statutory time period.

In the current climate where the flow of cash is so important, it is crucial that parties ensure they strictly comply with the CCA payment claim regime. A recent case illustrates the importance of contractors correctly preparing payment claims.

In the case of *Poly Wealth Trustee Limited v Carl Anthony Van Vlerken* [2020] NZHC 634, Mr Van Vlerken undertook construction work for Poly Wealth and then issued an invoice to Poly Wealth for \$100,000 for that completed work which Mr Van Vlerken claimed was a payment claim under the CCA.

Poly Wealth did not respond to the alleged payment claim within required statutory 20 working days period. Mr Van Vlerken then issued a statutory demand for the amount recorded in his invoice on the basis that he had an enforceable debt in Court against Poly Wealth. Poly Wealth brought an application to set aside Mr Van Vlerken's statutory demand (under section 290 of the Companies Act 1993) on the basis that there was a genuine and substantial dispute that the debt was owing or due.

One of the grounds of dispute was that the mandatory requirements of section 20(3) of the CCA had not been met. In particular, that the payment claim was not accompanied by an outline of the process for responding to that claim in the prescribed form (namely, form 1 of the Construction Contracts Regulations 2003) (**Prescribed Form**). The Prescribed Form is intended to provide clear and comprehensive advice to the payer about the 'sudden death' regime in the CCA if the payment procedures are not complied with.

Mr Van Vlerken's payment claim did include some of the required information. However, most parts of the Prescribed Form were missing. In particular, the following information was missing:

- The period in which to pay the claimed amount to avoid losing the right to object
- The details in responding with a 'scheduled amount' if the claimed amount is disputed
- The period within which to pay a 'scheduled amount'
- The importance of consulting a lawyer if anything is unclear.

A payment claim will not be found invalid because of purely technical deficiencies, particularly where it otherwise substantially complies with the CCA requirements.

The Court found that Mr Van Vlerken's omissions from the Prescribed Form were so fundamental and serious that it was arguable there was no substantial compliance with the requirements for payment claims as set out in the CCA. The non-compliances could not be said to be **trifling or mere technical quibbles**. A particularly serious omission was the failure to specify the due date for the payment **bearing in mind the important consequences that flow from that** (ie by that date the payer needs to either dispute the entire amount, pay the entire amount or pay a different amount if part of the amount is disputed).

The particular characteristics of the individual payer and whether or not he or she was prejudiced by the omissions in the payment claim are relevant in determining whether there was substantial compliance with the CCA. However, it is not conclusive. Whether there has been substantial compliance with the CCA requirements must be determined on a substantially objective basis. This is particularly the case in terms of the Prescribed Form. In this case, one of the directors of Poly Wealth, Mr Wang, was a solicitor who claimed on his firm's website to have expertise in construction law. The Court accepted that Mr Wang's experience was of some relevance but not determinative of the issue.

The 2015 amendment to the CCA removed the distinction between residential and commercial construction contracts in relation to the Prescribed Form so that it became required to be attached to all payment claims including those related to commercial construction contracts (ie not just residential construction contracts). By that amendment Parliament must have intended that all

parties who are served with payment claims, must receive the necessary information to respond to a payment claim and be expressly advised of the consequences of not responding, regardless of their own position or expertise. After all, the use of the Prescribed Form is mandatory.

The lesson from this case is quite simple: all payees should ensure strict compliance with the CCA requirements, particularly, when it comes to including the Prescribed Form. The Prescribed Form does not need to be amended in any way. It simply needs to be added to the back of the payment claim. It can be found on the [Government's Building Performance website](#).

If you require any assistance with this, feel free to get in touch with any one of our infrastructure team members.

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