

QUANTITATIVE ANALYSIS OF CONSTRUCTION-RELATED LEGAL CASES IN NEW ZEALAND

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ABSTRACT

The construction industry in New Zealand (NZ) plays a significant role in the country's economy. Similar to many other countries around the world, the construction industry in NZ is also prone to many disputes, which sometimes end up in courts. To investigate comprehensively about the disputes in the construction industry, several researchers have analysed court cases internationally. There is only a limited number of studies in NZ construction industry that followed court case analysis. This study has been carried out in search of quantitative aspects of 35 construction industry-related court cases in NZ. Based on the studied 35 court cases in NZ, majority of them has fallen into the area of payment issues, quality of works and variation entitlements. Poor contract understanding and administration, contractor's quality of work and poor contract arrangement have been identified as the most recurring primary causes of disputes. Further, the majority of cases that were heard before NZ courts had followed lumpsum contracts and traditional procurement route. The findings of this study is beneficial to the construction industry practitioners to avoid disputes by early identification of common issues in the industry.

Keywords: Causes of Disputes; Court Case Analysis; Disputes in NZ.

1. INTRODUCTION

Kumaraswamy (1997) has defined a dispute as a “situation in which a claim or assertion made by one party is rejected by the other party and the rejection is not accepted in return”. Disputes in construction projects hinder the project’s success as they largely impact the time, cost and quality objectives of its parties (Naji et al., 2020).

1.1 STUDIES ON COURT CASES RELATED TO THE CONSTRUCTION INDUSTRY

Given the importance of investigating disputes in the construction industry, many researchers have focused on this area. One of the main data collection methods for those studies related to disputes in the construction industry were “court case analysis”. Court

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case analysis provides an in-depth understanding of how judges make decisions and examines factors such as policy considerations and different viewpoints on past cases (Sunstein, 2005).

Davenport and Brand (2013) investigated how Australian high courts have relied on the effectiveness of the time bar clause in the case *Andrews v. Australia and New Zealand (NZ) Banking Group* case. To investigate the reasons for escalating the disputes from the arbitration and adjudication to litigation in England and Wales, a review of 48 legal cases were conducted by Barman and Charoenngam (2017). Arditì and Pulket (2005) gathered information from 114 construction related court cases in USA to develop a decision making tool based on a boosted decision tree system capable of forecasting the result of construction litigation.

1.2 STUDIES ON NZ COURT CASES RELATED TO CONSTRUCTION INDUSTRY

Jelodar et al. (2016) reviewed court cases in NZ from 2009 to 2014 and revealed:

- Opportunistic behaviour, breach of contract, poor workmanship and contract and documentation problems, are the most common causes of disputes,
- How relationships among the parties get impacted by a dispute, and
- The importance of proper contractual provisions, evidence and reasoning to manage a dispute smoothly.

Amongst the studied cases, 70% of the total court cases were triggered by multiple causes, hence the complexity of the causes was highlighted. Further, their study identified, disputes between client and the Contractor as the most frequent type of dispute to proceed to the courts while disputes between the Contractor and the sub-contractor being the second largest. Similarly, Ramachandra and Rotimi (2011) also ascertained amongst the cases studied, the majority (82%) were between the clients and contractors followed by cases between contractors and sub-contractors (10%) and between clients and sub-contractors (8%). This study examined the nature of payment problems in NZ by analysing 40 court cases (by identifying the parties, nature of the payment dispute, claimed amount and status of the final judgement) and liquidator's report. Moreover, 80% of the cases which were examined in this study were related to progress and final payment disputes.

1.3 NZ LEGAL SYSTEM

NZ legal system has diverged from the traditional English legal system in many aspects and it protects the customary or indigenous rights (Penk & Russell, 2018). In 1840, British Crown and Māori chiefs entered into an agreement called, “Treaty of Waitangi”, which emphasises the relationship between the Crown in NZ and Māori (Ministry of justice, 2020). Similar to England, NZ's constitution remains unwritten, but the parliament has passed many statues namely Constitution Act 1986, the State Sector Act 1988, the NZ Bill of Rights Act 1990. The sources of NZ law are mainly the parliament, where statues are originated and the courts, where case laws being initiated (Penk & Russell, 2018). Matters related to construction industry are often governed by the Construction Contracts Amendment Act 2015 passed by Parliament on 20 October 2015.

The court system, which belongs to the government and few private sector entities involve in dispute resolution process in NZ. The hierarchy of court system in NZ follows common

law jurisdictions similar to United Kingdom and Australia which allows to appeal the decisions of lower courts in higher courts. The court hierarchy is basically consisted of three levels namely: (a) Higher Courts, (b) Lower Courts, and (c) Tribunals and Authorities as illustrated in Figure 1.

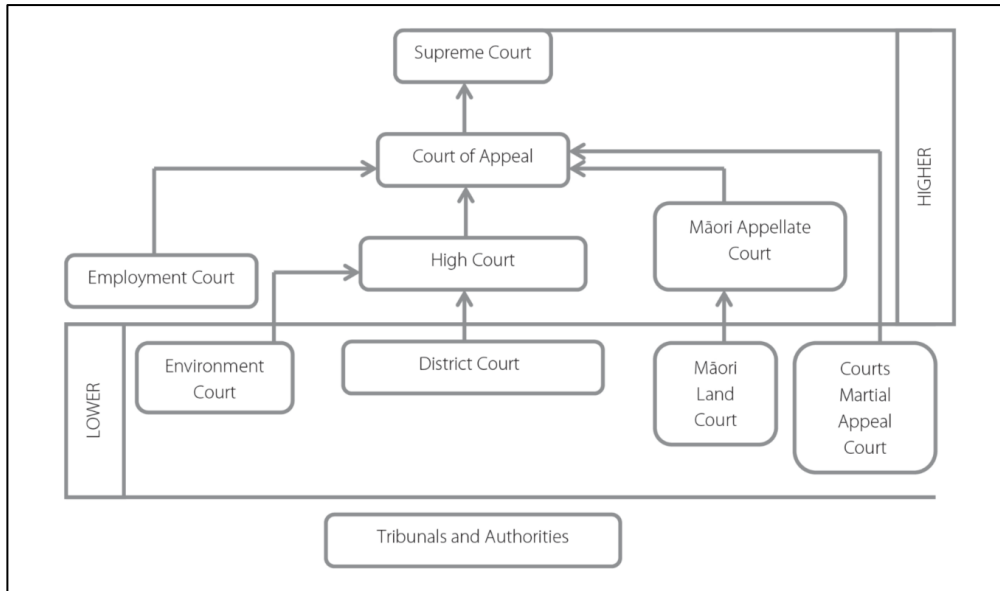


Figure 1 : Hierarchy of court system in NZ
(Source: Penk and Russell, 2018)

In summary, several studies around the world preferred court case analysis as their data collection method to achieve various research objectives such as investigating the usage of contractual provisions and developing decision-making tools to predict judges' decisions. However, in NZ, there are very limited number of studies regarding the construction related disputes such as the (a) study by Jelodar et al. (2016), which focused on how the relationship among parties gets impacted by a disputed environment, and (b) study by Ramachandra and Rotimi (2011), which focused on the payment related dispute. This study mainly aims to identify frequent causes of disputes and common types of disputes in the NZ construction industry. Additionally, it attempts to recognise what procurement and contract types have mainly contributed to disputes. The said aims were expected to be achieved using quantitative analysis of court cases in NZ construction industry.

2. RESEARCH METHODOLOGY

This paper presents the findings of only a part of a more extensive study. Researchers have already identified 28 causes of construction-related disputes under four main categories by conducting a systematic literature review. An in-detail court case analysis on the cases which were heard before the courts in NZ was carried out to study their causes more comprehensively. A simple methodology from the selection of cases step to the reporting step was followed as depicted in Figure 2.

“Lexis Nexis – NZ” is a powerful and user-friendly online database that has the ability to search cases and legal information effectively and accurately. Therefore, it has been used as the database to review the cases. Lexis Nexis - NZ contains number of varieties of cases and does not limit to construction cases. Users of Lexis Nexis have the ability to

filter cases which were categorised based on “catchwords”. Hence, firstly the main category, “Building and construction” was selected, secondly under that main category, only three sub-categories namely “Building Contracts”, “Construction” and “Subcontractors” were selected leaving four other sub-categories unselected as they were irrelevant to the focus of this study. Seventy cases were reviewed initially and almost half of them were not further considered as they were related to condominium property, building consent or litigation procedure-related disputes.

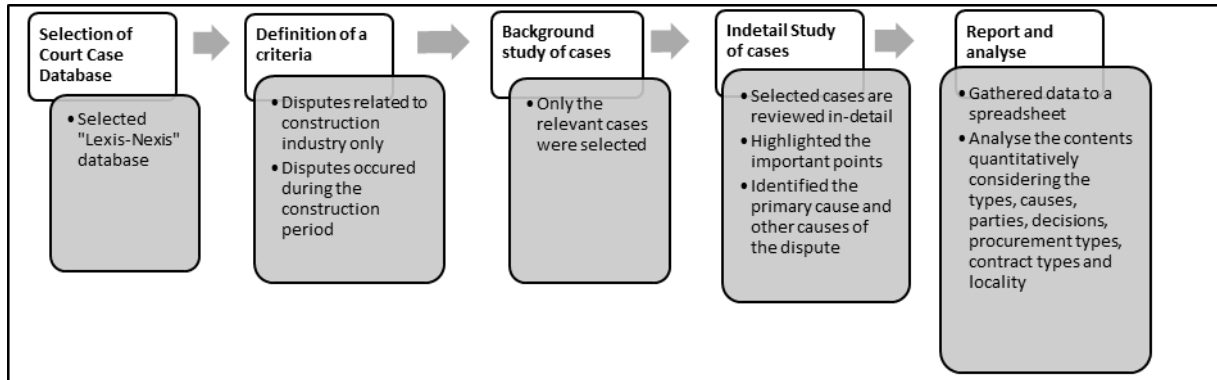


Figure 2 : Research methodology

The detailed study on the cases were carried for the selected 35 court cases. In each selected case, background information, location, year, primary cause of dispute, other causes and type of dispute were the main aspects recorded in the spreadsheet database. The cases were categorised mainly under eleven causes and analysed qualitatively and quantitatively. However, this paper only presents the quantitative findings. It is possible to bring quantitative aspects even for qualitative data by employing approaches such as frequency counts (by summarising the occurrence of different themes) and descriptive statistics (by calculating measures such as mean, mode and median) (Bryman, 2016; Saldaña, 2015). The reviewed cases were categorised and coded into eleven causes of disputes and 16 types/areas of disputes. Further, those cases were also categorised considering their procurement methods, contract types and locations. Under each category, the frequencies of occurrences of the selected cases were calculated to determine the most common/significant causes, types, procurement types, contract types and locations of construction-related disputes in NZ.

3. FINDINGS AND ANALYSIS

Within the selected 35 court cases, eleven “primary causes” of disputes have been identified. The number of cases identified against each of the primary causes is listed in Table 1.

Table 1 : Primary causes of court cases

Primary Cause	Total
Poor contract understanding and administration	10
Poor contractual arrangements	7
Contractor's quality of works	5
Unrealistic Expectations of Employer	4
Non or delayed payments	3

Primary Cause	Total
Unrealistic Expectations of Contractor	1
Employer-initiated scope changes	1
Weather and Environmental Issues	1
Engineer's faults	1
Financial Failure of Contractor	1
Other sub-contractors' conducts	1

Most of the cases (10 out of 35) were related to “poor contract understanding and administration”, which can be considered as a broad “primary cause” with several sub causes such as the party's unilateral decisions, poor instructions, improper reasoning and non-compliance to the contract document. Poor contractual arrangements and quality of the Contractor's work have also caused many construction disputes that have gone up to NZ courts. A previous study by Jelodar et al. (2016) reviewed court cases in NZ from 2009 to 2014 and revealed 26 causes of disputes and amongst those causes, opportunistic behaviour, breach of contract, poor workmanship and contract and documentation problems were identified as the most common. The study by Jelodar et al. (2016) have identified causes of disputes in more narrower manner whereas this study identifies causes in a more broad manner.

Several uncommon causes were also identified namely the Engineer's faults, the financial failure of the Contractor, and other sub-contractors' conducts. Even though a primary cause of each case was identified, several cases were triggered due to multiple reasons; for instance, in "Andrews Property Services Ltd v Body Corporate" (2017), the defendant decided to depart from one of its liabilities unilaterally and on the other hand appellant had not clarified design details during pre-contract stage, therefore this particular case was triggered by multiple causes. Moreover, in a case heard before the High Courts, NZ; "HSU v MAHONEY" (2021) was caused by lack of supervision by Employer and non-compliance to the construction Standards by the Contractor. Similarly, Jelodar et al. (2016) have also emphasised the fact that many of disputes (70% of cases studied by the author in NZ) were triggered due to several distinct causes.

Authors have further attempted to identify common areas of disputes among the selected 35 cases. Figure 3 depicts the areas and causes that led to a particular dispute area. Disputes related to payment issues were found on most of the cases (12 out of 35 cases) and causes for that dispute area were poor contract understanding and administration, poor contractual arrangements, non/delayed payments, Contractor's quality of works and weather and environment issues.

	Poor Contract Understanding and Administration	Poor contractual arrangements	Contractor's quality of works	Unrealistic expectations of Employer	Non or Delayed Payments	Unrealistic expectations of Contractor	Employer-initiated scope changes	Weather and Environmental Issues	Engineer's faults	Financial Failure of Contractor	Other sub-contractors conducts
Payment Issues	4	3	1	3			1				
Quality of works			3	1							
Vairation Entitlement		1				1					
Termination	1										1
Variation Procedural	1							1			
Compliance to authority			1	1							
Continuation of the Contract	1				1						
Design responsibility		1									
Act in Good Faith				1							
Undefined Party		1									
Who should pay for the works		1									
Compliance to Employer's Instruction	1										
Contractor's Design				1							
Abandon works									1		
Testing and Inspection	1										
Suspension	1										

Figure 3 : Primary causes and common areas of disputes

Though many stakeholders are involved in construction projects, disputes between the Contractor and the Employer are identified as the most common, accounting for 26 out of 35 cases. It re-confirms two previous studies in NZ by: (1) Ramachandra and Rotimi (2011a), which revealed that four-fifths of the cases in NZ were between the employers and contractors, and (2) Jelodar et al. (2016), which again found that disputes between client and the Contractor as the most frequent type of dispute to proceed to the courts. Amongst the cases between employer and Contractor (27), 15 were claimed/appealed by Contractor, and eight cases were decided in favour of Contractor. The rest of the 12 cases were claimed/appealed by employer, and employer managed to obtain a decision for their side in 7 cases. A total of 4 cases were identified between the Contractor and the sub-contractor in which majority of them were claimed/appealed by the sub-contractor (3 cases out of 4) who managed to win two of them. Overall, the claimed/appellant party were only successful in 15 cases. Table 2 shows the summary of court cases based on parties and their decisions.

Table 2 : Disputant parties in cases

Parties	Claimed / Appealed by	Decision in Favour of				
		Contractor	Employer	Sub-Contractor	Consultant	Authority
Employer VS Contractor (26)	Contractor (16)	8	8			
	Employer (10)	7	3			
Contractor VS Sub-Contractor (4)	Contractor (1)			1		
	Sub-Contractor (3)	2		1		
Contractor VS Consultant (2)	Contractor (1)				1	
	Employer (1)		1			
Authority VS Contractor (1)	Authority (1)					1
Employer VS Sub-Contractor (1)	Sub-Contractor (1)		1			
Employer VS Consultant (1)	Employer (1)		1			
		17	14	2	1	1

Traditional procurement, in which the Contractor only involves to the construction relying on the design provided by the employer, is identified in 70% of the cases as shown in figure 4. Importantly, findings show that extremely low number of cases (3%) were reported with regard to "design and built procurement" method. Some cases were raised from labour only (7%) and material only (7%) procurement settings. Besides the cases between employer and Contractor, few cases were reported between employers and consultants and contractors and authorities as well.

Cases were reported in various contract types. More than one third of cases (39%) were raised from lumpsum contracts whereas cost reimbursement contracts and measure and value contracts were highlighted in 13% and 9%, respectively. Noticeably, the parties of one out of ten cases have not agreed to a type of their contract at all. In some instances, parties had entered into very specific contracts such as "Working together agreements" and mixed type of contracts but could not resist carrying their disputes to the courts.

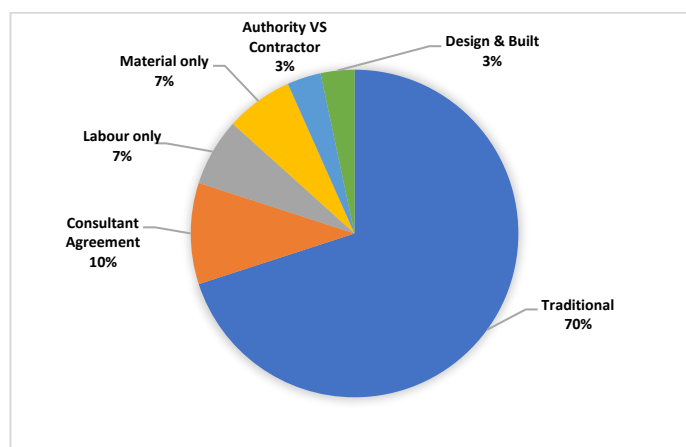


Figure 4 : Distribution of cases based on procurement type

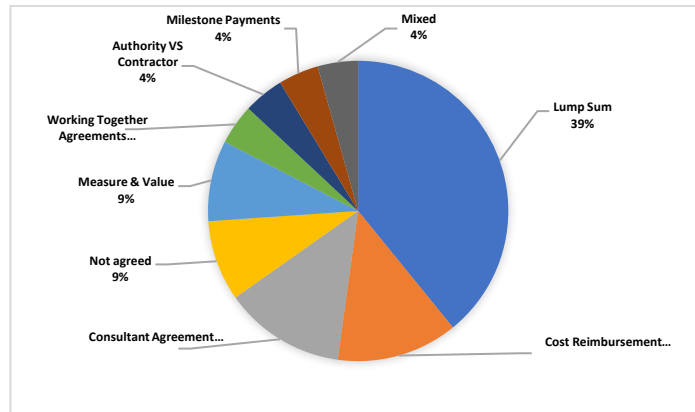


Figure 5 : Distribution of cases based on Contract Type

Amongst the studied cases, 23 of them had written contracts. Out of those 23 cases, 10 of them have clearly mentioned that parties had followed a standard form of contract such as NZS 3910:2003. However three cases had not had a written contract at all.

As shown in figure 6 below, court cases were reported across the two islands of NZ. However, the majority of them were reported in Auckland (16 cases) and Wellington (12 cases).



Figure 6 : Distribution of cases across NZ

4. CONCLUSIONS

Analysing court cases has been a popular research method for many studies related to disputes and law. As a part of a larger study, this paper has presented only quantitative findings of 35 court cases in the construction industry of NZ. The most significant cause of a particular court case has been considered as "primary cause" and eleven "primary causes" of disputes were identified. Poor contract understanding and administration, poor contractual arrangements, Contractor's quality of work and unrealistic expectations of employer were identified as the most frequent "primary causes" of disputes. Similar to few previous studies in NZ, payment issues were highlighted in most of the cases

followed by disputes related to quality of works, variation entitlement and termination. Most of the cases were between contractors and employers in which Contractor claimed/appealed often. Traditional procurement route and lumpsum contracts were reported in most of the cases. The findings of this quantitative study pave the path for an in-depth study investigating the reasons and avoidance strategies for the disputes which arise out of traditional procurement route and lumpsum contracts in NZ. Industry practitioners can also be aware of more common types of disputes and causes that mostly contributed to each type of disputes in NZ.

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