

BuildLaw

ISSUE 27 / MAR 2017

**THE NEW
RETENTION REGIME
MARCH 2017**

**HIGH COURT DISMISSES APPEAL
AGAINST ARBITRAL AWARD:
Custom Street Hotel Ltd v Plus
Construction NZ Ltd**

**THE BUILDING
(EARTHQUAKE-PRONE BUILDINGS)
AMENDMENT ACT 2016**

FROM THE EDITOR

Welcome to the 27th issue of BuildLaw® in which we draw on the experience and expertise of leading experts in the field to bring you commentary, articles and reviews on topical matters relating to construction law.

In this issue we feature new changes to the Construction Contracts Act – the new statutory trust model for retentions which came into force on 31 March 2017 including the late introduction of a 'complying instrument' option as a means of protecting retention money.

We also look at public sector procurement, peer professional opinion defences in negligence cases in Australia, the consequence of skipping a mandatory pre-arbitral step, extensions of time anomalies in relation to subcontracts, post termination calls on on-demand bonds, managing earthquake prone buildings; and more.

In 'Case in Brief', Sarah Redding discusses a recent appeal against an arbitral award made pursuant to a NZS3910:2003 contract and I look at a recent Court of Appeal judgment that dealt with the requirement to 'indicate' a claimed amount in respect of a contract where no price or payment mechanism was agreed.

I wish to take this opportunity to thank all our contributors. We are most grateful for the support we receive from dispute resolution professional, law firms, and publishers, locally and overseas, that allows us to share with you papers and articles of a world class standard, and to bring you a broad perspective on the law and evolving trends in the delivery and practice of domestic and international dispute resolution and construction law.

Contributions of articles, papers and commentary for future issues of BuildLaw® are always welcome. I do hope you find this issue interesting and useful. Please feel free to distribute BuildLaw® to your friends and colleagues – they are most welcome to contact us if they wish to receive our publications directly.

Warmest regards,



Editor and Director Building Disputes Tribunal



John Green

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BuildLaw: In Brief

Builder prosecuted for falsely claiming to be a licensed building practitioner



An unlicensed builder has been convicted of two charges of falsely claiming to be a licensed building practitioner.

Albany-based builder Blair Cole has been fined \$5,000 and ordered to pay court costs and \$1,296 in reparation to an Orewa homeowner.

The case against Cole was brought to the North Shore District Court by the Ministry of Business, Innovation and Employment (MBIE) Occupational Licensing Team.

"Mr Cole, who trades as Akoranga Construction Limited, ran numerous advertisements in local papers falsely claiming to be a licensed practitioner and displayed the Licensed Building Practitioner (LBP) logo on his business card, despite never holding an LBP license," says Investigations Team Leader Simon Thomas.

"Furthermore, an Orewa homeowner responded to one of these print advertisements, engaging Mr Cole to replace a number of piles under the deck of her house. Mr Cole undertook this work, continuing the guise of a licensed builder. The homeowner paid Mr Cole for the job, which remains unfinished."

It is an offence under the Building Act 2004 for a person to claim to be licensed to carry out or supervise restricted building work, while not being licensed.

Mr Cole pleaded guilty to both charges, was fined \$5,000, and ordered to pay court fees and \$1,296 in reparation to the homeowner for the unfinished work on her Orewa home.

"This prosecution sends a clear message to the building industry that claiming to be a licensed building practitioner without actually holding such a license is illegal. Where MBIE has evidence of this occurring, offenders can expect to be prosecuted accordingly," Mr Thomas says.

Builder's illegal gas cooker job earns \$6,000 fine

February prosecution by the Plumbers, Gasfitters and Drainlayers Board, backs the important messages to homeowners that are in their new public awareness campaign 'Sort the pros from the cons – your family's health and safety, your property and insurance are at risk.'

Auckland builder and Director of L&B Construction Limited, Byungsung Lim pleaded guilty to two charges: doing unauthorised gasfitting and doing unauthorised sanitary plumbing. He was fined \$6,000 on the gasfitting charge, and fined \$650 on the plumbing charge. He was also ordered to pay \$113 solicitor's costs.

The complainant in the case engaged Mr Lim to undertake kitchen and bathroom renovations.

Sanitary plumbing and gasfitting conducted by anyone who does not hold a current NZ Practising Licence from the Board is illegal activity.

Mr Lim has never been registered or licenced as a gasfitter or plumber. He illegally installed



a toilet and a gas hob/cooker during the renovation project – and his work was defective.

Approximately one month after the installation a strong smell of gas, sooty flames and carbon build up on one of the gas nozzles was noticed.

Prolonged low-level exposure, to carbon monoxide can cause illness, loss of normal cognitive function and drowsiness. At high levels of exposure, it can be fatal, which is why the fines associated with illegal work of this type are high.

"Dealing with gas is dangerous. Never install a gas appliance yourself. The law requires you to use a licensed tradesperson and our new campaign 'sort the pros from the cons', shows consumers how to choose the right people", said Martin Sawyers, Chief Executive for the Board.

"It highlights the importance of qualified tradespeople, and the need to eliminate any risk by asking to sight a New Zealand Practising Licence before any work begins."

"A qualified tradesperson will make sure gas appliances are connected correctly, flued and vented properly, working properly and most importantly, that it is safe to use," he continued.

The Board and The NZ Insurance Council NZ warn mistakes are costly, and you could void your insurance. Consumers can find out what's legal and what's not at www.pgdb.co.nz.

Where there is any concern that work may

have been done by someone who is not authorised, or there is concern about the competency of a tradesperson, consumers should notify the Board.

To make a complaint phone 0800 743 262, or use the R.A.C app (report-a-cowboy). It is available free and is a direct link to the Board's investigations team. Go to www.pgdb.co.nz.

Commission confirms charges filed against Bunnings for misleading advertising

The Commerce Commission has filed 45 charges in Auckland District Court against Bunnings (NZ) Limited alleging it misled consumers by advertising the prices of its goods as being the lowest in the market.

Bunnings is a duly incorporated company with its registered head office in Auckland. Its ultimate parent company is the Australian company Wesfarmers Limited, which also owns Coles, Target, K-Mart and Officeworks.

Bunnings is one of New Zealand's largest retailers, selling home improvement, outdoor living and general merchandise products. It has 46 retail stores nationwide, all of which it owns and operates. It employs 3,700 staff and stores stock on average 46,000 product lines.

The Commission alleges that Bunnings' advertising at its stores nationwide along with advertising campaigns on television, radio, online, and in newspapers and catalogues gave an overall impression that it offered the lowest prices for its products, when this was not true.

The Commission's investigation focused on the period 1 July 2014 to 28 February 2016.



BuildLaw: In Brief

New retention scheme came into effect on 31 March 2017

The details are set out in the Construction Contracts Amendment Act 2015. The retention money provisions are designed to ensure payment of retention money to subcontractors, even in the event of insolvency.

Further clarification of the retentions trust regime was provided for in the Regulatory Systems (Commercial Matters) Amendment Bill (the Bill) introduced into Parliament in 12 October last year. The Bill is an omnibus bill and one of a package of three omnibus bills that contain amendments to legislation administered by the Ministry of Business, Innovation, and Employment.

The primary purpose was to clarify that the new retentions trust regime will apply only to contracts entered into or renewed on or after 31 March 2017, however the Bill also introduced a new and significant alternative to the retentions trust regime in the form of a 'complying instrument'.

On 23 March 2017, the Bill passed its third and final reading. Sections 139 to 147 of the bill amend provisions in the Construction Contracts Amendment Act 2015 relating to retentions and came into force immediately after section 18 of the Construction Contracts Amendment Act 2015 came into force on 31 March 2017.

In summary, from 31 March 2017:

- existing contracts, and their retentions, are not caught unless the contract is renewed for a further term after 31 March 2017 or the parties agree that the retentions provisions will apply;
- the retentions regime will apply to all retentions withheld under all construction contracts entered into or renewed after 31 March 2017, no matter how small, unless the contract is residential construction contract, vis. a contract for a person who is occupying or intends to occupy the premises that are

the subject of the construction contract wholly or mainly as a dwellinghouse;

- the default position is that all retentions withheld by a payer in respect of commercial construction contracts entered into on or after 31 March 2017 must be 'held on trust';
- retention money may be held as cash or other liquid assets that are readily converted into cash;
- payers may invest the retention money and may retain any interest earned but are liable to make good any losses on the investment;
- retention funds can be comingled with other money but cannot be used as working capital;
- retentions funds cannot be used for anything other than remedying defects in the payee's work;
- retention funds are not available for the payment of debts of any other creditors, even if they are secured or preferential creditors;
- disbursement of retention money cannot be made conditional on anything other than performance of the payee's obligations under the contract;
- the date of payment of retentions fixed in the contract cannot be later than the date on which the payee's obligations under the contract have been completed;
- interest on retention money is payable from the due date for payment; and
- as an alternative, the payer may elect to put in place a 'complying instrument' to protect payment to the payee if the payer fails to pay – in practical terms that would mean an insurance policy, a bond, or a guarantee, provided that certain conditions are met, namely:



- the instrument must be issued by a licensed insurer, registered bank, or any other person who is not an associate of the payer prescribed by regulations;
- it must be issued in favour of the payee;
- it must be paid for fully by the payer and all conditions must have been satisfied so that the instrument is, and remains in effect;
- the retention money must be paid out if the payer fails to make payment on the date on which it is payable under the construction contract;
- payees can enforce the promise to pay against the issuer of the instrument; and
- importantly, records of financial instruments must be made available for inspection by payees at all reasonable times and without charge.

With both the default trust arrangement and the complying instrument option, there are onerous accounting and recording keeping obligations on the payer. The payee is entitled to inspect those records at all reasonable times and without charge.


Uncertainty remains as to the efficacy of the complying instrument option as the market has not yet responded with fit for purpose

complying instruments, the cost of obtaining such instruments is unknown, what might constitute minimum or prohibited terms is unclear, and just what a payee might be required to do to secure the release of retention monies from the instrument provider is unknown. Furthermore, in the event of any breach of its terms, the payer (and its directors) will immediately be subject to, and in breach of, the default retentions trust regime.

No regulations are currently proposed to set a minimum amount of retention money, alternative methods of accounting, or the default interest rate to apply for late payment of retention money. MBIE advises that the retention money provisions will apply regardless of the amount of money involved to ensure payment for small subcontractors is protected.

What is clear is that contractors pricing new projects will need to understand the basis on which retentions are to be held and agree whether the monies will be held in cash or as liquid assets, whether the monies will be held in a separate account or comingled with other retention money in a common project account, where those accounts will be held, and the interest rate that will apply in the event of late payment.

NEW REQUIREMENTS FROM 31 MARCH 2017



Do not let any employer withhold retentions from you unless they are held in trust in a unique BuildSafe Retention Trust Fund Account.

BuildSafe
SECURITY OF PAYMENT SCHEME
TE KAUPAPA MO TE WHAKARURU PAREMATA
RETENTION TRUST FUND

BALANCE RESTORED TO PUBLIC SECTOR PROCUREMENT - THE PROBLEM GAMBLING CASE



Tony Dellow, Susie Kilty, Alastair Hercus, Natasha Wilson

In two cases over the last few years, the High Court has departed from longstanding principles that meant that courts were reluctant to intervene in the conduct of public sector procurement decisions. Now the Court of Appeal has restored those principles in finding for the Ministry of Health (the Ministry) in *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609.

The Court of Appeal has gone back to the previously leading cases, *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd* and *Lab Tests Auckland v Auckland District Health Board*, to reinstate the general principle that judicial review of commercial contracting decisions by public sector agencies will not be available unless:

- The relevant procurement has some extra public law feature (eg, closing a hospital or preventing settlement of a Treaty of Waitangi claim), or
- The agency has failed to follow statutory requirements, or
- In cases of fraud, corruption, or bad faith.

The Court of Appeal has also helpfully stated that it does not agree with the view of the High Court in *Telco Technology Services Ltd v Ministry of Education* [2014] NZHC 213 that, in a commercial context, "the vacuum created by an absence of specific legislative provisions may be filled by public law principles such as natural justice and procedural fairness".

The Court of Appeal commented that, even though the Ministry's development of a problem gambling strategy was a public act with public consequences, the Foundation's judicial review claim did not relate to the public nature of the decision; but rather its own

disappointed commercial interests. Accordingly, judicial review of the Ministry's procurement decision was not possible in this case. Further, the Court of Appeal vindicated the Ministry's procurement process after the High Court had granted judicial review on three grounds.

The Court of Appeal found that the Mandatory Rules of Procurement by Departments (and now the Government Rules of Sourcing) are not in themselves able to be enforced by disaffected tenderers through judicial review. The High Court had indicated that a breach of the Mandatory Rules, unless immaterial, would vitiate the relevant procurement decision on the grounds of error of law. The Court of Appeal disagreed, stating that, although the Mandatory Rules bind the Ministry, since the Rules are administrative rules rather than legislation, the consequences of a breach of the Rules in the judicial review context will depend on the nature and consequences of the Rule breached.

The Court of Appeal also stated that the High Court's finding that there was a lack of probative evidence for the Ministry's decision was a review of the merits of the decision rather than of the process. Although the Ministry had, at one stage of the process, used a numbered ranking system to assess tenders, the High Court was wrong to characterise the



BALANCE RESTORED TO PUBLIC SECTOR PROCUREMENT - THE PROBLEM GAMBLING CASE CONT...

decision-making process as one involving statistical analysis with only one possible result.

Further, the Court of Appeal was highly critical of the High Court's approach to bias. The High Court had applied the Saxmere standard for judicial bias to the members of the panel considering the tenders: whether a fair-minded and reasonable lay observer would reasonably apprehend that the decision-maker might not bring an impartial mind to the issue. The Court of Appeal interpreted this as effectively requiring the panel to be made up of individuals with no previous involvement in the problem gambling sector. Although the

Mandatory Rules refer to the elimination of conflicts of interest in procurement decision-making, the Court of Appeal found that it would be unworkable, and not in the public interest, to subject procurement decision-makers to the Saxmere standard. Instead, what is required of procurement decision-makers is fairness, good faith, honesty, and a willingness to consider information which might change the decision-maker's view.

The Court of Appeal decision should be welcomed by all public sector agencies conducting procurements. It restores the flexibility required for agencies to conduct effective procurements, while ensuring that serious deficiencies in procurement processes can, in extreme cases, be rectified by way of judicial review. Public sector agencies are now again able to conduct procurement processes with less risk that a disaffected tenderer will be able to successfully challenge decisions for solely commercial reasons.

ABOUT THE AUTHORS

Tony, Susie, Alastair and Natasha are based in Buddle Findlay Wellington.

Buddle Findlay has been providing legal services for 121 years and is one of New Zealand's leading commercial and public law firms, with offices in Auckland, Wellington and Christchurch, and a global reach of contacts and experience.

To learn more , visit the [firm's website](#).



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Friday 16 June

Presentations: Museum of New Zealand Te Papa Tongarewa

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Obligations Mark Colthart (Barrister and Arbitrator)

Assigning obligations or Getting risk allocation right Kara Vague (Downer EDI Limited), Chair SCL(Aust)

Design Obligations

Brendan Cash (Bell Gully) and Jesse Wilson (Bell Gully)

Claims presentation

Richard Wilmot-Smith QC (39 Essex Chambers, London)

Securing performance of obligations: Bonds and Guarantees Brian Clayton (Chapman Tripp)

Panel Session "What Goes on Behind Closed Doors? - Internal Obligations"

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Main Contractor Craig Wheatley (Downer)

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How long do my Obligations last?

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led by Michael Weatherall (Simpson Grierson)

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CONSTRUCTION PROFESSIONALS AND THE PEER PROFESSIONAL OPINION DEFENCES

By Maxine Tills

Peer professional opinion defence - no 'get out of jail free' card for construction professionals

Since the recommendations made by the Review of the Law of Negligence Final Report (Ipp Report) in 2002, each Australian state has enacted legislation that provides for a defence of peer professional opinion. In Western Australia, the defence applies only to health professionals and, despite a wider application in the other states, the majority of cases dealing with the defence are medical negligence cases. The defence has been argued in a number of cases regarding claims against engineers, notably in New South Wales, most with little success.

The relevant provision in New South Wales is Section 50 of the Civil Liability Act 2002 (New South Wales) (CLA). The effect of the section is as discussed in *Dobler v Havlerson*:¹

If the conduct complained of accorded with professional practice regarded as widely accepted by peer professional practice as competent, then the professional escapes liability, subject to any irrationality of the practice.

The case confirmed the section provides a defence to claims of professional negligence and that (with the exception of WA) the professional has the onus of proving the existence of a professional practice widely accepted by peer professional opinion as competent professional practice.

The defence applies only to breach of a duty to exercise reasonable care whether under a contract or in negligence. It applies to damage

whether it be property damage, economic loss or personal injury. The defence does not apply to a claim for breach of an express term of a contract which imposes an obligation on a construction professional other than to exercise reasonable care or under consumer legislation for misleading and deceptive conduct.

Given that a large number of claims against construction professionals involve not only allegations of breach of duty of care but breach of contract and misleading and deceptive conduct arising from design drawings or the certification of the design, the defence's application is necessarily limited in defending claims.

The defendant should plead sufficient material facts to establish the defence. Reference to the section is desirable.² The material facts pleaded should include:

- the specific manner in which the defendant acted being a practice at the time;
- the fact of its wide acceptance by peer professionals as competent practice; and
- that the defendant acted in accordance with the practice.³

The defendant does not need to plead the names or number of professionals who accept the practice as competent professional practice.

Expert evidence is required to support the manner in which the defendant acted and to

establish evidence of acceptable professional practice. It is not sufficient for a professional to give abstract evidence that professional persons have responded in a similar way as the defendant in similar circumstances. Evidence should be adduced to prove the specific matters pleaded.⁴

The limitations of the defence under Section 50 CLA to allegations of professional negligence in complex engineering claims are evident in *UGL Rail Pty Ltd v Wilkinson Murray Pty Ltd (UGL Rail Case)*⁵ and *Thiess Pty Ltd and John Holland Pty Ltd v Parson Brinckerhoff Australia Pty Ltd (TJH Case)*⁶

The UGL Rail Case concerned the provision of advice by Wilkinson Murray, acoustic engineers, about what UGL Rail was required to do to comply with contractual specifications regarding reverberation control in the Epping to Chatswood Rail Link. In 2003, Wilkinson Murray under a consultancy agreement, provided advice in a report about the type and quantity of sound absorbent panels necessary to meet the reverberation times specified. In 2007, Wilkinson Murray provided further advice when its reverberation testing indicated that the tunnels did not meet the reverberation specification and more acoustic panels would be required. The claim relates to both pieces of advice.

The claim by UGL Rail against Wilkinson Murray was for both negligence and misleading and deceptive conduct in contravention of what was then Section 52 of the Trade Practices Act 1974 (Cth). The New South Wales Supreme Court found that, in relation to the 2003 report and recommendations, Wilkinson Murray was negligent and engaged in misleading and deceptive conduct because without undertaking any computer modelling, building a scale model or adopting a trial and error approach to determine the amount of acoustic panelling required to meet the reverberation specification, it was not in a position to make the recommendations it did and an engineer exercising reasonable care and skill would not

have made the recommendations made by Wilkinson Murray.

Wilkinson Murray submitted that it was not negligent and relied on evidence from its expert that it was unusual at the time for acoustic engineers in Australia to build scale models or perform computer modelling. Wilkinson Murray relied on Section 50 of the CLA in its defence. The Court rejected the peer professional opinion defence.

The Court found that while computer and scale modelling were not common in Australia at the time Wilkinson Murray provided its advice, a number of firms of acoustic engineers had the capacity to undertake computer modelling. The Court found that Wilkinson Murray's negligence was not that it had not undertaken computer modelling but that it had made recommendations about the acoustic panels required to meet the reverberation specification which in the absence of any modelling, it had no rational basis for making. The Section 50 CLA defence did not apply.

The peer professional opinion defence was more recently considered in the TJH Case, another complex engineering claim which involved litigation arising from the roof collapse of a section of the Lane Cove Road Tunnel at Artarmon in New South Wales resulting in significant loss of property and property damage. The designers of the works and the geotechnical engineers responsible for monitoring the ground conditions, formerly Pell Sullivan Meynink Ltd (in liq) (**PSM**) were among the professional consultants sued. As to be expected with a project of this size, there was a complex suite of contracts governing the project and the litigation was complex.

The Court found that PSM breached its obligations to TJH based on its conclusion that PSM's contract with TJH required it to continue to monitor and report on the adequacy of the design in response to the observed rock conditions and that there was no evidence that PSM undertook any assessment of the relevant support systems. The Court said the whole of



the present case, the obligations that PSM undertook were very carefully designed to reflect the particular demands of this complex project. It may be that peer professional opinion could be relevant in the context with which I am concerned. It is not necessary to decide that point...⁷

Conclusion

The peer professional opinion defence is routinely pleaded. However, while there may be some cases where a construction professional may be able to rely successfully on the peer professional opinion defence as the two cases briefly discussed demonstrate, in complex construction projects in which the obligations of a construction professional under its retainer are invariably specific and go beyond the usual obligation to exercise due care and skill in performing the duties under the retainer, the defence is unlikely to succeed.

End Notes

- [1] [2007] NSWCA 335 at 59-62 per Giles, JA.
- [2] *Sydney Southwest Area Health Services v MD* (2009) 260 ALR 702.
- [3] Douglas QC, R. 'CLA Professional Liability exemption – beware the calculus!' (2014) 11(9) Civil Liability 114 page 115.
- [4] *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505.
- [5] [2014] NSWSC 1959.
- [6] [2016] NSW 173.
- [7] [2016] NSW 173.

the design approach and of PSM's obligations was to require continual reassessment of the adequacy of the design in the conditions actually encountered.

PSM relied on the peer professional opinion defence. TJH argued that the expert evidence relied on by PSM did not provide any evidence of widely accepted peer professional opinion. The Court said in relation to section 50:

In my view, the question raised by section 50 cannot be considered in a vacuum. It can only be considered, and the widely accepted peer professional opinion can only be assessed, by reference to the specific obligations that the professional undertakes pursuant to the contract of retainer.

...

It is easy to see how section 50 operates where the professional undertakes no more than the usual and proper obligation to exercise due care and skill in the performance of duties of design, inspection, supervision, or whatever else is a subject of the particular retainer. In

About the Author

Maxine Tills advises professional indemnity and directors and officers liability insurers as both coverage and defence counsel, and acts for a range of insureds including construction professionals and financial institutions.

To learn more about Maxime, visit [Clyde & Co's website](#).

CLYDE&CO



THE CONSEQUENCE OF SKIPPING A MANDATORY PRE-ARBITRAL STEP

- MATTHIAS SCHERER & SAMUEL MOSS

In mid-2014 the Federal Supreme Court ruled that the requirement in the International Federation of Consulting Engineers (FIDIC) Conditions to submit a dispute to a dispute adjudication board (DAB) was a mandatory precondition for arbitration (for further details please see ["Supreme Court – DAB proceedings precondition for arbitration under FIDIC Conditions"](#)). However, the court was able to avoid the longstanding question of what the consequence for failing to comply with a mandatory pre-arbitral condition should be – should the arbitral tribunal:

- dismiss the case outright for lack of jurisdiction or inadmissibility;
- suspend the proceedings; or
- award damages for the breach and proceed with the arbitration in spite of the failure?

In a recent case (4A_628/2015) the Supreme Court finally addressed the question, ruling that an arbitral tribunal should suspend arbitration to allow the parties to comply with the pre-arbitral condition. The decision is particularly important for international construction contracts, which often contain multi-tier dispute resolution clauses requiring parties to resort to mediation, conciliation, dispute boards or DABs before initiating arbitration.

Decision

The case arose from a contract that required the parties to attempt conciliation under the International Chamber of Commerce (ICC) alternative dispute resolution (ADR) Rules before initiating arbitration. The rules provide that conciliation can be terminated by either party, but only after an initial procedural meeting is held. Although the claimant first initiated conciliation proceedings, it filed for arbitration before an initial procedural meeting was held. The conciliator therefore interpreted the claimant's action as a withdrawal of the conciliation request.

In the arbitration, the respondent objected to jurisdiction on the basis that the pre-arbitral conciliation requirement had not been complied with. The arbitral tribunal disagreed and rejected the objection in a partial interim award. The respondent then challenged the award before the Supreme Court.

Options and solution

Based on the wording of the ICC ADR Rules, the Supreme Court first concluded that the arbitral tribunal had erred in finding that the parties had complied with the conciliation requirement. It then turned to the question of what the consequence of the non-compliance should be – a question which it had until then managed to avoid addressing.

The court considered several options. It first looked into whether it was enough for an arbitral tribunal to award damages for breach of contract, without any impact on the arbitral proceedings. According to the court, such a solution would, however, deprive the pre-arbitral condition of any meaning, and therefore considered that a procedural consequence was necessary. Indeed, the purpose of a mandatory pre-arbitral condition is usually to provide an opportunity to avoid the expense and disruption of an arbitration, which is especially relevant for construction projects, which often give rise to numerous



highly complex disputes. That purpose would not be served if the payment of damages was the only consequence for failing to comply with the pre-arbitral condition.

The court went on to assess whether an arbitral tribunal should dismiss the case outright for lack of temporal jurisdiction. However, the court found this solution to be problematic for two reasons. First, if the pre-arbitral step does not result in a settlement of the dispute, the parties would have to incur significant costs to initiate arbitration a second time. Second, the dismissal of the case could cause problems if the claims at issue are close to becoming time barred, as pre-arbitral ADR proceedings will not usually interrupt a limitation period.

The court therefore found that the preferable solution would be for an arbitral tribunal to suspend the arbitration to allow the parties to comply with the pre-arbitral condition. According to the court, it is for the arbitral tribunal to define the conditions and duration of the suspension in order to ensure in particular that a party cannot take advantage of it to unduly stall the arbitration.

A question of jurisdiction?

The court characterised the question of the consequence of non-compliance with a

mandatory pre-arbitral condition as an issue of jurisdiction, which allowed it to review the matter in full in accordance with the Private International Law Act. However, the court was forthright about not being entirely convinced by its approach, conceding that it adopted it for lack of a better alternative. Indeed, the judges considered that there should be a consequence for failure to comply with a pre-arbitral requirement and acknowledged that addressing the issue as one of jurisdiction was the only way in which it could review the matter.

Comment

The decision provides welcome guidance on a question that often arises in construction disputes but that has long remained open. For arbitral tribunals, the decision imposes a practical solution over which tribunals can exercise some control in order to ensure that mandatory pre-arbitral conditions are not used by respondents to unduly delay arbitral proceedings. For would-be claimants, the decision emphasises the importance of complying with mandatory pre-arbitral conditions, but also makes clear that initiating arbitration prematurely (eg, in order to prevent claims from becoming time barred) will not entail drastic consequences.



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CASE IN BRIEF: DOUBLE EDITION

Custom Street Hotel Ltd v Plus Construction NZ Ltd [2016] NZHC 2011

by Sarah Redding

Recently, the High Court dismissed an appeal against an arbitral award made pursuant to parties contracting under the popular New Zealand Standard Form Contract NZS 3910:2003. As a rare occasion on which a construction dispute advanced beyond arbitration, the High Court's decision could have a significant impact on contractors' termination rights under NZS 3910 and other Standard Form Contracts.

Background

In November 2013, Custom Street Hotel Ltd ("**Custom**") and Plus Construction Co. Ltd and Plus Construction NZ Ltd (together, "**Plus**") entered into a redevelopment construction contract as principal and contractor respectively. The parties used the popular New Zealand Standard Form construction contract NZS 3910:2003, with an agreed contract price of \$14.45 million plus GST, and a completion timeframe of 52 weeks.

New Zealand Standard Form Contracts, such as NZS 3910, provide parties with ready to use contracts and obligations in line with New Zealand legislation. They are designed to allocate risks and duties fairly between parties in accordance with obligations under the Construction Contracts Act 2002, in order to avoid contracts weighted in favour of one party.

Once the contract works had commenced, a dispute arose between the parties over the non-payment of invoices issued by Plus. In January 2015, Plus served a default notice on Custom for payment of unpaid amounts due under the contract totalling in excess of \$250,000. The notice was served in accordance with clause 14.3.3 of the general conditions of the NZS 3910 standard contract. Clause 14.3.3 provides that if the Principal's default is not remedied within 10 working days, the Contractor may require the engineer to suspend works, "*following such suspension*" the contractor is entitled to terminate the contract by giving notice in writing to the Principal.

Custom failed to remedy the default within the required 10-day time frame. However, Plus wrote to the engineer asking him to suspend the contract works one day before the 10-day remedial period had ended, and on the following day purported to terminate the contract under clause 14.3.3.

Custom subsequently issued a notice of default on Plus, claiming it had abandoned the contract and had persistently flagrantly or wilfully neglected to carry out its obligations under the contract. Plus took no action in response to Custom's notice of default in reliance on its belief that it had already validly terminated the contract.

Custom then purported to terminate the contract itself and initiated processes to enable it to call on the performance bond, consistent with its position that Plus had not validly terminated the contract. In March 2015 the engineer certified \$24,948,392.35 was due under the contract, as the projected additional cost of completing the contract works after the delays. The engineer issued a certificate for the bond finding that Plus had failed to perform its obligations under the contract, had been given notice of its failure but did not rectify the failure within the requisite timeframe, and that the bond of \$3.6 million was due under the contract.



“...a party purporting to terminate must be ready and willing to perform the contract in all material respects.”

Arbitration

The issues for determination by the arbitrator were whether the engineer was entitled to issue the bond certificate, and whether Custom was entitled to make demand on the bond. Having considered the NZS 3910 contract, the arbitrator found that the engineer had erred and was not entitled to issue the certificate for the purposes of the bond. The arbitrator found that Plus had not failed to perform its obligations under the contract, and had in fact validly terminated the contract in February 2015 rendering it impossible for Plus to be in default when the engineer issued his certificate later that month.

The arbitrator also found that the engineer was wrong in certifying the claim for damages of \$24,948,392.35, as in accordance with the contract, any claim for additional completion costs could only be determined after the works have been completed. Therefore, no amount was properly due under the contract, including the bond certified by the engineer. Custom sought (and was granted) leave to appeal against the arbitral award on five questions of law.

High Court

The High Court upheld the arbitral award finding in accordance with the arbitrator's determination on all five points. Two of the pivotal questions considered by the High Court were whether a breach must be repudiatory in nature before disentitling a party from terminating, and whether the arbitrator correctly construed clause 14.3.3 of the contract in reaching his decision.

During the arbitration, Custom claimed that Plus's termination was invalid because its request to the engineer to suspend the contract works was made prematurely (inside the 10-day time limit Custom had for rectification), and was therefore invalid. Further, that the engineer did not suspend the contract works in response to the request; and a valid termination notice could only be given "following such [a] suspension" in accordance with clause 14.3.3.

The High Court took a different approach to the arbitrator, focussing on interpreting the contract in the context of the Contractual Remedies Act 1979 ("CRA"), as opposed to interpreting the wording of the contract in isolation. The High Court discussed cases confirming the principle that a party purporting to terminate must be ready and willing to perform the contract in all material respects, to ensure that it cannot benefit from its own wrong in any cancellation. Further, that a party who is in breach of an essential term of a contract, is not entitled to enforce its rights of cancellation.

“...under NZS 3910:2003, if a principal fails to remedy its breach prior to the expiry of the 10 working day notice period this would be a breach of an essential term that would normally entitle the contractor to cancel the contract under the CRA.”

In considering whether the arbitrator had erred in finding that Plus had validly terminated the contract, the High Court considered whether suspension was a precondition for termination in accordance with the contract. The High Court agreed with the arbitrator's determination that Plus was entitled to terminate the contract as a result of Custom's failure to make payment within the 10 working day timeframe, and that the words "following such suspension" in clause 14.3.3 did not mean suspension was necessarily a precondition for termination.

In considering clause 14.3.3 in the context of the CRA and Construction Contracts Act 2002 ("Construction Contracts Act"), the High Court found that clause 14.3.3 also did not exclude cancellation rights under section 7 of the CRA. Under the Construction Contracts Act, parties have a right to suspend work in various circumstances, including where a claimed amount is not paid in full by the due date. Further, the Construction Contracts Act provides that if a contractor exercises its right of suspension, it is not precluded from exercising any other remedies available under the CRA, including the right to cancel. Clause 14.3.3 modifies contractor's statutory right of suspension following non-payment, deferring any further rights (such as to cancel) until the 10 working day notice has expired un-remedied.

The High Court considered that while clause 14.3.3 modifies the contractor's rights under the Construction Contracts Act, the NZS 3910 contract is still consistent with the position under the CRA that if the contractor chooses to suspend the works under the contract, this will not amount to an affirmation precluding cancellation in relation to the same breach. In practical terms, this meant that while clause 14.3.3 modified Plus's rights they would otherwise have under the Construction Contracts Act, it did not limit Plus's rights under the CRA, including the right to cancel for breach of an essential term (such as Custom's breach for unpaid amounts due) or for a repudiatory breach.

The High Court went on to discuss essential terms and held that under NZS 3910:2003, if a principal fails to remedy its breach prior to the expiry of the 10 working day notice period this would be a breach of an essential term that would normally entitle the contractor to cancel the contract under the CRA. The High Court considered it farcical to require Plus to arrange for the engineer to suspend the works before it could proceed to cancel the contract, concluding that clause 14.3.3 does not exclude an innocent contractor's right under section 7 of the CRA to cancel the agreement in the event of the principal breaching an essential term. The High Court reached this conclusion despite the fact that NZS 3910 does not expressly state that payment of claimed amounts is an essential term of the contract.

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Comment

This decision provides some rare judicial comment on the popular New Zealand standard form Construction Contract NZS 3910. With adjudication provided under the Construction Contracts Act delivering a specialist forum for the resolution of construction disputes, the majority of construction disputes (including those under New Zealand standard form contracts) do not often come before the Courts.

The High Court's decision could have far reaching consequences for defaulting parties to construction contracts. While the amount in default in this decision totalled \$250,000, the High Court's decision places no minimum requisite value of an unpaid amount due under a contract allowing a party to terminate if it remains unpaid. This means that a defaulting party could owe as little as \$1, with any overdue unpaid sum amounting to a breach of an essential term triggering the right to terminate without need for suspension.

This broadening of termination rights has undoubtedly strengthened contractors' positions under NZS 3910. Given the High Court's approach to essential terms and termination rights under NZS 3910, the uptake of the decision remains to be seen along with whether it will have a broader impact on the interpretation of other Standard Form Contracts. However, given the rarity of construction cases advancing beyond adjudication and/or arbitration to come before the Court, the decision is likely to bind adjudicators and arbitrators considering construction disputes for some time.

by Sarah Redding, Solicitor



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CASE IN BRIEF: DOUBLE EDITION

C. J. Parker Construction Ltd (in Liq) v Ketan [CA, 03/02/2017]

by John Green

Background

The case involved an appeal against the dismissal of a summary judgment application on the basis that the appellant had not served a valid payment claim under section 20 of the Construction Contracts Act 2002 (the **Act**).

In or about early 2013, the parties had negotiated about a price for certain renovation work to a motel owned by the respondents, but no contract was ever executed. The renovation work began in mid-February 2013 but there was no agreed contract price, nor agreement of terms relating to payment method, progress payments and payment claims.

In July 2013, the respondents terminated C.J. Parker Construction Ltd's (**C.J. Parker**) involvement with the project before the work was completed. C.J. Parker then submitted an invoice that was stated to be a payment claim under the Construction Contracts Act 2002. However, the purported payment claim did not set out the details of how C.J. Parker had arrived at what it said was reasonable value for the work it had undertaken.

C. J. Parker applied for summary judgment on the basis that its invoice was a valid payment claim in terms of section 20 of the Act, the respondents did not reply to its invoice with a valid payment schedule within seven working days, and therefore the invoiced amount was a due debt under section 23 of the Act.

The respondents resisted summary judgment on the basis that the purported payment claim did not indicate *the manner in which the payee calculated the claimed amount* as required by section 20(2)(e) of the Act. They argued that several parts of the invoice did not make sense and that it was unclear how C.J. Parker calculated the amount claimed.

On 5 October 2015, Woolford J dismissed the application for summary judgment by C.J. Parker. Applying section 17(4) of the Act, the Judge said the value of the construction work was to be calculated with regard to the reasonable value of the work. His Honour held that C.J. Parker had not served a valid payment claim in terms of section 20 of the Act as it did not properly address the reasonable value of the work, and did not enable the respondents to respond effectively and in detail to the claim. Without determining the issue, he also observed that Dr Ketan's email in response to the invoice was likely to be a valid payment schedule in terms of section 21.

C J Parker appealed. The appeal raised a question about how much information must be provided by a payee to constitute a valid payment claim. The parties also disagreed about how much information must be provided by a payer to constitute a valid payment schedule.

It was submitted for the appellant that because section 17(4) applied and the calculation of price was simply by "reasonable value", it was not necessary for the invoice to provide a more detailed description of the way in which calculations were made. It was argued that *it should be open to a payee therefore to simply indicate what the payee considers to be "reasonable value" on the basis that the use of the word "indicate" in s 20(2)(e) suggests that a detailed explanation is not required... It would then be open to the payer to provide a payment schedule disputing the "reasonable value"*.



“...a payment claim must be sufficiently detailed and comprehensible to enable a payer to understand the basis on which the claim is made.”

The court made some general comments regarding the purpose of the act observing at [16] that *[I]t is sufficient for the purposes of this case to note that the Act focuses more on procedure than on proof and that it establishes a draconian “sudden death” regime if its payment procedures are not complied with. The scheme of the Act is to entitle a payee to prompt payment where the amount claimed is not disputed and to provide dispute resolution procedures for disputed claims.*

The court observed that a payer who elects to provide a payment schedule stating an amount less than the claimed amount must respond to the payment claim by indicating the manner in which the scheduled amount has been calculated and give a reason or reasons for the difference between the amounts and for withholding any payment and these obligations correspond to those of the payee under section 20.

The court went on to say that although the validity of a payment claim will not be impeached due to purely technical deficiencies, a bare statement of the amount claimed for each item making up a total claim does not meet the requirements of the Act in the context of a contract where neither a contract price had been agreed nor terms relating to payment method, progress payments and payment claims. The court observed that keeping in mind the Act’s purpose of facilitating regular and timely payments in the construction industry, *a pragmatic, common sense and contextual approach should be adopted when assessing whether a purported payment claim complies with s 20(2)(e).*

The court held at [26] that *[A] payment claim must be sufficiently detailed and comprehensible to enable a payer to understand the basis on which the claim is made. Only then can the payer decide whether to accept it or to put the payee on notice of a dispute by providing a payment schedule in response which explains the payer’s reasons for disagreeing with the claim. This requirement is implicit in the payee’s obligation to provide a claim that indicates “the manner in which the payee calculated the claimed amount” and in the payer’s obligation to respond by giving reasons for the difference between the amount claimed and the amount the payer is prepared to pay.*

The Court observed that while each case falls for determination on its particular facts, the requirements for a valid payment claim under a construction contract that does not provide expressly for a contract price, labour rates or prices for materials and services (a section 17(4) contract) may be more onerous than in cases where the contract price or other prices are agreed. The court held that the payee must indicate to the payer *an objectively understandable basis upon which the value of the work claimed is said to be “reasonable”* and merely setting out general figures without some reference to ascertainable factors in their calculation will not be sufficiently detailed and comprehensible in most instances.

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“..in many cases the payee asserting entitlement to payment of the claimed amount on the basis of default liability will instead refer the matter to adjudication in the first instance..”



The decision is notable for the fact that the court dismissed the appellant's argument that if the payer had not understood the payment claim in issue, *it could have obtained clarification by using the framework contained in the Act* being a reference to an observation made by the Court of Appeal in *George Developments Ltd v Canam Construction Ltd*. The court noted that it is not apparent from that passage in the judgment what part of the "framework" the Court had in mind as there is nothing in the Part 2 procedure expressly providing for a payer to obtain clarification, or for the running of the strict time period for providing a payment schedule to be suspended while clarification is sought. Rather, the court observed that a payer who has not been provided with sufficient information to understand the manner in which a claim has been calculated cannot reasonably be required to provide a payment schedule which complies with the obligation to indicate the reasons for any difference between the amount claimed and the amount the payer considers ought to be paid.

In the result, the court dismissed the appeal agreeing with the conclusion of Woolford J that the invoice was not a valid payment claim under the Act, that the respondents were therefore not required to submit a payment schedule, and that section 23 of the Act was not engaged.

The case provides a salutary lesson for parties seeking to enforce payment for claimed amounts by way of summary judgment on the basis of failure on the part of the payer to provide a valid payment schedule in response within the mandated time, or to pay the claimed amount by the due date for payment (ie on the basis of default liability under sections 22 and 23). While each such case falls for determination on its particular facts, what is almost certain is that the payee will face an argument that its payment claim was defective in some substantive way and therefore invalid in terms of section 20 of the Act and/or that any response to the payment claim was in fact a valid payment schedule in terms of section 21 which will then need to be heard and determined by the court.

Because of that almost inevitable outcome, in many cases the payee asserting entitlement to payment of the claimed amount on the basis of default liability will instead refer the matter to adjudication in the first instance to flesh out any such arguments and (hopefully) to obtain a determination in its favour that it can then enforce, if need be, as a debt due in the District Court together with the actual and reasonable costs of recovery.

The efficacy of that approach was confirmed by the Court in *Redhill Development (NZ) Ltd and Ors v Green and Anor* HC AK CIV-2009-404-3784 5 August 2009 at [42] – [51]. The obvious advantages being that the issue will be considered quickly and cost effectively in the private and confidential context of an adjudication and, either a readily enforceable determination obtained, or any deficiencies in the claimant's case will be identified that may then be made good for the purpose of any subsequent litigation. It is clear from the High Court judgment that the payee considered referring the matter to adjudication by BDT but in the end, it elected to proceed with summary judgment proceedings for reasons that are not so readily apparent.

ABOUT THE AUTHOR



John Green

John is a professional arbitrator, adjudicator and mediator based in Auckland, New Zealand. He has been appointed in more than 1,160 building, construction and infrastructure disputes over the past 26 years relating to residential, commercial and industrial construction projects, power stations, gas fields, manufacturing and processing plants, stadiums, hotels, land subdivisions, roading, railways, wharves, marinas, drainage, wastewater treatment plants, recycling plants, mining, services, and utilities, involving domestic and internationally based parties, complex technical and legal matters, and sums in dispute exceeding \$100M.

John is the founder and a Director of the Building Disputes Tribunal (BDT), the nationwide, specialist dispute resolution service provider for the building and construction industry in New Zealand and an Authorised Nominating Authority under the Construction Contracts Act 2002. He is also the founder and a Director of the New Zealand Dispute Resolution Centre (NZDRC); the New Zealand International Arbitration Centre (NZIAC); the New Zealand Family Dispute Resolution Centre (FDR Centre); the BuildSafe Security of Payment Scheme - BuildSafe®. He is a Principal Arbitrator, Adjudicator, Mediator, Expert Determiner and Early Neutral Evaluator for BDT, NZDRC and NZIAC.

To request the appointment of John Green for adjudication, arbitration or mediation please contact the Registrar:
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COURT OF APPEAL UPHOLDS EXTENSION OF TIME ANOMALY

Aidan Steensma and Kathryn Moffett

Last summer we reported on a TCC decision which had identified, for the first time, an anomaly commonly present in the extension of time provisions of traditionally drafted construction sub-contracts. The anomaly arises where a Sub-contractor becomes entitled to an extension of time for an event occurring after the contractual date for completion and can result in the Sub-contractor's liability being greater or lesser than the true consequences of its delay. In a decision last week, the Court of Appeal has upheld the TCC's decision, noting that the potential unfairness produced was not sufficient to overcome the standard drafting of the sub-contract in question.

Carillion Construction Ltd v Woods Bagot Europe Ltd: a recap

As discussed in our previous Law-Now (available [here](#)) construction contracts will normally allow a Contractor or Sub-contractor to claim an extension of time for events occurring after the contractual date for completion. There are no difficulties for a contract with a liquidated damages clause, where damages due to the Employer or Contractor are fixed. However, liquidated damages clauses are rare for sub-contracts, and where unliquidated damages apply the granting of extensions for events occurring after the contractual date for completion can lead to unexpected results.

As explained in more detail in our previous Law-Now, a Sub-contractor in such circumstances will already be in breach of contract for failing to meet the agreed completion date when the event giving rise to an extension of time arises (such as a new variation). Simply extending the existing date for completion will mean that the previous culpable delay in breach of contract will be erased and effectively "moved forward" by the amount of the extension. This creates a disconnect between the actual period when

the Sub-contractor was causing delay and the Sub-contractor's contractual liability for delay. The period for which the Contractor is entitled to claim delay damages will be disconnected from the actual effects of the delay caused by the Sub-contractor. The outcome is likely to be that one party receives a windfall whilst the other is unfairly prejudiced.

In the present case, Carillion as main contractor entered into an M&E sub-contract with EMCOR under the DOM/2 JCT form in relation to the construction of the Rolls Building in London. Carillion started proceedings against EMCOR seeking to recover liquidated damages levied against it under the main contract due to delays in carrying out the sub-contract as well as its own costs of delay. EMCOR claimed for extensions of time for events which arose after the contractual date for completion. Carillion claimed that any extension awarded for such events should be "discontinuous" and not simply added to the existing date for completion, so as to preserve the connection with any culpable delay by EMCOR prior to the event in question.

The TCC rejected Carillion's argument finding that any extension of time should be added contiguously to the existing date for completion. Carillion appealed.



Whilst perhaps being “*more troubled*” than the TCC about this, the court nonetheless found itself unable to allow this consideration to drive it from the natural meaning of the sub-contract provisions.

Conclusions and implications

The Court of Appeal’s decision reinforces the potential exposure highlighted in the TCC’s original decision for parties to construction contracts which provide for unliquidated damages in relation to delay. An entitlement to an extension of time arising after the contractual date for completion can result in delay related losses being unrecoverable by an Employer or Main Contractor, or disproportionate and unfair levels of loss being shouldered by a Main Contractor or Sub-contractor.

A right to claim unliquidated damages for delay is most commonly included in sub-contracts to avoid the difficulties of agreeing an appropriate rate for liquidated damages in circumstances where a Contractor may be entitled to recover several sets of liquidated damages from different Sub-contractors. Contractors and Sub-contractors in particular should be aware of the potential anomaly which arises on such an approach and consider whether special drafting is required to remove the inconsistency. Such drafting might provide for discontinuous extensions of time, as argued for by Carillion, or provide for other means of apportioning the total delay related losses suffered by a Contractor among those Sub-contractors actually responsible for all or part the delay.

The Court of Appeal

In a decision last week, the Court of Appeal has upheld the TCC’s decision:

- The court agreed that the natural meaning of the words used in the DOM/2 form, in keeping with most other construction contracts, showed that contiguous extensions of time were intended.
- Although noting that no previous cases (either in England or abroad) appeared to have considered the possibility of discontinuous extensions of time, the court noted that previous cases dealing with extensions of time for events occurring after an originally agreed date for completion had all granted contiguous extensions of time. These cases supported the TCC’s finding as to how a reasonable person with the relevant background knowledge would understand the sub-contract to work.
- Like the TCC, the court accepted that the anomaly pointed out by Carillion was real and that unfairness was likely to result.

About the Authors



Aidan Steensma

Aidan is a solicitor specialising in construction disputes work. He has significant experience in disputes concerning large scale construction and infrastructure projects, including power plants, oil and gas facilities, chemical plants, rail and highway concessions, hospital developments and sporting facilities.

Kathyn is a lawyer in the UK Construction Team. She specialises in construction disputes and has a range of experience in all types of dispute resolution, including adjudication, litigation and formal negotiation.



Kathryn Moffett

STATUS QUO RETURNS: THE HIGH COURT WEIGHS IN ON REFERENCE DATES AND THE NSW COURT OF APPEAL CLEARS UP THE GROUNDS FOR CHALLENGE

Sandra Steele and Michael O'Callaghan

The decisions of the High Court in *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd* [2016] HCA 52 and the New South Wales Court of Appeal in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] NSWCA 379 were delivered on 21 December 2016 and 23 December 2016 respectively and provide some certainty in respect of the importance of reference dates and the grounds upon which an Adjudicator's determination can be challenged.

The High Court's decision in Southern Han

The Southern Han decision confirms that the existence of a reference date under a construction contract is a necessary precondition to the making of a valid payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act).

Southern Han and Lewence were parties to a contract for the construction of an apartment block at Breakfast Point in Sydney. The contract made provision for Lewence to make payment claims on the 8th day of each calendar month for work completed up to the 7th day of the same month (referred to as the "reference date" under the SOP Act). A reference date is a date when a party becomes entitled to make a payment claim (either determined in accordance with the terms of a construction contract or, if a construction contract makes no express provision, a date determined in accordance with the applicable security of payment legislation).

On 27 October 2014, Southern Han took all of the work remaining to be completed under the contract out of Lewence's hands. Lewence treated Southern Han's conduct as a repudiation of the contract and elected to terminate. Under the terms of the contract, if works were taken out of Lewence's hands, Southern Han's payment obligations were to be suspended. On 4 December 2014, Lewence

served a document on Southern Han, purporting to be a payment claim under the SOP Act, for work carried out under the contract up to 27 October 2014 (i.e. for works carried out from the last reference date (8 October 2014) to the date the contract was terminated).

The matter proceeded to adjudication and Southern Han contended that the Adjudicator did not have jurisdiction to determine the Adjudication Application on the basis that the payment claim was invalid because it was not made in respect of an available reference date. The Adjudicator determined that the payment claim was valid and that monies were payable to Lewence.

Southern Han challenged the Adjudicator's determination in the Supreme Court of New South Wales, arguing that the determination was void because Lewence's payment claim was not valid under the SOP Act because it was not made in respect of an available reference date.

At first instance, the Court held that the payment claim was void and ordered that the Adjudicator's determination be set aside. Lewence appealed the decision. The NSW Court of Appeal upheld the appeal in reversing the decision and finding that the existence of a reference date was not a precondition to the making of a valid payment claim under the SOP Act. This decision was met with surprise in the building and construction industry as it went against the established *status quo*. The case then proceeded to the High Court.

The High Court held by unanimous joint judgment that the reference in section 13(1) of the SOP Act to a "*person referred to in s 8(1) who is or who claims to be entitled to a progress payment*" required the existence of a reference date under a construction contract, and within the meaning of section 8(1), as a precondition to the making of a valid payment claim – the status quo was restored. If a reference date was not available, any purported payment claim would be void.

The Shade Systems decision confirms that adjudication determinations made under the SOP Act may only be subject to judicial review when it is established that an adjudication determination is affected by a jurisdictional error of law. The decision provides a higher level of certainty for the building and construction industry by confirming that the scope for a Court to review adjudication determinations made under the SOP Act is confined to circumstances of jurisdictional error only. It is anticipated that this decision will be viewed positively by the building and construction industry and alleviate initial concerns of an increase in the number of adjudication determinations subject to non-jurisdictional error of law challenges. Confining the bases of challenge to jurisdictional errors of law only, may result in a decrease in applications to set aside adjudication determinations.

An Adjudicator will commit jurisdictional error when he or she purports to exercise a power beyond the power given to the Adjudicator under the SOP Act, or if an Adjudicator fails to comply with the "basic and essential requirements" of the SOP Act. For example, it would be a jurisdictional error for an Adjudicator to make a determination on the basis of materials not put before him or her by the parties. Conversely, nonjurisdictional errors of law refer to situations where an Adjudicator may make an error in interpreting the facts or law presented in the materials. For example, the misinterpretation of a time bar provision in a construction contract would be a non-

jurisdictional error and not challengeable.

The decision confirms that the scope for the Court to review adjudication determinations made under the SOP Act is confined to circumstances of jurisdictional error only.

What this means for you

By way of general reminder and incorporating some of the lessons learnt from Southern Han and Shade Systems:

- the existence of a reference date under a construction contract is a necessary precondition to the making of a valid payment claim. A Claimant should be confident that a reference date exists under its contract before bringing an adjudication application and should make submissions about it
- parties making payment claims should ensure that only one payment claim is submitted for each reference date in compliance with the Act
- no early payment claims – payment claims can only be made on and from reference dates
- where a dispute arises under a construction contract and a party contemplates suspension or termination, the timing of any proposed action should be considered in conjunction with the timeframes for reference dates arising under a construction contract
- the scope for the Court to review adjudication determinations made under the SOP Act is confined to circumstances of jurisdictional error only. An aggrieved party cannot seek to judicially review an Adjudicator's determination if the Adjudicator simply gets it wrong in fact or at law.

This article first appeared in Lexology. See the [original article here](#).



THE AUTHORS

Sandra Steele & Michael O'Callaghan

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**NOTICE OF
ADJUDICATION**



#2

**APPLICATION
FOR
APPOINTMENT**



#3

NOMINATION



#4

**PAYMENT
OF
SECURITY**



#5

**ACCEPTANCE OF
APPOINTMENT**



#6

CLAIM



#7

RESPONSE



#8

REPLY*



#9

REJOINDER*



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POST-TERMINATION CALLS ON ON-DEMAND SECURITIES: COURT OF APPEAL GUIDANCE

NIDCO v Santander: a recap

As explained in more detail in our earlier Law-Now ([click here](#)), NIDCO called on a number of Standby Letters of Credit ("SLCs") after terminating a large FIDIC based contract for the construction of a highway in Trinidad and Tobago. Santander had provided SLCs to serve as retention security in lieu of deductions from interim payments. NIDCO was required to certify to Santander that the amounts demanded were "due and owing" to it by the contractor.

Santander claimed that NIDCO's calls were fraudulent because they were made in respect of termination losses which were not yet "due and owing". Santander also argued that NIDCO had claimed for amounts greater than the cash retention it would have been entitled to retain at the date of termination under the terms of the construction contract.


The Commercial Court disagreed that Santander's arguments provided a basis to doubt the honesty of NIDCO's calls. Santander's case rested on a legal analysis of the underlying contract and NIDCO's belief was not to be treated as a "function of [that] legal analysis". Santander had not shown a triable case that NIDCO did not believe the amounts demanded to be "due and owing".

The Court of Appeal

Santander's appeal against the Commercial Court's decision was heard on an expedited basis and was dismissed last week. In doing so the Court of Appeal directly challenged the legal analysis relied upon by Santander:

- The court disagreed as a matter of law that the requirement for amounts to be "due and owing" did not extend to NIDCO's unliquidated claims for damages arising from termination. The underlying contract incorporated the standard FIDIC clause 4.2(d) which stated that performance securities were required not merely for failures to pay amounts due but also for "circumstances which entitle the Employer to termination ... irrespective of whether notice of termination has been given." This was important background against which the SLCs were to be interpreted and showed that unliquidated claims for damages arising on termination were permissible.
- NIDCO was entitled to call for the full amount of the retention security even though this sum exceeded the amount of the cash retention which would have been held by NIDCO at the date of termination had the retention security not been provided in lieu of a cash retention. The court viewed the provision of a retention security in lieu of cash retention as being "for the benefit of the contractor" and any restriction on the Employer's ability to call on the full amount of the retention security needed to be expressly stated in the SLC.

By Aidan Steensma - CMS Cameron McKenna



“...retention securities given in lieu of cash retentions will allow demands to be made for their full amount...”

Having found that NIDCO's calls had a valid basis in law, there were no grounds on which it could be suggested that NIDCO's calls were fraudulent.

Conclusion and implications

The Court of Appeal's decision provides additional clarity for Employers considering the termination of a construction contract and the pulling of on-demand securities. Although much will still depend on the circumstances of each case, the standard FIDIC provisions in relation to performance securities will support a broad interpretation of such securities, permitting unliquidated claims for damages arising on termination. The approach taken by the Court of Appeal may also encourage parties in other circumstances to rely to the terms of their construction contract to influence the interpretation of on-demand securities which have been supplied pursuant to its terms.

It appears also that retention securities given in lieu of cash retentions will, in the absence of any contrary wording, allow demands to be made for their full amount regardless of the stage at which a project has reached (provided of course that the Employer has genuine claims which support the making of a demand). Contractor's wishing to limit such securities to a percentage of the amounts certified for payment at any given time should include specific wording to this effect.

References: National Infrastructure Development Co Ltd. v Banco Santander S.A [2017] EWCA Civ 27



The Court of Appeal's decision provides additional clarity for Employers considering the termination of a construction contract and the pulling of on-demand securities.

THE BUILDING (EARTHQUAKE-PRONE BUILDINGS) AMENDMENT ACT 2016¹

by Anton Trixl

In 2016, the Building Act 2004 (Building Act) underwent significant changes to address deficiencies in the system for managing earthquake-prone buildings in New Zealand. These deficiencies were first highlighted in the Royal Commission of Inquiry into the Canterbury Earthquakes (Royal Commission) report.

Parliament has sought to balance the protection of citizens from earthquake-prone buildings; the cost of strengthening, upgrading or demolishing buildings; and the protection of heritage buildings. And, after extensive public consultation, the Building (Earthquake-prone Buildings) Amendment Act 2016 (Amendment Act) was passed to achieve these aims.

This paper will first address the background to the changes, including the previous regulations, the recommendations of the Royal Commission, and the Bill's progress through Parliament. Secondly, it will discuss the key changes made by the Amendment Act. Thirdly, this paper will set out the regulations detailing Amendment Act requirements. Finally, this paper will identify a number of issues that may arise under the Amendment Act and their potential implications.

Background to the amendments

Previous Regulations

Previously, under the Building Act, buildings that would have their ultimate capacity exceeded in a moderate earthquake, causing death, injury or damage to other property were required to be strengthened. However, the Building Act left territorial authorities responsible for developing their own systems for identifying and managing earthquake risks.

This resulted in a wide divergence in approaches between territorial authorities, with some territorial authorities taking a "passive" approach (requiring strengthening to occur when building consent applications were made), while others took an active approach to requiring strengthening. Even within the "active" territorial authorities, there was still wide divergence in requirements, with:

- assessment timeframes varying between 1 and 30 years;
- strengthening timeframes varying between 1 and 70 years; and
- levels of strengthening required varying between 34% and 67% of the current Building Code.

This system led to widespread confusion and dissatisfaction amongst those in areas subject to harsher regimes. The Supreme Court presided over the case *University of Canterbury v The Insurance Council of New Zealand Incorporated*² and others concerning whether or not a council can require compliance in excess of 34% of the Building Code. The Supreme Court determined that, despite a territorial authority's policy, a building owner cannot be required to strengthen an earthquake-prone building to a standard higher than 34% of the current Building Code.



“The Amendment Act is expected to take effect on 1 July 2017.”

Canterbury Earthquakes Royal Commission

After the Canterbury earthquakes, the Royal Commission was established to report on the causes of building failure during the earthquakes. Among other things, the Royal Commission was tasked with investigating the legal and best-practice requirements for buildings in New Zealand's central business districts.

The Royal Commission report contained a number of recommendations for changes to the provisions of the Building Act. Significant recommendations included:

- (a) that all earthquake-prone buildings be upgraded to at least 34% of Building Code;
- (b) that timeframes be established to ensure building upgrades are prioritised; and
- (c) improving the regulation around unreinforced masonry buildings, which was a major contributor to casualties in the Christchurch earthquakes.

Building (Earthquake-prone Buildings) Amendment Bill

On the back of the Royal Commission report, the Building (Earthquake-prone Buildings) Amendment Bill (Bill) was introduced to improve the system for managing earthquake-prone buildings. The Bill opted for greater national consistency by introducing the earthquake-prone building methodology (EPB methodology) for territorial authorities to follow in identifying potentially earthquake-prone buildings and determining whether buildings should be categorised as earthquake-prone.

The Bill initially introduced strict timeframes for managing earthquake-prone buildings, these included requirements for:

- councils to assess and identify potentially earthquake-prone buildings within a 5-year timeframe; and
- owners to carry out strengthening works to 34% of Building Code or demolish the building within 15 years (with the potential of extensions for heritage buildings).

Discontent with the strict timeframes and one-size-fits-all approach was reflected in the 535 submissions received on the Bill. Of note, a number of territorial authorities provided submissions looking to extend the timeframes for assessment and strengthening and to have the requirements be more targeted. The majority of submitters also considered the timeframes initially proposed to be inadequate for strengthening to be carried out sustainably.

Amendment Act

In light of the extensive submissions received on the Bill, the Government adjusted its approach to the issues and recognised that the different seismic zones required different treatment and the assessment timeframes needed to recognise the capacity constraints of the New Zealand engineering market.

The Amendment Act was passed into law on 10 May 2016 and we highlight the key elements below.

Effective

The Amendment Act is expected to take effect on 1 July 2017.

Definition of Earthquake-prone Building

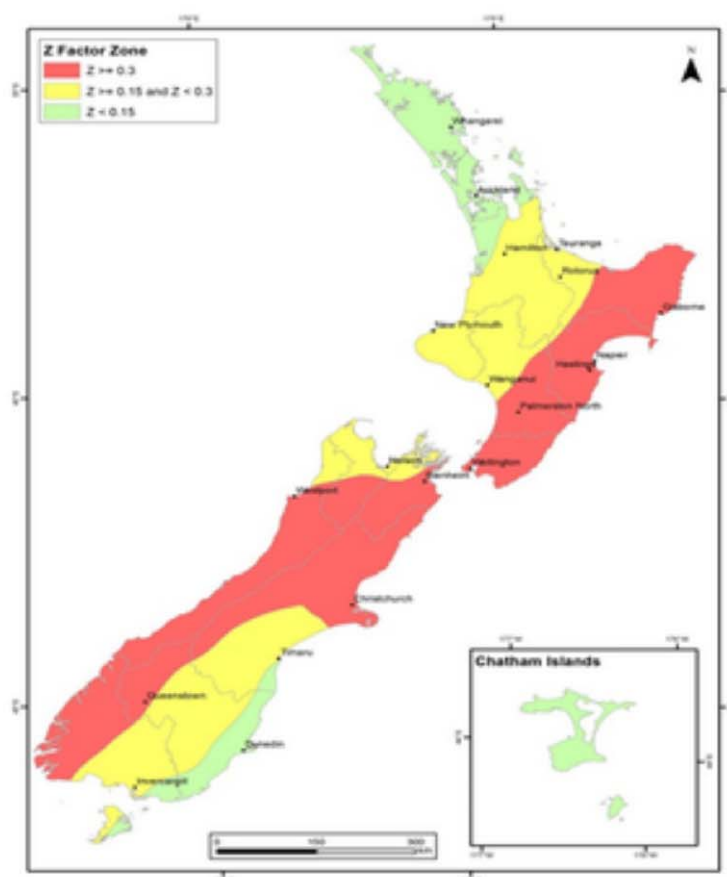
The Amendment Act retains the 34% of the Building Code threshold for defining whether a building is earthquake-prone. However, amendments have been made to clarify aspects of the definition, including that an earthquake-prone building can apply to parts (but not all) of a building.

THE BUILDING AMENDMENT ACT 2016 CONT...

Categorisation according to seismic risk

The Amendment Act provides final dates by which identification and strengthening of earthquake-prone buildings must be completed, based on a classification of whether the building is in an area of high, medium or low seismic risk. The areas of seismic risk are identified in Map 1.

Map 1



Map 1

The timeframes for identifying and strengthening earthquake-prone buildings are as follows:

Table 1:

Seismic risk area	Territorial Authorities must identify potentially earthquake-prone buildings within:		Owners must strengthen or demolish earthquake-prone buildings within:	
	Priority	Other	Priority	Other
High	2.5 years	5 years	7.5 years	15 years
Medium	5 years	10 years	12.5 years	25 years
Low	n/a	15 years	n/a	35 years

The Amendment Act establishes a methodology for identifying earthquake-prone buildings to target buildings that pose the greatest risk. The EPB methodology provides the guidelines by which territorial authorities can identify earthquake-prone buildings, including a profiling tool and current engineering assessment guidelines.

Earthquake-prone education buildings, emergency service facilities, certain hospital buildings and buildings located on strategic routes (especially those with unreinforced masonry) are to be prioritised. These buildings, if located in medium and high seismic areas, are required to be identified and remediated in half the standard time.

Timeframes under the Amendment Act

The timeframes for territorial authorities to identify potentially earthquake-prone buildings apply from the date the Amendment Act provisions take effect. If a building is determined to be earthquake-prone and the territorial authority notifies the building owner, the owner must strengthen or demolish the building within the required timeframe from the date of notification.

Remediation deadlines for buildings that were identified as earthquake-prone buildings under the old regime will remain the same, except:

(d) where a deadline would otherwise fall after the deadline that applies under the Amendment Act, in which case the deadline is brought forward.

(e) where the owner was given a shorter deadline to complete strengthening work under the old regime, the owner may apply to the appropriate territorial authority to have the longer period applied retrospectively from the date of the notice from its territorial authority under the old regime.

As the Amendment Act now has a single percentage (*i.e.* 34% of the current Building Code³) against which to assess whether a building is earthquake prone, the Amendment Act also revokes the notices given to building owners under the old regime that would have required their buildings to be strengthened in excess of the new standard.

Strengthening if carrying out substantial alterations

The Amendment Act introduces a new requirement to strengthen earthquake-prone buildings when building owners undertake 'substantial alterations'. What constitutes 'substantial alterations' that will trigger early strengthening work is not yet clear and it is expected that this will be covered in the regulations.

Exemptions and extensions under the Amendment Act

Owners of the most important heritage buildings (Category 1 listed heritage buildings and buildings on the National Historic Landmarks List) are provided with an opt-in extension of up to an additional 10 years to remediate under the Amendment Act. Similarly, opt-in exemptions from the requirement to remediate may be provided on a case-by-case basis.

Certain buildings are excluded under the Amendment Act, including residential buildings of less than two storeys or less than three household units. In addition, the Amendment Act excludes buildings where applying the earthquake-prone building provisions would be impractical or excessive; these exemptions apply to farm buildings, stand-alone retaining walls, fences, some monuments, bridges and tunnels. The exemption regime is to be developed under the regulations.

EPB notice

If a territorial authority makes an assessment that a building is earthquake prone, it must issue a notice for the building (**EPB notice**). EPB notices must disclose earthquake ratings and will be placed on all buildings deemed to be earthquake-prone. EPB notices are intended to improve the public's accessibility to earthquake risk information.

A publicly available national register of earthquake-prone buildings has been established. Enhanced notices are to be issued for buildings on the register to help the public better differentiate between earthquake-prone buildings and encourage owners to remediate their buildings. Information on a building's earthquake-prone building classification and earthquake rating will also be available to the public.

The regulations

Ministry of Business, Innovation and Employment (**MBIE**) has developed proposals and undertaken extensive public consultation on the regulations to the Amendment Act and EPB methodology. The consultations focused on the definition of 'ultimate capacity', earthquake ratings categories and the form of EPB notices, the criteria for 'substantial alterations', and exemptions from remediation. We highlight below some of the issues being considered.

Ultimate capacity:

(f) The definition of 'ultimate capacity' is currently undefined in the Building Act, but this term is critical to determining whether a building is earthquake-prone.

(g) MBIE proposed that ultimate capacity would relate to the probable load-resisting ability of a building to withstand actions caused by a moderate earthquake, and to maintain vertical load-carrying capacity. However, details remain to be seen and the extent to which it imposes additional buildings to be earthquake-prone will be extremely important.

Substantial alterations:

(h) As mentioned above, the criteria for 'substantial alterations' are being developed by MBIE. These criteria will be utilised by territorial authorities to identify when alterations to an earthquake-prone building trigger requirements for earlier seismic upgrades. This will in theory promote more progressive and earlier upgrades of earthquake-prone buildings, which in turn helps achieve improved building safety. Whether this plays out in practice will be another matter.

(i) The proposed criteria for a 'substantial alteration' would capture work requiring a building consent that has a value that is more than a set percentage of the rateable value of the building (excluding land value). Consents will be withheld if owners fail to undertake the required remediation work early. The substantial alterations provisions will apply to earthquake-prone buildings in all seismic risk areas and priority buildings, which may provide a headache for building owners in Auckland and Dunedin who would not otherwise have to strengthen their buildings for 35 years.

Exemptions:

(j) MBIE also considered proposals for regulations on exemptions under the Amendment Act. Exemption provisions will allow owners of earthquake-prone buildings to be exempted from upgrading their buildings if the consequence of failure is low.

(k) It is expected the exemption provisions will apply primarily to small town buildings that are used infrequently by a small number of people (e.g. small rural community halls and rural churches, where the cost of strengthening would not be viable and would instead likely result in demolition). The exemptions will not apply to priority buildings, but particular heritage buildings may meet the required characteristics.

In addition to the main regulations, and in the wake of the Kaikōura earthquake in November 2016, the Government passed additional regulations to urgently deal with the risks associated with unreinforced masonry. These regulations, which formed part of the Hurunui / Kaikōura Earthquakes Recovery Act regulations, came into force on 28 February 2017.

Under these new regulations:

(l) territorial authorities in Wellington, Lower Hutt, Marlborough and the Hurunui district must notify building owners if their buildings have unreinforced masonry that needs to be secured by the end of March 2017; and

(m) if a building owner is notified that they must secure unreinforced masonry, they must secure the unreinforced masonry within 12 months of receiving notice.

If a building owner fails to carry out the work required to secure the unreinforced masonry within this 12 month period, the territorial authorities may do the work themselves and seek reimbursement from the building owner. Fines of up to \$200,000 may be imposed on building owners who fail to comply with the

If a building owner fails to carry out the work required to secure the unreinforced masonry within this 12 month period, the territorial authorities may do the work themselves and seek reimbursement from the building owner. Fines of up to \$200,000 may be imposed on building owners who fail to comply with the council's notice.

To assist building owners in meeting the cost of these repairs, the Government has established the Unreinforced Masonry Buildings Securing Fund. This fund is a new joint Government and council initiative of approximately \$4.5 million, which is available to fund some of the costs of securing unreinforced masonry in these areas. Building owners can apply to MBIE for reimbursement of their reinforcement costs up to \$15,000 for a façade and/or \$10,000 for a parapet.

Key issues

The Amendment Act raises a number of practical issues for territorial authorities, building owners, building users, and the public.

Finance / funding

The mandatory strengthening imposed under the Amendment Act may cause a number of obstacles for building owners and bodies corporate. It may be difficult for building owners to raise the funds required to meet their strengthening obligations, especially if the building are owned by diffusely owned bodies corporate. A single owner who fails to meet its share of the cost may prevent a body corporate from carrying out strengthening. Consideration may need to be given to whether financing arrangements, secured against building owner's interests, can be imposed by bodies corporate to ensure this work can be done, despite reluctant owners.

Obligations under leases

We are starting to see large tenants pushing the boundaries with provisions in leases relating to earthquake-prone buildings. In particular, some tenants are requiring

buildings to meet a certain percentage of the NBS throughout the tenancy and if, when tested, the building fails to meet that standard, the tenant may require an abatement of the rent, the landlord to strengthen the building, or the right to early termination of the tenancy.

However, in general, tenants have not been able to force building owners to carry out strengthening works or abatement of rent unless the building falls below 34% of NBS. The new Amendment Act and the assessments to be carried out under it will give tenants greater information with which to have these arguments.

Impact on territorial authorities

Territorial authorities will have the responsibility to identify potentially earthquake-prone buildings in their district within the timeframes established under the Amendment Act. In areas of high seismic risk, such as Wellington, Christchurch, Palmerston North, Napier / Hastings, Gisborne and Blenheim, this responsibility will impose significant burden on the territorial authorities' resources.

Territorial authorities are also major building owners throughout New Zealand. These strengthening obligations will place additional financial burdens on them and their rate-payers, which will not be welcomed.

Unreinforced masonry also poses a big issue for territorial authorities. These features are often on heritage buildings and provide our towns and cities with their unique architectural features. However, they are often the weakest and most dangerous elements of buildings in an earthquake. Territorial authorities are likely to face difficult choices between preserving these unique heritage features and allowing building owners to remove them (or demolish the buildings), with some or all of the cost falling back on territorial authorities.

Increased burden on building owners

Building owners served with an EPB notice are required to provide an engineering assessment to their territorial authority within 12 months. Many building owners will lack the skills or knowledge to deal with the complexities of the engineering and bureaucratic processes involved in undertaking this assessment and then following the process to have the building upgraded.

In the event an owner fails to provide an assessment or notifies the territorial authority that they do not intend to provide an assessment, the territorial authority will proceed as if the building was determined to be earthquake-prone, which will obviously have very serious implications. Consequently, some form of support or guidance will be needed to ensure that inexperienced building owners are not prejudiced against.

Industry capacity

The Amendment Act requirements will place significant pressure on the engineering industry, given the increased assessments and strengthening requirements, combined with stricter timeframes. Doubts exist as to whether there will be a sufficient number of skilled engineers available to achieve the assessment and strengthening requirements within these timeframes.

Private funding for public good

The Amendment Act has the aim of protecting the public from harm caused by earthquake-prone buildings. However, the cost of that public good will fall primarily at the feet of the building owners, which many building owners have objected to.

We would not be surprised to see building owners, despite the terms of the Amendment Act, pushing for central and local government contributions to their strengthening obligations, so that the public safety aims of the Amendment Act can be realised.

Conclusion

The amendments to the Building Act raise a number of issues for territorial authorities, building owners, building users and the public. A balance has been struck between the protection of citizens from earthquake-prone buildings, the costs involved with strengthening or demolishing buildings to ensure they are no longer earthquake-prone, and the protection of New Zealand's built heritage. However, the new structure is likely to impose additional costs on building owners and additional pressure on territorial authorities to comply with timeframes.

The full extent of the new provisions will be felt in high seismic risk areas where timeframes have been halved for both territorial authorities and building owners.

Endnotes

1. by Anton Trixl, Senior Associate, and Nina Harland, Law Clerk, Anderson Lloyd, Auckland
2. [2014] NZSC 193
3. 2533825



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Bingham's Corner

TONY BINGHAM

Is an Arbitrator, Mediator and Barrister. As well as that, Tony is a renowned writer, commentator and lecturer.



EYES WIDE SHUT

THOSE PAYMENT NOTICES: PIPE UP OR PAY UP

Companies have been ignoring applications for payment for decades even though doing so invariably lands them in a whole heap of trouble. The payer screamed that this isn't the true value of the interim account. Quite probably it isn't, said the adjudicator, but that's what is to be paid anyway.

Look up Salcombe Harbour Hotel if you fancy a few days in a top-notch hotel. Rent one of the five-bedroom suites. Galliford Try's staff have spent umpteen days there - building the place. It is one of those nice size projects at about £8m. That's where it started. The fuss I will tell you about came when an interim account popped up from Galliford Try at £12.6m.

Now then, how did we use to deal with an approach for payment? Well, in decades gone by, we would gawp at the contractor's account, say damn all and eventually pay a lump of cash we were comfy with. And when the contractor eventually received the cheque with a remittance advice telling him nothing but the bare figures, he would go berserk. Things sort of changed 17 years ago when the Construction Act said the payer was supposed to send a payment notice broadcasting what he said he might pay. But no one bothered to send that notice. Things sort of changed again when the Construction Act underwent a refurb job. Payment notices got a bite - one hellava bite. And somehow the bite has been slow to, well errr, bite. Three recent cases have come trotting along together to tell us about the bite. Go to the third, the Galliford Try case, because it sweeps up the other two: ISG vs Seevic College; and Harding vs Paice.

In came the Galliford Try interim application at £12.66m. The developer and hotel owner is called Estura. The contract document is the ordinary JCT family. Perhaps Estura's folk were away on holiday or asleep or busy; their reaction to the £12.66m application was to say nothing. They get two goes at rejecting the builder's application. First is to serve a payment notice (with a different, presumably lower sum). The second is to send a later "payless notice" indicating a sort of counterclaim. But nothing like that was used. In which case the application for payment becomes the "notified sum". It's a default system. If you don't pipe up, you have to pay up. And by the way, all contract documents must contain that rule. If not in the document, the

Bingham's Corner Cont...

Construction Act imports the rule by law. No escape. So Galliford Try knocked on Estura's door for the gross £12.66m less previous paid.

Just as in ISG vs Seevic, the payer screamed that this isn't the true value of the interim account. Quite probably it isn't, said the adjudicator, but that's what is to be paid anyway. It's nothing to do with the value of work. It's a default system. More likely, and this I feel uncomfortable about, it is a penalty for keeping quiet. Get this fixed in your head: never ignore a demand for payment. Don't behave the way we in construction have done for all time by tossing an application for payment on one side. Tackle it head on. Pipe up.

In ISG vs Seevic, interim application No.13 met silence. The adjudicator quite properly ordered the application to be paid in full less previous. He very fairly said in that formal decision: "I have not valued the work." This, he said, is the default position. True. So Seevic began an adjudication on interim No.13 (again) requiring a decision as to the value. Can't do that. No second bite of that cherry is allowed. The default cash payable is deemed to also be the value.

Go back to Galliford Try. Here we have the same circumstances of silence, so the application becomes payable. The judge helpfully said: "In the ordinary course of things any errors in an interim application, or the consequences of an employer's failure to issue the relevant notices can often be put right on a subsequent interim application." So, if the contractor is overpaid on interim 13, the ordinary position is that the overpayment can be corrected by an adjudicator in applications 14 or 15 etc. OK? Hmmm.

Some say that the JCT does not provide for repayment via a subsequent interim valuation. Some say you must wait until the final account because there in JCT it allows the repayment. True, the JCT does not say repay via interim accounts. Some say the JCT needs to move at lightning speed to put an express term into all its documents. It's easy. They only need copy what NEC says.

But if JCT can't move at emergency pace to bring in an express term, some say the Scheme deals with overpayments of interims via repayment. Goodness knows whether these folk are right. The notion is that when a gap is found in the contract itself, the payment rules in the Scheme fill the gap. It looks for "circumstances" not dealt with in a document. Each valuation date gives rise to a notified sum. That sum is the difference between the value of the work at that date and the sums paid. So there you have the balance to be paid. Some say: Hmmm. I say, come on JCT, hands to the pump.

As for the beautiful hotel job, Galliford Try didn't get their £4m, they got £1.5m instead. It was a brilliant Lord Denning style approach. The £4m would "stifle further pursuit by Estura of its rights", so the judge used his powers "as best I can". It's the way of things, I think.



LETTERS TO THE



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- * Email a MS Word copy of your letter as an attachment to editor@buildingdisputestribunal.co.nz – with "Letter to the Editor" as the subject
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- * Keep your letter short, concise and to the point.
- * Avoid personal attacks (even if you perceive you are responding to a personal attack).

We look forward to hearing from you.

A handwritten signature in blue ink, appearing to read 'John Green'.

John Green

