By all accounts it has been a busy start to the year for those involved in the resolution of building and construction disputes and as summer ever so slowly drifts into autumn it is perhaps timely to reflect on some of the more significant decisions from the Courts over the past few months which will undoubtedly affect the way cases are run and arguments are structured for many years to come.

Notable amongst these were of course, the much awaited Court of Appeal decisions in the Sunset Terraces and Byron Avenue cases. As expected, the judgments contained extensive legal analysis and reasoning of the issues put before the Court on appeal. Importantly, the Court held that owners of apartments in substantial complexes have the same right to claim damages against a local authority for carelessness in the performance of their functions as Hamlin held was available to the owner of a modest house. Other issues of interest related to the accrual of causes of action and reliance on the Council’s inspection regime notwithstanding that a code compliance certificate may not have been issued.

In an unusual step, William Young P and Arnold and Baragwanath JJ were all moved to express their concern about the unsuitability and inadequacy of litigation as a mechanism for addressing and resolving the leaky home problem in a logical and fair way.

Chee v Stareast Investment Ltd was a case involving appeal proceedings brought in the High Court under the Weathertight Homes Resolution Services Act 2006. Wylie J held that the subject WHT adjudication proceedings had failed the parties. Wylie J was critical of procedural shortcomings, breaches of natural justice, failure to provide adequate reasons in crucial areas and other aspects of the Member’s conclusions. His Honour observed that there was insufficient information before the court to enable him properly exercise any of the powers conferred by section 95(1) of the WHRSA and as a result, the
matter was remitted back to the WHT for a rehearing. The case will be of interest to those parties and their representatives who have been critical of procedures adopted by the WHT in relation to interlocutory and procedural matters.

The recent decision of the Supreme Court in *Vector Gas Limited v Bay of Plenty Energy Ltd* has caused some interesting debate on contractual interpretation in circumstances of mistake, ambiguity and special meaning and whether New Zealand has moved too far in relation to the extent that extrinsic evidence, particularly evidence concerning pre-contractual negotiations and post contract conduct, may be taken into account for the purpose of establishing what meaning parties intended their words to have. There was also an interesting side issue concerning the desirability of practitioners not acting as counsel in litigation where they have been personally involved in the matters at issue. (To read the full judgments in these and other recent cases, please visit the Resources section of our website www.buildingdisputestribunal.co.nz).

The Tribunal recently filed comprehensive submissions in relation to the Building Act Review Discussion Document produced by the Department of Building and Housing for the purpose of seeking feedback on proposed measures to update the building control system. The Tribunal’s submissions were directed to addressing the issues related to Improving Contracting Practices and Dispute Resolution. Unsurprisingly, the Tribunal is opposed to any (additional) form of government intervention in relation to the delivery of dispute resolution services on the basis that parties to construction contracts and disputes arising thereunder are already well served by the Tribunal’s effective and efficient specialist nationwide services. Any barrier to access to justice for parties to disputes involving relatively modest amounts has effectively been addressed through our LVC fixed fee low value claims service.

The purpose of the proposed measures was stated as being to rebalance responsibility toward building professionals and tradespeople who are making decisions about building work away from an undue over-reliance on building consent authorities. However, one would be most surprised if there were any broad community support for self certification and diminished BCA responsibility in circumstances where the quality, standard and compliance of building work has been found seriously wanting with that additional layer of independent certification. The leaky building crisis is clear evidence of that.

Nonetheless, we, along with the rest of the building industry, now wait with baited breath to hear the Government’s decisions on proposed measures to update the building control system.

I am pleased to report that work is progressing on a possible review of the Construction Contracts Act. We will keep you posted as to progress.

Derek Firth’s article on leaky buildings in the last issue of BuildLaw generated considerable interest and caused me to reflect on my own experience as a WHRS adjudicator over the past seven years. That in turn caused me to put pen to paper (well at least fingers to the keyboard) and I composed an article that I titled “The Great Shame”. That article resulted in television interviews on Campbell Live and the Breakfast Show and radio interviews on Radiolive and National Radio.

What is clear is that the leaky building crisis remains a major social and economic problem for the community of unparalleled proportion, penetration and destructive effect. It is simply untenable given the size and scope of the problem and the contributory role of the BIA in the crisis that the government should just sit there with its head in its hands saying “Well I just don’t know how to do this”.

The WHRS initiatives and court processes applied to the problem to date are palpably unsuitable and
inadequate for addressing the crisis in ways which are fair to all parties and resolve the underlying problem.

As Baragwanath J said in the recent Sunset Terraces case, the leaky building crisis is a systemic problem presented to the community which requires initiatives beyond those to which the courts can contribute.

What is required is a commonsense solution based on practical considerations. Unless the government takes the lead nothing will change. Let’s hope that the budget announcements this month bring new hope for all leaky building victims, claimants and respondents alike.

Consistent with our commitment to excellence and to constantly reviewing and improving our procedures and DR services, I am pleased to report the launch of our new arbitration programme that was signaled in the last issue.

The development of the new suite of expedited commercial arbitration processes is the culmination of months of work. The new processes represent a significant departure from conventional arbitration procedures in New Zealand and will provide a credible and effective alternative to adjudication and litigation. I am absolutely certain that the new procedures will increase the efficiency, potency and the use of arbitration as a modern dispute resolution process. They will enable us to provide parties to disputes with a number of alternative and fully administered processes that are truly capable of delivering a proportionate response to the amounts in dispute and the complexity of the issues involved.

There are a number of other exciting initiatives that we are currently working on to improve and enhance the way in which parties to building projects conduct and regulate their relationships and to resolve disputes when they occur - but more about that later!

We have really been pleasantly surprised by the large number of requests that we have had from people wishing to be added to our distribution data base for BuildLaw® and BuildLaw®:In Brief (our free email alert service).

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Please feel free to distribute BuildLaw® to your friends and colleagues – they are of course most welcome to contact us if they wish to receive our publications directly.

We are passionate and proud of serving the industry and the community. We are grateful as always to our contributors. I do hope you find this Issue of BuildLaw interesting and useful.

John Green
Alternative Dispute Resolution Conference
Christchurch, 5-7 August 2010

The Arbitrators’ and Mediators’ Institute of New Zealand (AMINZ) is holding its annual alternative dispute resolution conference jointly with the Institute of Arbitrators and Mediators Australia (IAMA). Members and non-members are welcome.

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How to give expert evidence
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