BuildLaw: In Brief

Further Construction Contracts Act Amendments as of 1 September 2016

The latest amendments under the Construction Contracts Amendment Act 2015 have come into force as of 1 September 2016. The definition of 'construction work' has been broadened to include design, engineering and quantity surveying work. The effect of the wider definition means designers, engineers and quantity surveyors can ensure they are paid for their services in a timely manner, while consumers can hold architects, engineers and quantity surveyors to account for their work. Parties to contracts involving design, engineering, and quantity surveying will now be able to access the payments and dispute resolution services under the Construction Contracts Act 2002. The change will only apply to contracts entered into or renewed on or after 1 September 2016, and will not affect contracts entered into or renewed before 1 September 2016.

2016 Second Edition Unit Titles Manual – Thomson Reuters

Thomson Reuters has published the second edition of its Unit Titles Manual, a practical guide to understanding the Unit Titles Act 2010 (**the Act**). The manual was written to assist bodies corporate to understand the Act, regulations, and wider considerations that are generally relevant to people at all levels of a body corporate. The second edition provides commentary on amendments to the Act, and includes a new comprehensive chapter on dispute resolution, written by Director of the Building Disputes Tribunal, and dispute resolution expert John Green.

Highest Annual Housing Consents in over a Decade

Statistics New Zealand has released new data confirming annual housing consents have reached new highs. Over 29,000 new homes were granted building consent in the year to June 2016, marking a 16 percent increase from the previous year. The annual total is the highest since 2004, with Auckland and surrounding areas as the main growth contributors. A total of 2,752 new homes were consented in June 2016 alone, which marks a 35% increase from June 2015. Non-residential consents have also increased by 63%, reaching a record high of $739 million in June 2016. Regional growth showed the regions with the largest dwelling consent growth were Auckland, Wellington, Waikato and Bay of Plenty, while Christchurch showed a 14 percent decrease following previously increasing rates. Statistics released on 30 August 2016, also show an increase in the overall value of planned building work (excluding housing) of $1 billion dollars over the past year. Investment in schools, universities and hospitals have been identified as the main contributors to this significant value increase. In the year to July 2016, $6.3 billion of non-residential building work was consented, compared to $5.3 billion in the July 2015 year. Education buildings including the University of Otago and University of Canterbury accounted for half, while health buildings such as Christchurch Hospital contributed one-quarter of the increase.

Further Support for Puhoi to Warkworth Motorway Project

On 2 August 2016, Transport Minister Simon Bridges announced that the NZ Transport Agency will enter into preferred bidder negotiations with the Northern Express Group for the Puhoi to Warkworth motorway project (**the Project**). The Project has been identified as one of the Government's Roads of National Significance, forming the first part of a larger motorway project in the Northland area identified as key to economic growth. Mr Bridges believes that delivering the Project

through a public private partnership (PPP) model will allow funding and innovative design and construction benefits. The Puhoi to Warkworth PPP model follows on from the Transmission Gully motorway project in Wellington, which was the first state highway in New Zealand being delivered through a PPP, expected to open in 2020. Mr Bridges expects the PPP contract for the Puhoi to Warkworth Project to be finalised by late 2016.

China: 57 Stories in 19 Days

China's construction industry was the centre of internet attention recently, following the construction of J57 SkyTown, a 57 story building built in just 19 working days. The building boasts 19 atriums, some 800 apartments and office space for over 4,000 people. The almost unbelievable timeframe is attributed to modularisation – where 95% of the parts used in construction are pre-fabricated in a factory prior to construction, and then put together on site. Modularisation gained momentum following its revolution of the car manufacturing industry, and is now being increasingly engaged by developers in the construction industry as a means to maximise efficiency through advances in technology. However, like any construction method, the benefits of modularisation need to be weighed against the logistics involved and potential risks including: increased forward planning required, reduced flexibility, limited customisation, and more substantial financial investment upfront. Despite potential risks, the world of modularisation has opened up construction opportunities by making what were once impossible timeframes eminently more achievable. Video footage of the construction can be found **here**.

Winner of Competition to Design New Museum of London

On 28 July 2016, architects Stanton Williams and Asif Khan beat six other shortlisted architectural practices, being crowned the winners of the international competition to design the new Museum of London. Having outgrown its current building and location, the Museum invited global architects to submit designs for a building at the new site, with a brief to ensure the building *meet[s] the needs of a 21st century museum, while also preserving the rich history of [the] great Victorian structures*. The winning design includes a substantial glass dome in the entrance, spiralling escalators to an underground chamber as well as a sunken garden. Planning applications are expected to be submitted in 2018 with a predicted opening date some time in 2022.

Fail to Provide Building Guarantee in Contract? Get Fined

Canterbury builder, Gerard James Thomson, Director of construction business Flaxmill Ltd, was fined $12,800 and ordered to pay $16,700 in compensation by the District Court for making false representations about providing Homefirst building guarantees to home owners. Mr Thomson plead guilty to three charges of false or misleading representations under section 13(i) of the Fair Trading Act 1986. The Commerce Commission brought the case against Mr Thomson after three homeowners complained of not receiving the guarantee, when they had contracted on the basis that Mr Thomson would apply for it prior to starting construction work. The Court found that Mr Thomson never intended to apply for an independent guarantee, and as a result, his customers did not receive the protection he had led them to believe they had. In sentencing, the Court held that *representations about building contracts need to be scrupulously accurate... whether they are making promises orally or in writing, the building services provider needs to do what they've committed to do.*

Unseen Standard Terms Included

In *Barrier Ltd v Redhall Marine Ltd* [2016] EWHC 381 (QC), the UK High Court held that unseen standard terms referred to in a contract were

incorporated into the contract. The decision comes as a timely reminder to contracting parties to ensure they are provided with all documents referred to in the contract, as any such documents will form part of the agreement. The case involved provision of a purchase order which included the words *the terms overleaf must be read and strictly adhered to*. The terms referred to were Redhall's standard terms and conditions, however the purchase order did not reproduce the conditions. The Court held that it was not necessary for the standard terms and conditions to be set out in the purchase order, holding that incorporation by reference is sufficient, provided that reasonable notice of the conditions has been given. As a result, parties negotiating contracts are reminded to always thoroughly read all documents and request any documents referred to that have not yet been provided, otherwise they may find themselves bound to terms they have not seen.

The Vexatious Problem of Oral Variations – Can You Contract Out?

Debate over oral contract variations is longstanding. Construction contracts often include clauses preventing oral variations, instead stipulating that all variations must be in writing and/or signed. In a recent UK case the Court considered whether such clauses mean that parties will never be bound by oral variations. In *Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd* [2016] EWCA Civ 936, the Court suggested that oral variations can still be binding, even where a contract provides otherwise. There was a clause in the parties' contract stating that variations could only be made in writing, however Globe contended that there had been a valid oral variation, and that agreement was evidenced by the parties' conduct. The Court relied on *World Online Telecom v I-Way* [2002] EWCA Civ 413, holding that the parties' autonomy was most important, such that if it is clear the parties' intention was to orally vary the contract notwithstanding a clause to the noted that its decision does not invalidate anti-oral variation clauses entirely, as any party alleging variation will have to prove their argument and provide persuasive evidence to overcome the clauses of the contract. Parties should take from this decision that while anti-oral variation clauses are valuable for providing contractual certainty, any clear agreement to oral variation may still be enforceable.

Brexit Effect on Construction Industry

The anticipated effect of Brexit on the UK construction sector could be both vast and negligible in different respects. Areas including international labour, international standards and legislation are expected to show a range of effects. Without free movement of workers within the EU, the cost of construction work in the UK will rise significantly, and the sector's ability to meet demand will be impacted by a lack of skilled workers entering the construction workforce. The UK's compliance with international design and manufacturing standards may show little change, as to ensure exportability, the UK will almost certainly need to continually comply with EU standards. From a legal perspective, Brexit may be less obvious, and certainly less abrupt. Previous legislation enacted to ensure UK compliance with EU law may be unlikely to change, as the UK may have a similar experience to Norway and Switzerland who were required to implement a considerable amount of EU legislation to foster trade agreements within the EU. Regarding trade, legislation in the form of bilateral trade agreements will need to be negotiated with the EU to enable the UK to access the Common Market.

Supreme Court Grants Leave to Appeal Question on s37 Weathertight Homes Resolution Act 2006

In a judgment on 3 August 2016[1], the Supreme Court granted leave to appeal on the question of whether, in terms of s37 of the Weathertight Homes Resolution Services Act 2006, the application for an assessor's report "stopped the clock" for limitation purposes with regard to the proceedings against the respondent. The case concerned construction of Ms Lee's house, which presented latent weathertightness defects in February 2008 including leaking. Ms Lee initiated proceedings in May 2014 against the local Council, alleging negligent inspections throughout the construction process. However, summary judgment was granted against Ms Lee on the basis that her claim was governed by s4(1)(a) of the Limitation Act 1950 not by s393 of the Building Act 2004, and was therefore out of time. The Court of Appeal dismissed Ms Lee's appeal[2], however, the Supreme Court granted leave to appeal in part, to determine the question of whether in terms of s37 of the Weathertight Homes Resolution Services Act 2006, the application for an assessor's report "stopped the clock" for limitation purposes with regard to the proceedings against the Council. If Ms Lee's assertion is found to be correct, her claim may not have been out of time under the Limitation Act as determined by the High Court.

References:

1 *Lee v Whangarei District Council* [2016] NZSC 98

2 *Lee v Whangarei District Council* [2016] NZCA 258

MEDIA RELEASE

CARTER HOLT HARVEY LTD v MINISTER OF EDUCATION & ORS (SC 93/2015) [2016] NZSC 95

- PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz.

The appellant, Carter Holt Harvey Limited (CHH), manufactures cladding sheets and cladding systems that have been installed in schools throughout New Zealand that are owned or administered by one or more of the respondents. The cladding sheet product is known as "Shadowclad". The respondents say that a large number of school buildings have been affected by weathertightness issues and allege that these problems have arisen because the cladding sheets and cladding systems supplied by CHH are defective. The respondents brought five causes of action against CHH, including claims in negligence, negligent failure to warn and negligent misstatement.

CHH applied to the High Court for an order striking out a number of the causes of action. Asher J in the High Court declined the application, ruling that all claims should go to trial. CHH appealed