Russell McVeagh

Breaking Ground

Russell McVeagh
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Changes bring clarity to the retentions regime

Changes to the retentions regime that aim to strengthen and clarify the existing regime come into force on 5 October 2023.

Some of the key changes include the automatic creation of a trust, the ban on "commingling", mandatory reporting, and the introduction of offences. These changes affect principals, head contractors, subcontractors and insolvency practitioners, and reflect the concerns raised in the High Court decision of *Bennett v Ebert Construction Ltd* [2018] NZHC 2934.

You can read more about the key changes to the regime in an article recently published on our website here.

Amendments to NZS 3910:2013

The much-anticipated redraft of New Zealand's most frequently used standard form construction contract has been released for public consultation this month. The proposed revisions to NZS 3910:2013 aim to respond to changes in legislation and evolving norms within the construction sector.

The key proposed amendments are summarised below.

Overheads terminology: This is a simple terminology change whereby On-Site Overheads has been replaced with Preliminary and General (P&G), and Off-Site Overheads and Profit has been replaced with Margin throughout the Contract. The definitions have remained essentially the same.

Contract price is 'pick and mix': The Contract now allows any combination of contract price mechanisms. For example, one separable portion may be fixed price, while the others may be measure and value.

Target Price introduced: The introduction of Target Price provides a fourth option for the contract price structure, whereby the over-run or under-run will be shared between the Contractor and Principal in accordance with agreed percentages, and up to the cap stated in the Specific Conditions.

Replacement of Engineer's dual role: The Engineer's dual role has been divided into the role of the Contract Administrator and the Independent Certifier. Previously, the Engineer was required to act both for the Principal as its agent, and as an independent body when determining and issuing certificates. It proved practically and psychologically difficult to perform both roles. Under the proposed amendments, there will remain an option to appoint the same individual for both roles, for lower value contracts or for those concerned about an increase in administration costs.

Health and Safety and Environment: The Health and Safety provisions have been updated to align with the Health and Safety at Work Act 2015, and environmental protections have been updated to align with the Resource Management Act 1991 (although this is in the process of being repealed and replaced).

Management Plans and Reporting: The requirements for quality, safety and traffic management plans have been removed in favour of a more general requirement for management plans as agreed between the parties (and specified in the Specific Conditions). The same will apply to status reports.

Indemnity and Liability Limit: The indemnity has been amended to be fault based and there is an option to include a cap on the Contractor's liability.

Variations and Cost Adjustments: Various price adjustments which were previously included in clause 12 (including the final account) are proposed to move to clause 9. Cost fluctuations are proposed to be the default, whereby an adjustment shall be made unless the parties opt out. The final account mechanism requires the Contractor to prepare an Interim and, later, a Final Account.

Extensions of time (EOT): The grounds for an EOT remain the same, however, the mechanism for notifying and assessing EOT claims has changed, including requiring the Independent Certifier to have regard to specific considerations in making the decision.

Disputes: Engineer's Decisions have been reallocated to the Independent Certifier and have been moved to cl 6.4. The step-through process of seeking a review, then a Final Decision (previously a Formal Decision) is retained, in addition to the ability of the parties to seek an expert's review.

Section 13 provides for an informal dispute resolution process where senior representatives of each of the parties attempt to resolve the matter before any formal dispute process (ie, mediation, arbitration). There is an unambiguous agreement to refer any disputes to arbitration, and no requirement to follow a specific process prior to doing so.

The public consultation process closes on 30 June 2023. Make sure to have your say here.

Please get in touch with one of our experts if you would like to discuss what these changes may mean for you.

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Case Law Update - NZ

Body Corporate 449665 v CMP Construction Ltd [2023] NZHC 449

A recent decision of the High Court considers when a claimant will be regarded as having "late knowledge" of their claim, for limitation purposes.

Background

The Body Corporate for a block of apartments alleged that a waterproofing membrane was installed incorrectly, allowing water into the building and causing the roof terrace to degrade. The work was completed by Aquastop Ltd, who had been engaged by head contractor CMP Construction Ltd (CMP). The Body Corporate said that CMP bore the risk of any loss resulting from its subcontractor's failure to exercise reasonable skill and care in completing the work.

CMP denied any liability and stated that, in any event, the claim was time-barred under the Limitation Act 2010 (Limitation Act). It applied for summary judgment of the claim, or for it to be struck out.

Limitation

Under section 11 of the Limitation Act, the starting point is that the claim needs to be filed within six years of the act or omission on which the claim is based. However, an exception will apply if the claimant has "late knowledge" of the issue. In that case, the claim can be brought three years after what is known as the late knowledge date.

In this case, the apartments were constructed between January and November 2013. By the time the Body Corporate filed its claim in December 2021, the six-year primary claim period had ended. CMP said that the Body Corporate had sufficient knowledge of the defects in the membrane by 20 August 2018, and that the "late knowledge" period had also passed.

The key issue for determination by the Court was therefore whether the Body Corporate had acquired late knowledge less than three years prior to filing the proceeding (sometime after 6 December 2018). Otherwise, they would be time-barred under the Act from bringing their claim.

Submissions

CMP said that the Body Corporate acquired late knowledge when it discovered the building was having issues with leaks through the membrane, which had occurred in 2018.

The Body Corporate said it did not acquire late knowledge until 18 May 2020, when it received an in depth, independent report that identified the defects causing the leaks, made clear their extent, and indicated that the defects may be attributable to the company that had applied the membrane. The Body Corporate stressed that simply having awareness of some leaks was not sufficient to constitute "late knowledge"

Decision

In the High Court, the Associate Judge found it was reasonably arguable that the earliest possible date the Body Corporate could have acquired late knowledge was when an investigation into the membrane was conducted by a third party in late 2019. The investigation revealed to the Body Corporate that the issue with the membrane was systemic, not simply localised leaks requiring minor repairs. Although the Body Corporate still did not fully understand the defects at that point, it did have sufficient information to constitute constructive knowledge of the issues underlying the claim, which was sufficient for time to start running for limitation purposes.

On that basis, CMP had not established that the Body Corporate was time-barred from bringing its claim, and its applications for summary judgment and strike out were dismissed.

Observations

This case illustrates the orthodox application of the law of limitation. The trigger point for initiation of the late knowledge period will always be very fact-specific, depending upon when the claimant is held to have had sufficient knowledge of a cluster of facts (including all elements of the claim, and that the issue is at least in part attributable to the defendant). In particular, simple knowledge of the existence of some form of defect is unlikely to be enough; it will be necessary to know that the issue is sufficiently serious to justify a claim.

CONTRIBUTORS:
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Case Law Update - NZ

Trustees of Buchanan Family Trust v Tasman District Council [2023] NZHC 53

Background

In 2008, Ms Buchanan and Mr Marshall purchased a "high-end award-winning" property near Nelson. A central feature of the property's design was an in-ground swimming pool and courtyard, around which the house was positioned.

The Tasman District Council (Council) had issued a building consent for the house and pool four years prior, in 2004. It had carried out its final inspection, then issued the code compliance certificate (CCC) in 2006. In 2009, and then 2012, the Council inspected the pool again, and confirmed its compliance with the Fencing of Swimming Pools Act 1987 (FOSPA).

When the homeowners decided to sell their house in 2019, the Council inspected the pool again. This time, it determined the pool did not comply with the FOSPA and that, in fact, it had never complied with it. The homeowners were required to undertake extensive remediation work, including the installation of a fence around the pool. They considered that this addition changed the design of the house to such an extent that the character of the property was ruined.

Proceedings

The homeowners filed proceedings against the Council in the High Court. While the Council admitted negligence in issuing the building consent and CCC in 2004 and 2006 respectively, those claims were time barred. Instead, the homeowners sued the Council for negligence, negligent misstatement, and breach of a statutory duty under the FOSPA in relation to the pool inspections in 2009 and 2012. The homeowners said the Council's actions in relation to those two inspections had lost them the opportunity to sue the Council for negligence regarding building consent and the CCC.

The central issue for the Court was whether the Council owed a duty of care to the homeowners to undertake pool inspections with reasonable skill and care, so as to protect them from financial loss.

The Council said it did not owe a duty of care to protect the homeowners from financial loss in carrying out its inspections. It said the foreseeable loss of a failed pool inspection is the risk of harm to a young child (who could gain unsupervised access to the pool), not financial loss to the homeowner.

Decision

The judge determined that claims regarding the 2009 inspection were also time barred. In relation to the 2012 inspection, the judge held that:

- The Council did owe a duty of care to the homeowners in relation to the pool inspection and had breached that duty.
- It was reasonably foreseeable that, if the Council negligently undertook pool inspections and advised the homeowner their pool was compliant, then the homeowner would (1) be unaware of any compliance issues; (2) not take action to remediate them; and (3) not take any steps to seek redress.
- It was also reasonably foreseeable that, if the Council inspections did not reveal the breach until after the limitation period had passed, the homeowners would lose the opportunity to seek redress and suffer loss accordingly.

The judge additionally held the Council liable for negligent misstatement. The claim for breach of statutory duty under the FOSPA was dismissed, on the basis the particular provision relied on did not create a duty that could be enforced by private action.

The plaintiffs were awarded damages of around $270,000, including $195,000 for the difference in value between the amount they had paid for the property and its actual market value at the time, given the pool was non-compliant.

Observations

Where a negligence claim has become time barred, that will usually be the end of the matter. But where, as here, a claim in negligence has become time barred as a consequence of a further act of negligence, it may still be possible to bring a claim on the basis of a "loss of a chance" (ie, a chance to bring litigation).

In such cases, the valuation of damages will be assessed in light of the "lost" claim's chance of success, and the damages the claimant was likely to have recovered had the claim succeeded. In this case, the Court's calculus was made simpler by the fact the Council accepted it would have been liable in negligence for issuing the building consent and CCC, if not for the time bar, meaning the homeowners' prospects of succeeding in the lost claim were assessed at 100%. The damages assessment may be different where there is not such a high degree of certainty about the prospects of the lost opportunity.

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Case Law Update – England and Wales

Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd [2023] EWCA Civ 292

The Court of Appeal of England and Wales has upheld the Technology and Construction Court's decision that an alternative dispute resolution clause that lacked sufficient clarity and certainty as to the agreed process was not enforceable. However, the Court also confirmed that sufficiently clear dispute resolution processes can function as conditions precedent to the commencement of proceedings between contracting parties.

Background

In 2004, the Children's Ark Partnership (CAP) entered a head contract with Brighton and Sussex University Hospital NHS Trust (Trust) to finance and build a children's hospital in Brighton. CAP then sub-contracted with Kajima Construction Europe (UK) Ltd (Kajima) for the design and construction of the hospital.

Various clauses in the head contract referred to a particular dispute resolution process. It stated that construction disputes were to be referred to a "Liaison Committee", consisting of representatives from CAP and the Trust, which would convene within 10 days' notice and then make a final and binding resolution on the parties (unless otherwise mutually agreed). The parties were only able to refer disputes to mediation or adjudication, or to file proceedings, after having used the Liaison Committee procedure.

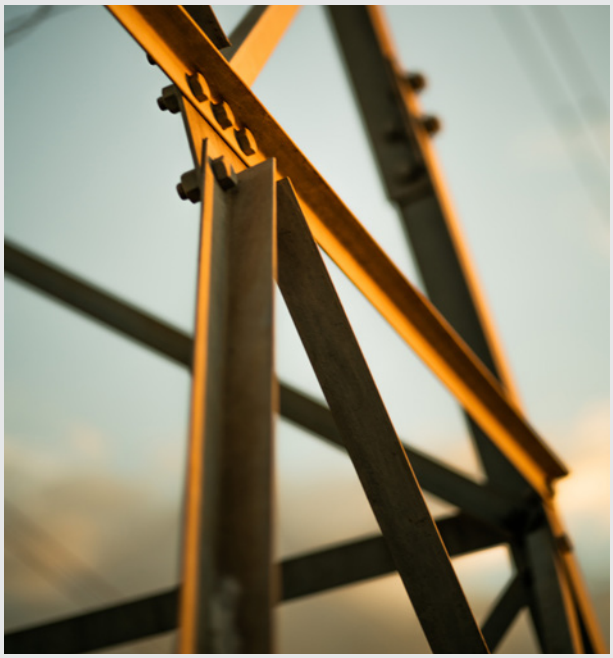
The issues in this case largely arose because the subcontract directly imported the dispute resolution process from the head contract, without providing for representation on the Liaison Committee for Kajima. This meant that, on a literal interpretation of the clause, Kajima could not make submissions to the Committee, or even view Committee documentation such as meeting minutes.

The Dispute

Following the 2017 Grenfell Tower fire, the cladding and fire-stopping elements of the Hospital were inspected. That inspection uncovered certain fire safety defects which required remediation.

In 2021, when their claims in relation to those defects were at risk of becoming time-barred, CAP brought proceedings against Kajima in court. It then applied for a stay of those proceedings so that the parties could attempt to resolve the dispute via the Liaison Committee process. Kajima sought to have CAP's claim struck out, arguing that the Liaison Committee procedure constituted a condition precedent to the commencement of proceedings, leaving CAP unable (and now out of time) to issue proceedings.

When Kajima's strike-out application was rejected by the High Court, it appealed to the Court of Appeal.



The Decisions

The Court of Appeal confirmed the findings of the High Court. While the dispute resolution process was clearly expressed as a condition precedent, it lacked sufficient clarity and certainty (with reference to objective criteria) to be enforceable.

Observations

A key takeaway from Kajima is that the same principle of certainty of terms that governs the formation of contracts generally also applies to the enforceability of alternative dispute resolution clauses. If the parties to a contract clearly provide for a specific dispute resolution process, and expressly intend that it be a condition precedent to proceedings (ie, a process that must be used before proceedings can be commenced), the Court will generally seek to uphold this agreement. However, there needs to be specificity as to the parties' key obligations within that process, including in relation to participation, representation, and adherence to outcomes reached.

This aligns with the New Zealand approach to the enforceability of contractual dispute resolution processes, which focuses on whether there is sufficient specificity as to how the parties are to initiate and properly participate in the process. The strong emphasis on certainty in Kajima is likely to be a key characteristic of the New Zealand approach going forward.

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Breaking Ground is produced quarterly by Russell McVeagh. It is intended to provide summaries of the subjects covered, and does not purport to contain legal advice. If you require advice or further information on any matter set out in this publication, please contact one of our experts.

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