Russell McVeagh

Breaking Ground

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Case Law Update - NZ

Doubt as to the reasonableness of an Engineer's certification led to interim injunction preventing call on contractor's bond

Hawkins Ltd v Elizabeth Properties Ltd [2024] NZHC 561

An Engineer's certificate was not enough to enable a principal to call on a contractor's performance bond. The Court granted an interim injunction to restrain a call on the bond, pending an adjudication determination regarding whether liquidated damages (LDs) were in fact due.

Background

Elizabeth Properties Ltd (Developer) engaged Hawkins Ltd (Hawkins) under a standard NZS 3910:2013 build only contract. The project was significantly delayed. The Developer deducted LDs from a payment claim, prompting Hawkins to issue an adjudication claim regarding whether LDs were due. An attempt at a negotiated settlement failed, and the adjudication continued.

The Developer indicated it would call the $3 million bond if Hawkins failed to pay over $22.5 million in LDs. Hawkins refused to pay, and the Developer wrote a bond demand letter to the Engineer. Hawkins applied for an interim injunction preventing the bond being called until the LDs adjudication was determined.

In the interim between Hawkins' injunction application and the hearing, the Engineer issued a certificate stating that Hawkins was in default of its contractual obligations for failing to pay the LDs. The Engineer did not review Hawkins' adjudication papers in making this certification, as the Developer had not consented to these papers being provided.

Arguments

Hawkins' position was that the Developer's bond call was invalid, on the basis that:

- the project delays were design-related and therefore not Hawkins' responsibility as a build-only contractor;
- there was an ongoing adjudication to determine whether LDs were due; and
- the Engineer did not have access to sufficient information to make a reasonable decision in good faith on the question of LDs.

The Developer asserted the LDs were due, and that the ongoing adjudication did not impact its contractual right to call the bond.

It also argued that, in cases where an injunction seeks to restrain payment under a bond, a higher standard was required to get an injunction; instead of a "serious question to be tried", the Developer argued there needed to be a "strong case" that the bond call was unjustified.

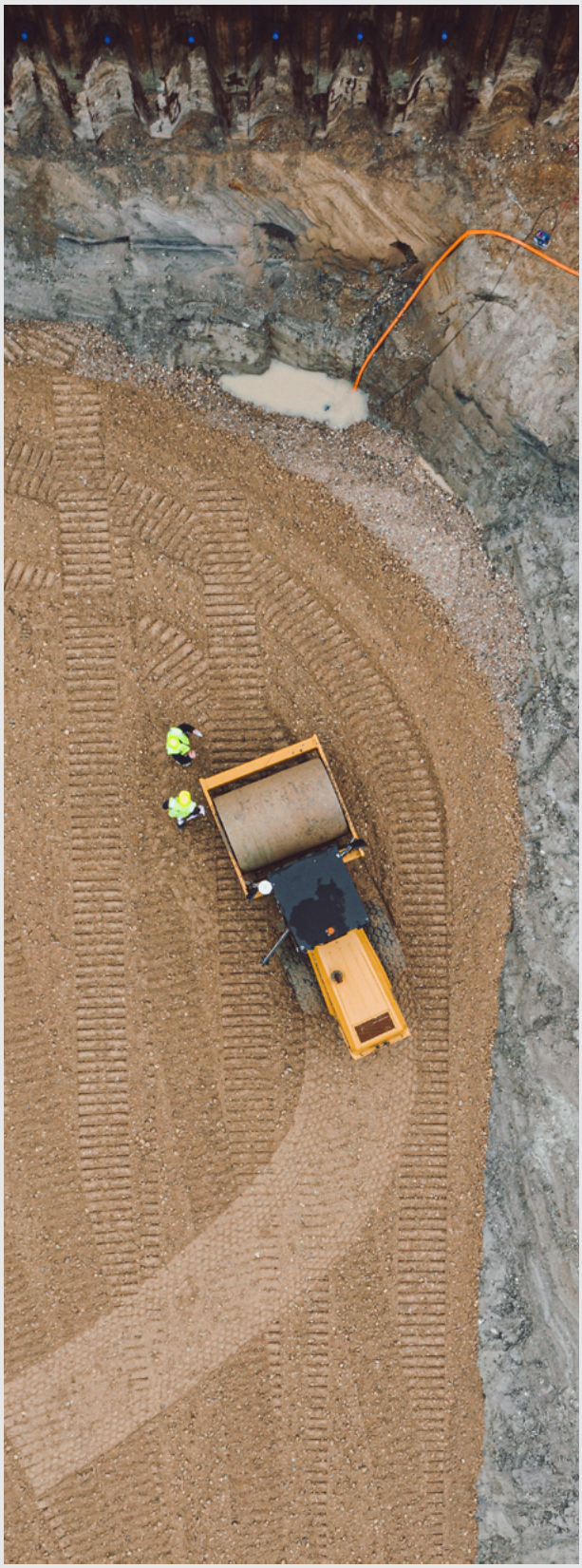
Decision

The Court granted the injunction restraining a bond call until the LDs adjudication was determined, having applied the standard two-stage approach for injunctions. It rejected the Developer's "strong case" threshold, saying instead that the strength of the case could simply be considered as a factor when assessing the balance of convenience.

Observation

This decision reinforces the obligation on the principal to make sure the Engineer acts reasonably and in good faith when the Engineer is tasked with making decisions entrusted to him or her under the contract, to value work, and to issue certificates. This includes, at a minimum, providing all relevant information (from both sides) available to the Engineer so that he or she may consider all the facts.

The case turned largely on the wording of the bond. It was a precondition for payment that there be a valid Engineer's certificate. On the facts, the Court considered there to be a serious question as to whether such a certificate had been issued. Had the bond been an on-demand bond (ie without such preconditions) the result may well have been different. The case therefore highlights the need for care in choosing appropriate wording for any performance bond.



High Court once again demonstrates the difficulty in seeking to judicially review an adjudication determination

Sam Pemberton Civil Limited v Robertson [2024] NZHC 272

The High Court reiterated that challenging an adjudicator's determination is best done through mediation, arbitration, or litigation – not judicial review. To succeed in judicial review, the adjudicator must have erred in law or acted unreasonably or unfairly. This is a high threshold.

Background

Landsdale Development Limited (Landsdale) contracted Sam Pemberton Civil Limited (Contractor) to undertake earthworks and civil works on a project. Almost six years after project completion, the Contractor commenced an adjudication seeking to review the Engineer's decision as to the sum owed by Landsdale to the Contractor. Landsdale applied to enlarge the adjudication by consent to include its claim against the Contractor for liquidated damages (LDs). The Contractor refused, so that application was declined. However, the adjudicator's determination included a finding that Landsdale was entitled to set off LDs. Landsdale commenced a second adjudication to recover the LDs. The second adjudicator largely adopted the findings of the first adjudicator and determined that Landsdale was entitled to LDs.

The Contractor applied for judicial review of the two adjudications, arguing that:

- the claim for LDs was time barred; and
- the adjudicators failed to apply the correct threshold for costs.

Outcome

Justice Whata declined judicial review of either adjudication. In doing so, he reiterated that, while judicial review is not limited to instances of alleged jurisdictional errors, judicial review will very rarely be the appropriate option for challenging a determination on substantive grounds – particularly for complex construction issues. In such cases, parties should instead take the underlying dispute to arbitration, including on matters of limitation.

Having declined judicial review, Justice Whata provided comments in relation to the time bar and costs questions.

Time bar

The second adjudicator was deemed not to have erred in determining that the "act or omission" on which the LDs claim was based was the date of the first adjudicator's determination. Having considered Parliament's intentions in changing the wording of s 11 between the 1950 and 2010 Limitation Acts, and noting that the definition of LDs in the special conditions to the contract tied LDs to the due date for completion, Justice Whata considered that the "act or omission" on which a claim could be based was the date on which entitlement to (and correspondingly, the obligation to pay) LDs crystallised. This might be the date of an Engineer's decision, or an adjudication determination, updating and/or fixing the project completion date.

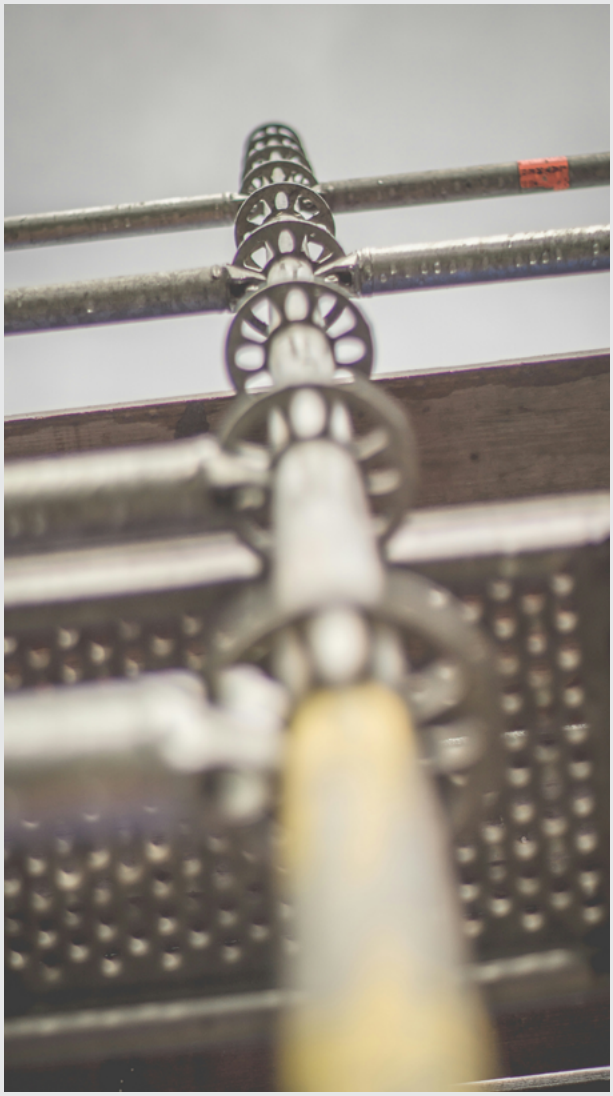
Costs

Where an adjudicator considers that a party's submissions lack substantial merit, that is a proper basis for awarding costs. In this case, the weaknesses of the Contractor's claims had been sufficiently reviewed (and were sufficiently clear) such that the costs determinations of both adjudicators against the Contractor were justified.

Observation

There are a few reasons the Contractor may have pursued judicial review in this case despite the ongoing arbitration. Most obviously, in terms of cashflow it likely hoped a successful judicial review application would allow it to quickly recover (and avoid having to pay further) LDs. It also sought to establish that LDs were not recoverable because they were time-barred.

The application failed because of the particularly high bar to successfully judicially reviewing an adjudication determination. This case is a reminder that judicial review is a course of action that should be considered carefully, particularly in relation to adjudication determinations.



A design subcontractor may be obliged to ensure that their design complies with the principal's requirements

CPB Contractors Pty Limited v WSP New Zealand Limited [2024] NZHC 640

A design subcontractor owed a contractual duty to the main contractor to ensure that its design complied with the principal's requirements. Breach of this contractual obligation entitled the head contractor to claim the difference between the actual tender price and the higher price it would have tendered had the subcontractor provided an adequate design.

Background

Following a tender process, CPB Contractors (CPB) was engaged to design and construct an upgrade to State Highway 1 between Manukau and Papakura. CPB engaged WSP New Zealand (Designer) to provide design services at the tender stage for a fee of around $1.8 million.

CPB incurred an overall loss of around $42 million on the project, some of which related to deficiencies in the Designer's tender design. It sought to recover $5.3 million from the Designer for breach of contract and/or negligence in failing to provide designs that complied with the principal's requirements. The $5.3 million was calculated by CPB as the difference between its actual tender price, and the price it claimed it would have achieved had the Designer provided adequate designs.

Outcome

The Court held that:

- Correctly interpreted, the contract placed an obligation on the Designer to provide a tender design that complied with the principal's requirements, despite the lack of an express clause to this effect.
- CPB had used the correct method for calculating loss in this type of situation, based on its 'expectation interest' – ie the position it would have been in had the Designer performed its contractual obligation. The judge accepted that a higher tender would have been accepted, as the next highest tender had been over $67 million higher.
- An exclusion clause in the contract, relied on by the Designer, did not apply. The clause specifically excluded indirect, consequential or special loss, or loss of profit. However, the losses claimed in this case were direct losses.

The Court also rejected an argument from the Designer that CPB's amended statement of claim was time-barred, as the causes of action were not essentially different from CPB's original claim (which had been brought within the required six-year timeframe).

Observation

This case demonstrates that loss can be calculated in many ways depending on the situation. Here, CPB chose to calculate the loss with reference to what would have been achieved at tender, and in so doing quantified the loss in a way that was not subject to the exclusion clause.

Another recent case with similar characteristics is *H Infrastructure Limited (in receivership and in liquidation) v Worley New Zealand Limited*. In that case the contractor claimed for losses arising from a breach of warranty by the designer in preparing the tender design. Loss was assessed as the extra cost incurred in remedying the defective design.

Limitation of liability is not in breach of the Building Act 2004

Tauranga City Council v Harrison Grierson Holdings Ltd [2024] NZHC 714

The High Court enforced limitation clauses relied on by designers of a commercial building, allowing the designers to cap liability for costs arising from breaches of their duties under the Building Act 2004 and Fair Trading Act 1986 (FTA).

Background

In 2017, Tauranga City Council (Council) contracted Harrison Grierson Holdings Ltd (Designer) to design a transport hub in the centre of Tauranga. Constructure Auckland Ltd (Reviewer) was engaged to review the design.

Major flaws were discovered with the design at an early stage in the construction process. The design issues were so extensive that construction was ultimately abandoned with the structure partially complete, leaving the land worthless. The Council sold the land for a nominal amount of $1 and issued proceedings against the Designer and the Reviewer for breaches of duties under the Building Act and FTA, seeking damages of over $20 million.

The Designer and the Reviewer sought to rely on limitation clauses in their respective standard form agreements, capping their respective liabilities at $2 million and $500,000. The Council argued that these clauses illegally sought to contract out of compliance requirements under the Building Act and FTA.

Outcome

The Court held that the limitation clauses in the agreements were enforceable, capping the liability of the Designer and the Reviewer at the stated amounts. It rejected arguments made by the Council that these claims offended against mandatory obligations under the Building Act or FTA.

In relation to the Building Act, it said that such limitation clauses did not undermine the objective of safe and healthy buildings. The building still had to undergo remediation to achieve the relevant standards; by agreeing a liability cap, the Council had agreed to cover the majority of those remedial costs.

In relation to the FTA, while the FTA prevents parties from contracting out of their duties under the Act, s 5D provides an exception for parties in trade. The Court determined that, with the form requirements of s 5D having been met, it would ultimately be fair and reasonable for the parties to be bound by the limitation clauses.

Observation

This case will no doubt be of comfort to designers and contractors who use limitation clauses in their standard agreements. This is also a timely case given the new NZS 3910:2023 terms provide an option for the parties to agree liability caps.

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