Russell McVeagh

Breaking Ground

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Case Law Update - NZ

Misstatements in producer statements can give rise to criminal liability under the Building Act 2004.

Solicitor-General's Reference (No 1 of 2022) From CRI-2021-463-55 ([2022] NZHC 556) [2024] NZCA 514

When issuing building consents or code compliance certificates building consent authorities often rely on producer statements. These are statements of professional opinion, typically given by engineers, designers or other professionals involved in the design or supervision of building work, and provide the building consent authority with assurance that there are reasonable grounds to issue a building consent or code compliance certificate without needing to duplicate checks already carried out by those professionals. Producer statements have no particular status under the Building Act 2004 (**Act**) but are widely used.

In these proceedings, an engineering firm had carried out construction monitoring of a residential development. The sole director of the engineering firm was convicted in the District Court for producer statements (containing misstatements) he issued in respect of the development. The District Court found that his behaviour, while not deliberate, was "highly negligent". That conviction was quashed in the High Court, and a question of law was subsequently referred by the Solicitor-General to the Court of Appeal.

The Court of Appeal was asked to consider whether the issue of producer statements following construction monitoring ("**PS4s**") in relation to non-compliant building work could give rise liability under s 40 of the Act.

Section 40 of the Act provides:

1. A person must not carry out any building work except in accordance with a building consent.
2. A person commits an offence if the person fails to comply with this section.
3. A person who commits an offence under this section is liable on conviction to a fine not exceeding $200,000 and, in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued

This is a strict liability offence.

The Court held that issuing a PS4 could be "building work" and therefore issuing a negligent PS4 an offence under section 40. The focus in assessing liability for PS4s is on the quality of the work of the professional issuing the PS4, rather than the work to which the PS4s relate.

Observations

The definition of "building work" under the Act also includes certain types of design work, and so liability under s 40 of the Act could extend to the giving of other types of producer statements (covering design (PS1), design review (PS2) and construction (PS3)).

This decision will no doubt cause concern amongst engineers and other professionals who issue producer statements. While the Court's view that criminal liability will promote accountability may prove true, the decision will likely increase the costs of design review and construction monitoring services as professionals will seek to be adequately compensated for this insurable risk.

Case Law Update - NZ

Retention payment clauses which are conditional upon anything other than contractor's performance of contractual obligations are void.

Stevensons Structural Engineers 1978 Ltd (in liq) v McMillan Lockwood (PN) Ltd [2024] NZHC 2415

A structural engineering company entered into three subcontracts with a head contractor to undertake steel fabrication and installation works on various projects. Under the subcontracts, the head contractor deducted and held retentions of over $200,000. These retentions were to be released in two stages: half of the retentions were to be released within 30 days of the completion of the subcontract works, and the other half were to be released within 30 days of practical completion of the head contract works.

Before the projects could be completed, the subcontractor went into liquidation. The liquidators demanded release of the retentions. The head contractor refused. As a result, the liquidators applied for summary judgment, contending that the second stage release was prohibited under s 18I(1)(a) of the Construction Contracts Act 2002 (**CCA**). Section 18I(1)(a) provides that:

> Any term in a construction contract is void that purports to…make the payment of retention money conditional on anything other than the performance of party B's obligations under the contract

Associate Judge Skelton agreed with the liquidators that the retention clause was prohibited because the issue of the certificate of practical completion for the head contract works is dependent on things other than the performance by the plaintiff of its obligations under the contract.

As a result, the retentions clause was held to be void and of no legal effect. This meant the head contractor was entitled to withhold the retentions and the subcontractor's right to the retentions had accrued prior to the liquidation. The retention monies were therefore due and payable to the liquidators.

Observations

- Retention clauses should be carefully drafted to comply with the requirements of the CCA. This includes ensuring that payment of retention money is not conditional on anything other than the performance of a contractor's obligations under the contract.
- For more information about the retentions regime read our summary here.

Case Law Update - NZ

Court of Appeal removes some uncertainty about equitable liens over partly completed modular houses

The Podular Homes Decision – Francis v Gross [2024] NZCA

The Court of Appeal overturned a High Court decision, where the purchasers of modular homes, which were being built off-site, were found to have an equitable liens over the partly completed buildings when the contractor went into liquidation. The High Court decision would have had the effect of altering the priorities of creditors established under the Personal Property Securities Act and Companies Act.

The Court of Appeal concluded that New Zealand law should not recognise the existence of a purchaser's equitable lien over partly completed buildings, as doing otherwise would disrupt the carefully crafted regulation regarding the priority of creditors on insolvency.

The effect of this was that the purchasers were found not to have an equitable lien over the partly completed modules and (unless they had specifically negotiated a security interest) they were unsecured creditors.

For traditional building contracts, where a building is being constructed onsite, such issues are unlikely to arise. That is because, even if a contractor were to become insolvent, the partly completed building is affixed to land and therefore owned by the landowner.

In contrast, purchasers of modular housing should take steps to protect themselves by negotiating for security interests over the goods allocated to the modules being constructed for them.

For more information read our in-depth analysis of *Francis v Gross* [2024] NZCA 528 here.

New Zealand – Potential legislative change

The Government has recently announced a new programme of work to investigate options for a new self-certification regime for low-risk residential building work undertaken by qualified building professionals and accredited building companies. This is aimed at removing or reducing the role Building Consent Authorities play in reviewing work.

New Zealand – Standard form updates

A year after its launch we are seeing an increasing uptake in use of the new NZS 3910:2023, New Zealand's standard contract for construction and infrastructure projects.

Under the new standard, the core obligations between Principals and Contractors remain largely unchanged, but two updates have been of particular interest: splitting the Engineer's role into Contract Administrator (representing the Principal) and Independent Certifier (independent decision-maker), and being able to embed special conditions directly into a soft copy of the contract.

The role split addresses long-standing ambiguity under previous versions, where the Engineer acted as both the Principal's representative and an independent decision-maker, but without necessarily delineating clearly between those roles. This caused disputes over potential bias. Now, the roles are distinct. The Principal can appoint a single individual to both roles, or separate individuals to each, either from within the same firm or separate firms. Some industry participants have questioned whether this change requires a full overhaul of commonly used project management structures. However, the NZS 3910:2023 contractual structure is sufficiently flexible to allow parties to continue with familiar structures and achieve a best for project outcome, albeit with an overlay of greater role definition.

In our observation, the majority of developer clients are enthusiastically taking up the opportunity to embed special conditions in a soft copy of the contract. Special conditions will continue to be relevant, as the update did not change the key rights and risk allocations from the 2013 version. However, digital integration simplifies their inclusion, causes the parties to focus on the need for change and is expected to be beneficial for all parties when it comes to contract administration.

Many organisations are using the transition as an opportunity to review and revise their precedent contracts to align with the new standard. With Principals having taken this last year to work through that process and changes required to supporting documentation, we expect to see an increased use of the 2023 form in tenders to market next year.

For more information, and pointers on some key changes we recommend, read our commentary here.

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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