Russell McVeagh

Breaking Ground

Russell McVeagh
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Case Law Update - NZ

Potential claims should be promptly investigated or risk being time barred

Rea v Auckland Council [2024] NZCA 313

The usual limitation period of six years can be extended if a claimant has "late knowledge" of a claim (ie they prove that they neither knew, nor ought reasonably to have known of all the facts specified in s 14(1) of the Limitation Act 2010, including for example, the fact that the act or omission on which the claim is based is attributable to the defendant).

The Court held that a homeowner knew enough to have "late knowledge" of claims against Auckland Council when it became aware, from a building surveying report, that the house they purchased had defects, including potential breaches of the Building Code, and that a Code of Compliance Certificate had been issued by the Council.

The homeowner's claims were time barred, having been brought both outside of the primary limitation period of six years, and more than three years after they gained late knowledge of these facts.

Observations

- The practical upshot is simple. If you are considering bringing legal proceedings, investigate them promptly and to a conclusion.
- Be vigilant about time bars, and conservative in assessing their application. The three-year period, which starts on the acquisition of "late knowledge", may start sooner than you think.

Case Law Update - NZ

Courts are willing to issue interim injunctions to further protect retention monies

Wellington Developments Limited v Cannon Point Development Limited [2024] NZHC 1798

The High Court granted an interim injunction requiring retention funds to be deposited into a solicitor's trust account pending the outcome of an adjudication.

There was no evidence that the party holding the retention money was in default of its obligations under the Construction Contracts Act 2002 (CCA) to hold the applicant's retentions on trust. However, the Court was willing to require the holder of the retention to do more and to pay the money into the other party's solicitor's trust account.

Observations

- A contractor concerned about the protection of its retentions should act quickly and be proactive in seeking additional protections.
- In this case and in others (eg *Hanlon Plumbing Ltd v Downey Construction Ltd* [2020] NZHC 2457) the Courts have shown a willingness to grant interim orders supporting the retentions regime under the CCA.

Case Law Update – United Kingdom

In the UK, there is no right to adjudicate disputes under most collateral warranties

That is the conclusion reached by the UK Supreme Court in Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP [2024] UKSC 23.

The issue in question was whether the collateral warranty for workmanship qualified as an agreement for "the carrying out of construction operations". Had it done so, adjudication would have been available to the parties, pursuant to the relevant statutory provisions.

The UK Supreme Court held that, in general, collateral warranties will **not** be agreements for the carrying out of construction operations because "*the main object or purpose of such a warranty is to afford a right of action in respect of defectively carried out construction work, not the carrying out of such work.*"

There is a similar test under New Zealand's Construction Contracts Act 2002 (CCA), which confers a right on parties to "construction contracts" to refer disputes to adjudication. The CCA defines "construction contracts" as a "contract for carrying out construction work".

Observations

- If you want to be able to adjudicate disputes under a collateral warranty, the safest course is to provide for it expressly in the wording of the warranty.

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