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Preparation of payment claims: the devil may be in the detail

South Pacific Fire Protection South Island Alarms Ltd v Safe NZ Ltd [2016] NZHC 1810, a recent decision of the High Court, serves as a reminder of the importance of ensuring that payment claims under the Construction Contracts Act 2002 (the **Act**) comply with the statutory requirements in section 20 and the dangers of ignoring statutory demands.

The Court found that just four of the fifteen invoices issued by South Pacific were valid payment claims under the Act. In particular, the Court identified that a number of the invoices failed to identify the period in relation to which they had been issued and failed to indicate the manner in which South Pacific had calculated the claimed amount, thereby preventing Safe NZ from checking the accuracy of the invoices against its own records.

Associate Judge Matthews judgment can be found here.

Take care to be fair when engaging in tenders

In *Energy Solutions EU Ltd v The Nuclear Decommissioning Agency* [2016] EWHC 1988 (TCC), the High Court (England and Wales) considered the tender process to become the "Parent Body Organisation" for 12 sites operating "Magnox" nuclear power stations, together with two other sites. Having come second to the winning tendered by a margin of .06%, Energy Solutions analysed the responses received from the NDA and reached the conclusion that the NDA had acted in breach of the Public Contracts Regulations.

Giving judgment on Energy Solution's challenge to the tender process, Mr Justice Fraser held that the bid submitted by Energy Solutions (as a party to a consortium tendering) would have won had the bids been subject to a proper evaluation process.

A number of issues were identified, including: the occurrence of informal and undocumented discussions; one of a number of the evaluators stating that he did not feel obliged to be consistent in his evaluation, as that requirement was not within the scoring criteria; and notes used for evaluation were destroyed.

The High Court's decision highlights the need for contractors to conduct any tender process on a transparent and equal basis, with all tenderers evaluated against the same objective criteria.

Mr Justice Fraser's judgment can be found here.

New requirements for retentions

The upcoming 31 March 2017 amendments to the Construction Contracts Act requiring retentions to be held on trust have been the subject of many a discussion over the past year. Whilst many are concerned by a perceived lack of clarity over how this will work in practice, what is clear is that any commercial contractors will need a plan in place to ensure they do not fall foul of these new statutory requirements come the second quarter of next year.

One easy way of managing these new requirements is to use the BuildSafe Retention Trust Fund, which Natalia Vila explains in more detail at pages 9 and 10.

For more information visit the web page on BuildSafe Retention Trust Fund.

Reference dates under the SOP Act: a cautionary tale

The pre-requisite for a contractor to submit all necessary documentation, and for a specified date to pass, was previously a common requirement before a reference date will arise under the New South Wales Building and Construction Industry Security of Payment Act 1999 (**SOP Act**).

In *J Hutchison Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126, the New South Wales Supreme Court held that a provision requiring the submission of a 'Subcontractor Statement' as a pre-requisite to accrual of the reference date was void under section 34 of the SOP Act, being an attempt to contract out of that Act.

Whilst this is a cautionary tale, it should be noted that this particular case dealt with circumstances where a reference date had not arisen as the construction contract purported to provide that, until certain conditions were fulfilled, no reference date would arise.

Mr Justice Ball's judgment can be found here.

Australian builder fined $12,500 for workplace bullying

A Geelong builder who repeatedly bullied his teenage apprentice over a two-year period was recently convicted and fined $12,500 in the Geelong Magistrates' Court.

Wayne Allan Dennert, of Bell Post Hill, pleaded guilty to failing to provide a safe system of work and the necessary information, instruction, training and supervision to employees in relation to workplace bullying.

The court heard that during Dennert not only encouraged employees to participate in bullying behaviour against the teenager, but actively participated. Some of the physical incidents included:

- A live mouse being put down the back of his shirt by an employee.
- Being spat on by an employee.
- Having 'Liquid Nails' squirted in his hair by an employee.
- Dennert taking his mobile phone and posting an inappropriate sexual comment on his female friend's profile page.
- Dennert holding a rag doused in methylated spirits over his mouth.
- Dennert holding hot drill saw bits and baton screws to his bare skin.
- Dennert scraping sandpaper across his face.
- Dennert grabbing him from behind and pinning his arms while another employee painted a strip of paint across his face.

The court also heard Dennert regularly called him derogatory names and questioned him about his sex life.

In a victim impact statement read to the court, the apprentice said that he continues to suffer from anxiety, depression, nightmares and insomnia caused by the bullying. But it was the emotional trauma that was the hardest to bear. He told the court "[He] *would rather be burnt, bruised, assaulted, drenched in glue, water, paint, weeks' old coffee and spat on all over again than to relive a week of the* psychological torment I endured."

Workplace bullying is also recognised as a significant workplace hazard in New Zealand. Not only does it affect people physically and mentally, it can disrupt workplaces and reduce productivity. Employers who don't deal with it risk breaching legislation, such as the Health and Safety at Work Act 2015, the Employment Relations Act 2000 and the Human Rights Act 1993.

Worksafe New Zealand has prepared guidelines which focus on both employees and employers responding early before a situation gets out of hand and focusing first of all on workplace-based solutions.

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Another round on concurrent delay

Saga Cruises BDF Limited v Fincantieri SPA [2016] EWHC 1875 (Comm) is yet another decision concerning the question of concurrent delay. In this case, the Court found in favour of the claimant noting: *the importance in concurrency arguments of distinguishing between a delay which, had the contractor not been delayed would have caused delay, but because of an existing delay made no difference and those where further delay is actually caused by the event relied on.*

Following this, the Court did not grant the defendant an extension of time for the period where the claimant also caused delays. For the defendant to benefit from the *Malmaison* principle, it needed to prove that the claimant's delay events in fact caused delay.

Unfortunately, this decision does not resolve the uncertainty in relation to concurrent delay. Nevertheless, it does show an inclination towards a more restrictive approach to the assessment of concurrent delay.

The judgment of Ms Sara Cockerill QC (sitting as a Deputy High Court Judge) can be found here.

Construction reaching record levels

According to the Building and Housing Minister Dr Nick Smith, New Zealand is into its fifth consecutive year of strong growth in construction, reaching an average annual growth of 20 per cent. This equals 30,000 homes consented per year – the fastest rate in the local industry in the last ten years.

"Residential construction activity has reached $12.5 billion, an all-time high, and the number of homes consented has topped 30,000. This is the longest and strongest residential construction boom in New Zealand history, with five straight years of growth averaging over 20 per cent per annum. This is as fast as you can practically grow a sector as large and as complex as construction without compromising quality," Dr Nick Smith says.

Payment and Adjudication over the holiday period – a cautionary reminder

Just a cautionary reminder that notwithstanding the fact that many contractors like to take extended breaks over the summer holiday period, **the Construction Contracts Act 2002 only provides a short period between the 24th of December and the 5th January in the following year that does not count as 'working days'** for the purpose of responding to payment claims, suspension notices, and participating as a party in an adjudication.

If you may be a recipient of a payment claim, or you are a party to a dispute that is, or might be the subject of an adjudication, you should take steps to ensure that someone regularly checks emails and any physical address where such related documents may be served, and that someone has the ability and the authority to deal with such matters.