

BuildLaw: In Brief

BuildSafe launches new escrow service for prefabricated building components and indent goods

BuildSafe, the New Zealand building and construction sector specialist escrow service has launched a companion service to its residential security of payment scheme. Tradesafe was recently launched specifically to meet the needs of suppliers and purchasers of prefabricated components and indent supplied goods for building projects such as joinery, windows, fireplaces, flooring, furnishings etc. With a minimum fee of \$10 and a maximum fee of just \$37.50 TradeSafe is already making its mark as a credible and practical means of protecting parties to what can otherwise be high risk transactions for both sides. The recent failure of furniture supplier PK Furniture is a good example of why paying deposits to suppliers/merchants in advance of receiving goods and services is a high-risk game plan.



More building companies go bust

The recent high-profile failures of former Certified Builders member Point to Point Holdings and former Master Builders member Cranston Homes are just further examples of why using BuildSafe's independent escrow services is just 'plain commonsense'. Point To Point is reported to have gone into liquidation owing almost \$2 million to creditors including 30 homeowners who have been left in the lurch, some for the second time, having paid deposits of \$40-50,000 per dwelling and with nothing to show for it. To add insult to injury, it would seem the company operated on a heavily front-loaded milestone payment

system with one couple reported to have paid \$130,000 with only an unusable foundation on their Gulf Harbour section. Cranston is reported to have failed owing creditors about \$1.5 million including customers who paid deposits for houses who are owed about \$160,000.

Despite record building activity levels, residential building remains a high-risk activity with many building companies operating well beyond their capacity, experience and resources in a virtual financial nirvana as a result of iniquitous front-loaded milestone payment regimes. This false sense of 'financial wellbeing' created by taking money in advance of delivering services sees them artificially cash rich until it comes time to finish projects for which there is no longer any money available from their clients and the only source of finance to complete those projects becomes the deposits they take from new clients – it's called robbing Peter to pay Paul and among other things, it's a recipe for disaster for both the builder and its clients.

UK Government offers no cost cladding checks in wake of Grenfell Tower fire

In the wake to the Grenfell tower disaster the Department for Communities and Local Government ("DCLG") is offering to test the cladding of private residential blocks in England. This is due to the public concern about problems with the type of cladding which was used on Grenfell Tower. DCLG has asked owners, landlords and managers of private residential blocks to consider checking their properties to identify whether any cladding panels are made of Aluminium Composite Material. If Aluminium Composite Material is identified, then a sample can be submitted to the Building Research Establishment ("BRE") for testing. Priority is being given to buildings over six storeys or 18 metres high. Initial testing will be paid for by



DCLG and information from the checks will be available to DCLG from BRE. Remedial action would be the responsibility of the owner of the building. The DCLG website explains how to identify the cladding and how to access the testing facilities including a form to be returned with samples and an email address for enquiries.

Building activity

Total building activity fell in both volume and value terms in the March 2017 quarter, compared with the December 2016 quarter.

For the March 2017 quarter compared with the December 2016 quarter, in seasonally adjusted volume terms:

- residential building activity fell 0.8 percent
- non-residential building activity fell 7.2 percent
- all building activity fell 3.5 percent.

The volatile non-residential building work series led the volume fall, decreasing a seasonally adjusted 7.2 percent, while residential building work decreased 0.8 percent.

"Building activity adjusted for price changes fell for the first time in two years, due to a decrease in commercial and other non-residential building work this quarter," said Jason Attewell, Senior Manager International and Business Performance at Statistics New

Zealand. "Building work has been at historically high levels since late 2015."

The seasonally adjusted value of all building activity fell 2.2 percent, following a 3.0 percent rise in the December 2016 quarter. "When not adjusted for inflation, building activity fell for the first time in five years."

The volume trend for all building work has declined, but is still 68 percent higher than a low point in the September 2011 quarter. It is also 15 percent higher than the earlier series peak in the June 2005 quarter. The volume trend series began in the December 1989 quarter, so does not include the 1970s residential building boom. Building consents for new homes fell in April, partly due to the timing of Easter, Stats NZ said today.

The seasonally adjusted number of new homes consented fell 7.6 percent in April 2017 compared with March, mainly because of Easter, which occurred in April this year. This fall followed a 1.2 percent fall in March, and a 15 percent rise in February.

"Councils don't usually issue building consents on public holidays, so the timing of Easter drove a fall in April's building consents," Business Indicators Senior Manager at Statistics new Zealand Neil Kelly said.

A total of 2,106 new homes were consented in April 2017, compared with 2,361 in April 2016.

"On an annual basis, home consents have reached a 12-year high this year, with more than 30,000 new homes being consented per year," Mr Kelly said.

In the year ended April 2017, 30,371 new homes were consented – up 8.3 percent from the previous 12 months, and the most for an April year since 2004.

Despite all the talk of affordability, QV New Zealand reports that Kiwis still prefer their assets in property form. QV says the value of residential property continues to grow beyond one trillion dollars, dwarfing the value of other asset classes, with residential mortgages secured against 23% of this value.

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Building (Earthquake-prone Buildings) Amendment Act 2016

From 1 July 2017, the Building (Earthquake-prone Buildings) Amendment Act 2016 (the Amendment Act) is expected to take effect.

It will ensure the way our buildings are managed for future earthquakes is consistent across the country, and provide more information for people using buildings, such as notices on earthquake-prone buildings and a public register.

Earthquake-prone buildings pose a risk to people or other property in a moderate earthquake event. The primary objective in managing these buildings is to protect people. This means that the law focuses on the most vulnerable buildings in an earthquake in terms of the risk to people's safety.

The Building Act 2004 sets up the framework for how to manage buildings for future earthquake risk. Building users, owners, councils and engineers need to be aware of the upcoming changes to how earthquake-prone buildings will be managed, as this will affect you. [New framework for managing earthquake-prone buildings](#) on the MBIE Corporate website has further information.

MBIE clarifies Commerce Commission ruling on J-Frame Laminated Veneer Lumber

After a period of relative quiet, a couple of decisions have recently been issued by the Courts in relation to the Construction Contracts Act 2002.

J-FRAME is a general purpose structural laminated veneer lumber gauged framing timber manufactured by JNL from 100% renewable Radiata Pine, plantation forest. According to JNL's website, J-FRAME is an independently certified engineered wood product, to AS/NZS4357 (Structural LVL) that is a reliable straight and durable product that can be used in a wide range of applications including residential and commercial framing and truss systems.

On 9 June 2017, the Commerce Commission

issued a compliance advice letter regarding the labelling of J-Frame Laminated Veneer Lumber.



The Commerce Commission stated in that compliance advice letter that J-Frame laminated veneer lumber, manufactured by Juken New Zealand Limited:

- did not meet the requirements of NZS 3640
- was incorrectly labelled as H1.2
- may not have complied with AS/NZS 1604.4 because it does not carry an "E" label signifying that it is an envelope treatment.

On 28 June 2017 MBIE issued Building Controls Update No. 217 to describe the form of the Commerce Commission's action and to clarify some of the wording in relation to the labelling of J-Frame Laminated Veneer Lumber. MBIE says:

The Commission's compliance advice letter is about labelling and makes no judgment about the durability and performance characteristics of Juken's J-Frame product or whether it is fit for purpose.

This advice is intended to clarify the position of building consents involving J-Frame following the Commission's compliance advice letter.



J-Frame has a BRANZ appraisal and a CodeMark certificate. These are unaffected by the Commerce Commission's compliance advice letter. This means that J-Frame is certified for use where the H1.2 hazard class applies. If J-Frame is specified in plans for a use in situations where the H1.2 hazard class applies then a Building Consent Authority is obliged to accept this, on the basis of the CodeMark certificate.

If consented plans specify "H1.2" and a Code Compliance Certificate has not yet been issued then a minor variation to the consent will be needed if the builder uses (or proposes to use) J-Frame.

Minor variations to building consents: Guidance on definition, assessment and granting has further information.

The Qatar crisis highlights the question of *force majeure*

The Qatari diplomatic crisis highlights the issue of *force majeure* clauses in construction contracts.

Imports of construction materials needed for the State of Qatar to deliver its World Cup and Vision 2030 infrastructure schemes are being severely impacted by the recent closing of borders by key neighbours Saudi Arabia and the UAE, leading to

increased costs and delays on major construction projects.

Under Qatari law, the doctrine of *force majeure*, found at Article 256 of Law No. 22 of 2004 (the Civil Code) states: "If the debtor does not perform the obligation specifically, or is delayed in its performance, he is obliged to compensate the damage caused to the creditor; unless it is proved that the non-performance or the delay was for an extraneous cause for which the debtor is not responsible." Further, parties can agree to take responsibility for the consequences of a *force majeure* event, as Article 258 of the Civil Code states: "It is permissible to agree that the debtor shall bear the responsibility of *force majeure* or sudden incident."

As such, where an agreement contains a *force majeure* clause which specifies the exclusive events that constitute *force majeure*, then such clause will be valid, binding and enforceable between the parties to that agreement.

The question that arises is whether or not the current diplomatic crisis constitutes a qualifying event for the enforcement of a *force majeure* clause in a construction contract?

The definition of *force majeure* events may be drafted widely, or narrowly to include only specific events in construction contracts. The crisis highlights the importance of careful drafting of *force majeure* clauses to carefully define the trigger events for *force majeure* clause to apply.

DON'T FORGET: NEW REQUIREMENTS FROM 31 MARCH 2017



Do not let any employer withhold retentions from you unless they are held in trust in a unique BuildSafe Retention Trust Fund Account.

BuildSafe
SECURITY OF PAYMENT SCHEME
TE KAUPAPA MO TE WHAKARURU PAREMATA
RETENTION TRUST FUND