BuildLaw: In Brief

Government Procurement Rules 4th edition

The Ministry of Business, Innovation and Employment (MBIE) has closed public consultations on the proposed fourth edition of the Government Procurement Rules and is now finalising its advice to go to the Cabinet for approval in May.

Proposals include, among other things, that government agencies be required to consider:

- broader outcomes beyond simple value for money. These are described as 'secondary benefits' and can be environmental, social, economic or cultural;
- the skills development and training practices of the supplier and its subcontractors when procuring construction works over $10m as a weighted evaluation criterion; and
- standardised construction contracts for public sector procurement.

Submissions close at 5pm on 16 June 2019.

Report released about Tauranga City Council's actions related to Bella Vista

On 26 March 2019, the Ministry of Business, Innovation and Employment (MBIE) released a review report about Tauranga City Council's actions relating to the failed Bella Vista development.

The review was completed by the Building System Assurance team and included interviews and an in-depth review of the Bella Vista site and similar developments in and around Tauranga. The review examined how the Council performed its functions and exercised its powers under the Building Act 2004 and associated regulations, in order to:

- identify how and why the Bella Vista development failed;
- establish whether there were similar problems occurring elsewhere in Tauranga at that time; and
- consider any measures needed to prevent a similar failure occurring again.

The review did not identify a systemic issue with houses built in Tauranga around the same time as the Bella Vista development (2015–2018). MBIE considers the extent of the Council's failure to be an isolated incident with a unique set of circumstances.

Key findings from the review include:

- the Council did not follow its documented building control processes and procedures for the Bella Vista development;
- record keeping and reasons for decisions were not well documented;
- sequencing of construction works were not performed well on what was a geographically and geotechnically complex site;
- there was a lack of enforcement action by the Council to either stop non-compliant building work or require non-compliant building work to be fixed; and
- the Council did not follow protocol when managing variations to the issued building consents.

As a result of this review, the Council must provide MBIE with revised building control policies and

houses built in Tauranga around the same time as the Bella Vista development (2015–2018). MBIE considers the extent of the Council's failure to be an isolated incident with a unique set of circumstances.

Key findings from the review include:

- the Council did not follow its documented building control processes and procedures for the Bella Vista development;
- record keeping and reasons for decisions were not well documented;
- sequencing of construction works were not performed well on what was a geographically and geotechnically complex site;
- there was a lack of enforcement action by the Council to either stop non-compliant building work or require non-compliant building work to be fixed; and
- the Council did not follow protocol when managing variations to the issued building consents.

As a result of this review, the Council must provide MBIE with revised building control policies and procedures within two months of receiving the review report, and a progress update within the next 12 months. MBIE will also undertake a follow-up visit to the Council in the next six months.

As part of the review, MBIE also consulted with the appointed building consent accreditation body (International Accreditation New Zealand) and the Ministry for the Environment regarding its findings and areas for future improvement.

MBIE recommends all Building Consent Authority staff read the report to better understand the reasons for the failure.

Read MBIE's Review of Tauranga City Council here

there was a substantial risk of the beams falling over. It did not provide workers with clamps to ensure heavy steel beams were secure while on work trolleys.

Head of Specialist Interventions Simon Humphries said Pegasus Engineering Limited had not developed and implemented a safe system of work.

"A worker has tragically lost their life because this company failed to carry out a risk assessment.

"A proper risk assessment involves identifying and assessing risks, eliminating or minimising risk, then monitoring the implemented control measures and reviewing systems for improvement. This serves as a reminder to all PCBUs to ensure proper safety procedures are always in place."

Notes:

- A fine of $250,000 was imposed.
- Pegasus Engineering Limited was sentenced under sections 36(1)(a), 48(1) and (2)(c) of the Health and Safety at Work Act 2015.
- Reparations in excess of $165,000 were ordered.
- Being a PCBU, it failed to ensure, so far as was reasonably practicable, the health and safety of

BuildLaw: In Brief

ensure heavy steel beams were secure while on work trolleys.
Head of Specialist Interventions Simon Humphries said Pegasus Engineering Limited had not developed and implemented a safe system of work.
"A worker has tragically lost their life because this company failed to carry out a risk assessment.
"A proper risk assessment involves identifying and assessing risks, eliminating or minimising risk, then monitoring the implemented control measures and reviewing systems for improvement. This serves as a reminder to all PCBUs to ensure proper safety procedures are always in place."
Notes:

- A fine of $250,000 was imposed.
- Reparations in excess of $165,000 were ordered.
- Pegasus Engineering Limited was sentenced under sections 36(1)(a), 48(1) and (2)(c) of the Health and Safety at Work Act 2015.
- Being a PCBU, it failed to ensure, so far as was reasonably practicable, the health and safety of workers who worked for the PCBU, while the workers were at work in the business or undertaking, namely the manufacture of steel products, and that failure exposed the workers to a risk of death or serious injury, arising from exposure to a crushing hazard created by the movement of unsecured heavy steel beams placed on work trolleys.
- The maximum penalty is a fine not exceeding $1,500,000.

Christchurch pipeline maintenance firm warned over price-fixing

Quik-Shot Limited and its director Raad Al-Karbouli have been issued formal warnings for price fixing conduct relating to pipe rehabilitation services in Christchurch.
The Commission's investigation was opened as a result of Fletcher Construction raising concerns about the conduct of two now former employees of its subsidiary company Pipeworks.
The investigation ultimately focused on quotes requested by a business seeking pipe rehabilitation services in November 2017.
The Commission found that the Pipeworks employees had provided Mr Al-Karbouli with the price Pipeworks would be submitting for the contract through WhatsApp, and recommended a price range that Quik-Shot should quote to win the

The investigation ultimately focused on quotes requested by a business seeking pipe rehabilitation services in November 2017.
The Commission found that the Pipeworks employees had provided Mr Al-Karbouli with the price Pipeworks would be submitting for the contract through WhatsApp, and recommended a price range that Quik-Shot should quote to win the work. Mr Al-Karbouli confirmed his receipt of this information and submitted a price for Quik-Shot within this range.
These communications between competitors were unknown to the business and it ultimately awarded the contract to Pipeworks.
"Taking into account the lack of harm caused by Quik-Shot's unsuccessful bid and the limited duration of the anti-competitive conduct, we considered a formal warning was sufficient in this instance. However, this case is a useful reminder to businesses to maintain strict oversight of their tender and pricing processes and avoid discussing pricing information with competitors,"
Commission Chairman Dr Mark Berry said.
"Fletcher Construction correctly alerted us to its concerns and fully cooperated with the Commission's investigation."
A copy of the warning letter can be found on the Commission's website.
More information about price fixing can be found here.

Background

The Commerce Act prohibits contracts, arrangements or understandings between competitors that contain a cartel provision. This includes price fixing as these agreements have the purpose or effect of fixing controlling or maintaining the prices for goods and services. An individual can be fined $500,000 and/or prohibited from directing or managing a company. A body corporate can be fined the greater of $10 million or three times the commercial gain from the breach (or 10% turnover) for each separate breach.

Liquidated damages before and after termination

In *GPP Big Field LLP v Solar EPC Solutions SL (Formerly Prosolia Siglio XXI)* [2018] EWHC 2866 (Comm), Richard Salter QC, sitting as a deputy judge of the High Court, held that the liquidated damages provision was not a penalty and that the contractor's parent company was liable for those damages under a contract of indemnity. This detailed judgment provides a helpful summary of the operation of liquidated damages clauses in commercial contracts and also considers the obligations arising under parent company guarantees and indemnities.
The dispute concerned five Engineering, Procurement and Construction (EPC) contracts for the design and construction of solar generation power plants in the south of England. GPP's claims were to recover liquidated damages for Prosolia's failure to commission the solar plants by the date specified in each contract.
Solar argued the LD Clauses should be construed as unenforceable penalties, because the daily rate of liquidated damages accruing under each of the Contracts was the same, despite applying to different plants with differing energy outputs. Further, the LD Clauses had not been subject to detailed negotiation between the parties, and were each referred to as a "penalty".
Applying the Supreme Court's recast penalties test from *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2015], the court rejected Solar's argument that the clauses were unenforceable as penalties. It found that the provisions did not exceed a genuine pre-estimate of loss, and that the sums were not in any way extravagant or unconscionable in comparison with the legitimate interest of the employer in ensuring timely performance of the contracts. The Court noted that liquidated damages clauses were commonplace in construction contracts and that all parties were experienced and sophisticated commercial entities.
In respect of one of the EPC contracts, Solar argued that GPP's entitlement to liquidated damages ceased when GPP terminated the contract. The Court rejected this argument and relied upon the judgment of Coulson J (as he then was) in *Hall v Van Den Heiden (No 2)* [2010] EWHC 586 (TCC). However, the basis for this decision is questionable as it is a principle of contract that termination will discharge a party's primary obligations. In the

BuildLaw: In Brief

In respect of one of the EPC contracts, Solar argued that GPP's entitlement to liquidated damages ceased when GPP terminated the contract. The Court rejected this argument and relied upon the judgment of Coulson J (as he then was) in *Hall v Van Den Heiden (No 2)* [2010] EWHC 586 (TCC). However, the basis for this decision is questionable as it is a principle of contract that termination will discharge a party's primary obligations. In the circumstances it is difficult to see how the secondary obligation to pay liquidated damages might survive termination. The view that liquidated damages clauses cannot be relied upon after termination was endorsed by Edwards-Stuart in *Shaw v MFP Foundations and Pilings Ltd* [2010] EWHC 1839 (TCC) which leaves conflicting High Court decisions on the issue – perhaps the Court of Appeal will provide guidance on this issue shortly.

Liquidated damages – there is now no material difference between Australian, English and New Zealand law in relation to penalties

In *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2019] NZCA 122, 127 Hobson and Mr Parbhu appealed against a decision of Whata J in the High Court finding an indemnity clause in a collateral deed to a deed of lease between 127 Hobson and Honey Bees to be lawful and enforceable.

The Court of Appeal held:

> a. the proper construction of the indemnity clause, having regard to what the parties intended the obligation to be, was (1) that the indemnity (if triggered by default) ran until the end of the initial term of the lease and no further; and (2) the indemnity included only payment of rent and outgoings, and did not extend to non-economic obligations excusing all tenant obligations until final reversion; and
> b. the principles stated in *Wilaci Pty Ltd v Torchlight Fund No 1 LP (in rec)* [2017] NZCA 152, [2017] 3 NZLR 293 (applying NSW law) apply also to New Zealand. The indemnity was not a penalty. Honey Bees had a legitimate interest in performance given the importance of the primary obligation to install a second lift to their business and distrust that had developed after execution of the agreement to lease. The indemnity was not out of all proportion to this legitimate interest, given the potential disadvantage to Honey Bees of containing the clause in a collateral deed rather than the lease deed itself and the risk settings agreed to by the parties.

At [29] the Court provided guidance as to the law prohibiting penalties in New Zealand in the following terms:

> *Wilaci* was a decision of this Court, applying New South Wales law. Its reasoning should be regarded as applicable in New Zealand — as several commentators have observed. The reasons for that are fourfold. First, New Zealand law has largely followed English law prohibiting penalties. The principles expressed in the influential speech of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co* Ltd long held force here. Secondly, English law was then restated in 2015 in the United Kingdom Supreme Court decision in *Cavendish*. Thirdly, one issue apart, there is now no material difference between Australian and English law in relation to penalties. Fourthly, we consider a commensurate redirection of the penalties prohibition in New Zealand is necessary. The balance of the common law tilts more in favour of freedom of contract, and the enforcement of consensually selected remedies, today than it did a century ago. Ours is an age of far greater consumer legislative protection. Foremost among these statutes were the Credit Contracts Act 1981 and the Fair Trading Act 1986. Today, contractual overreach calls for assessment primarily through the lens of impaired consent, unconscionability or consumer law infringement. That means there is less for the prohibition against penalties to do. Commercial parties should generally be left to the certainty of the bargains they have made, including the

impaired consent, unconscionability or consumer law infringement. That means there is less for the prohibition against penalties to do. Commercial parties should generally be left to the certainty of the bargains they have made, including the remedies they have elected collectively, save in cases of gross overreach.

The Court went on to explain that "[t]he primary test for a penalty is now the disproportionality test. The essential question is whether the secondary obligation challenged as a penalty imposes a detriment on a promisor out of all proportion to any legitimate interest of the promisee in the enforcement of the primary obligation."

The Court described the *disproportionality* test as "a more sophisticated and demanding one than the comparative damages test which prevailed under *Dunlop*," and noted: "[t]he disproportionality test may also be cross-checked by another intimately associated test: the *punitive purpose test*. That is, whether the predominant purpose of the secondary obligation is to punish the promisor rather than protect the legitimate interest of the promisee in performance of the primary obligation. These tests are two sides of the same coin."

Lodder v Slowey [1904] AC 442

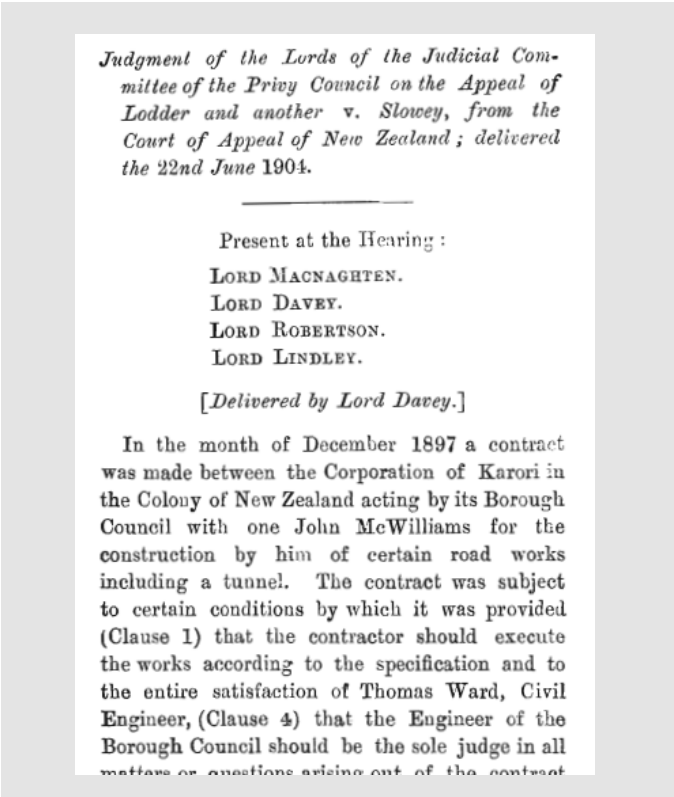
Professor John Sharkey AM says that those at a Sydney conference last year might recall a lively discussion around the 21st century propriety of the principle derived from the Privy Council decision in *Lodder v Slowey* [1904] AC 442, namely that, in the circumstance of an employer or owner having repudiated a construction contract, the contractor is entitled at its election to be paid on a *quantum meruit* as an alternative to the traditional remedy of damages.

Professor Sharkey reports that on Friday, 14 December 2018 the High Court of Australia granted the owners' application for special leave to appeal from the decision of the Victorian Court of Appeal in *Mann v Paterson Constructions Pty Ltd* [2018] VSCA 231. The owners had, in the view of the trial judge, repudiated a construction contract. Applying *Lodder*, as he was bound to do, the judge held the contractor entitled to be paid on a *quantum meruit* an amount considerably in excess of any damages calculation made in accordance with the contract.

The Victorian Court of Appeal upheld the trial judge, saying if *Lodder* was to be overturned then that was a matter for the High Court.

The grant of the application for special leave will come as a surprise to some, given that the High Court has in recent years twice refused to entertain the same application - in 1992 in *Renard* and in 2009 in *Sopov*.

So, 115 years on, sometime in 2019 the High Court of Australia can be expected to pronounce upon whether or not *Lodder* remains part of the law of Australia. It shapes as the most significant appeal in Australian construction law for many years and will be closely watched, not just in Australia but throughout the common law world.



Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lodder and another v. Slowey, from the Court of Appeal of New Zealand; delivered the 22nd June 1904.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Davey.*]

In the month of December 1897 a contract was made between the Corporation of Karori in the Colony of New Zealand acting by its Borough Council with one John McWilliams for the construction by him of certain road works including a tunnel. The contract was subject to certain conditions by which it was provided (Clause 1) that the contractor should execute the works according to the specification and to the entire satisfaction of Thomas Ward, Civil Engineer, (Clause 4) that the Engineer of the Borough Council should be the sole judge in all matters or questions arising out of the contract