

# BuildLaw in Brief

## “Ground level” in *Morgan & Griffin Pty Ltd v CB (Qld) Pty Ltd & Anor*

On 10 December 2021 the Planning and Environment Court in Queensland, Australia, published its decision in [Morgan & Griffin Pty Ltd v CB \(Qld\) Pty Ltd & Anor \[2021\] QPEC 70](#). This case concerned the interpretation of the term “ground level” in the Brisbane City plan.

The primary question in dispute between the parties was whether fill placed on the land when an earlier building was constructed ought to be disregarded in calculating the ground level of the proposed new building. The answer to this question had consequences for whether the development application was properly code assessable or impact assessable. If building height was calculated from the top of the fill, the building did not exceed the prescribed height envelope.

The Court held that the measurement of building height, by including the fill lawfully placed on the land when the existing building was constructed, was the correct measurement taking into account the ground level (with the result that the development application was always code assessable). The case has broader application given that the same definition appears in identical terms in many Queensland local planning instruments.

## JCT/SBCC final account procedure

East Ayrshire Council (the **Council**) engaged D McLaughlin & Sons (**DMS**) to build an extension to a school. A dispute arose in relation to the sums claimed by DMS in terms of the contract (an amended Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) 2011 edition).

On 10 August 2017 DMS issued an interim payment notice claiming some £949,556.50. Despite further exchanges, the Council did not pay the amount claimed by DMS. The Council issued a final certificate on 17 July 2019 with a gross valuation of £3,343,223.82. In September 2019 DMS issued

proceedings in the Sheriff Court claiming a gross valuation of £3,711,242.80 and sought an order for payment of the balance.

In March 2020 DMS commenced an adjudication claiming a gross valuation of £3,802,614.87, relying upon the interim payment notice dated 10 August 2017. The Council argued for a nil valuation on the grounds that the notice was invalid and that the final certificate issued on 17 July 2019 was conclusive evidence of the sum due. The adjudicator disagreed. Having decided that the notice was validly issued and that the final certificate could not affect a dispute concerning an interim payment application, he awarded DMS £427,578 plus VAT and interest.

DMS took enforcement action against the Council. As part of the enforcement proceedings, the Council lodged a counterclaim seeking declarations that the adjudicator was bound by the final certificate and also that the interim payment notice was invalid. The effect of these declarations would be to reverse the adjudication decision.

This case is significant in confirming the approach to the JCT/SBCC conclusivity provisions. The Judge observed that the law was clear that an adjudicator’s decision was binding until final determination. Still, he agreed that there could be circumstances in which the final determination could properly be made at the time of the adjudication enforcement proceedings in the interests of justice. However, those circumstances were likely to be few and far between.

## Key background information missing in without notice application

On 4 November 2021 the High Court granted a without notice application requesting injunctive relief made by the claimant against a number of individuals carrying out protests against ongoing construction works. Justice Wylie was satisfied it was appropriate to allow the application to proceed without notice, which meant the defendants did not know of the application made against them. The Court ordered those named



to stay 20 m away from the site which was on a marina. The injunction did allow for some protest – but at a distance.

One of the defendants applied to set aside the order. While the Court upheld the original injunction, it did vary some of its provisions. In coming to its decision, the Court found that the claimant had failed to disclose some relevant background information and that the claimant should also have given informal notice of the application. A full copy of the decision can be found here: <https://www.courtsofnz.govt.nz/assets/cases/2022/2022-NZHC-257.pdf>.

## New user-friendly FIDIC Green Book released for lower-risk projects

The much-anticipated 2021 update of the FIDIC Green Book is now available. The updated short form of contract meets the current demand of the international construction industry for projects where the perceived level of risk is low and/or where construction parties need a contract form that is simple to use and does not require significant contract administration and management resources.

The Green Book 2nd Edition continues FIDIC's key principles of balanced risk-sharing while seeking to build on the substantial experience gained from the original Green Book's use over the past 22 years.

A new feature includes 40 proforma notices and requests and other documents required to be submitted under the contract. Users will undoubtedly find them helpful.

## Payment claims may only be made in respect of one construction contract at a time

The decision in [\*Ventia Australia Pty Ltd v BSA Advanced Property Solutions \(Fire\) Pty Ltd\*](#) is of interest to parties to standing order contracts and the industry more generally as confirming the 'one contract rule' under the security of payment regime.

BSA (subcontractor) and Ventia (head contractor) were parties to a fire asset maintenance subcontract which enabled the head contractor to issue *work orders* to the subcontractor for

particular works. The fire asset maintenance subcontract provided that where a work order was issued, that would form a separate and fresh agreement between the parties for the carrying out of the relevant work. The subcontractor made a payment claim claiming for works carried out under more than one work order and then made an adjudication application under the Act based on that payment claim. The adjudicator made an adjudication determination in the subcontractor's favour. The head contractor challenged the adjudication determination, arguing the underlying payment claim was not valid because it claimed payment under more than one construction contract.

The NSW court allowed the application for judicial review. It quashed the adjudication determination because the requirement that a payment claim be made in respect of one construction contract only is a jurisdictional fact, the existence of which is necessary to the existence of an adjudicator's jurisdiction to make an adjudication determination under the Act. The payment claim claimed for work under more than one construction contract.

## UK transforming public procurement

The United Kingdom (**UK**) is revising the laws that apply to Government agencies' procurements. While the UK's proposed approach has similarities to New Zealand, there are also significant differences. One which is likely to be of interest to agencies here is the UK's proposed transparency and information sharing requirements, which are more extensive than in New Zealand.

The current UK procurement laws are based on EU directives. As the UK left the EU in 2020, the UK is revamping its laws to be simpler and to focus on its own interests.

The proposed new laws, which are the subject of extensive public consultation, are expected to be introduced into the UK Parliament this year and come into force in 2023.

Further information can be found here: <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement/outcome/transforming-public-procurement-government-response-to-consultation>.

