BuildLaw in Brief

Supreme Court of Western Australia considers meaning of 'bona fide claim' in bank guarantees as security clause

In *Lanskey Constructions Pty v Westrac Pty Ltd* [2022] WASC 90, a contractor failed to obtain an interim injunction to prevent a principal calling on the contractor's bank guarantees, in a case concerning a disputed claim for liquidated damages. In considering the application, the Supreme Court of Western Australia applied the two-limbed test for granting of an interlocutory injunction: whether there is a serious question to be tried; and whether the balance of convenience favours the grant of the injunction.

The construction contract between Westrac Pty Limited (the **Principal**) and Lanskey Pty Ltd (the **Contractor**) contained a clause under which the Contractor provided several bank guarantees as security for (inter alia) any **'bona fide' claim** made by the Principal arising out of the contract. Such clauses are common in Australian construction contracts.

The Contractor missed the completion date, and the Principal claimed liquidated damages. The Contractor disputed the claim, alleging that the Principal had verbally agreed to waive liquidated damages. The Principal denied waiver and sought to call on the Contractor's bank guarantees for the sum of the claim, pending the outcome of the dispute.

The Contractor applied for an urgent injunction to stop the Principal calling on the bank guarantees. It led evidence on the alleged agreement to waive liquidated damages, to show a prima facie case that the Principal's claim was not 'bona fide' under the terms of the bank guarantee clause.

The Court refused to grant the injunction. Under the first limb (whether there was a serious question to be tried) the Court considered the meaning of 'bona fide claim' in the bank guarantees clause. The Court held the threshold to meet the 'bona fide claim' test is a low one – all that is required of the Principal is to *honestly and genuinely believe it is entitled to recover the amount claimed* and that it is a *genuine claim which is not fraudulent or untenable*. Despite the Principal not leading any evidence, the Court held that the Contractor's evidence failed to establish a prima facie case that the Principal's liquidated damages claim was being made in bad faith. There was therefore no serious question to be tried.

Although it was not necessary to go on to consider the second limb – whether the balance of convenience favoured granting the injunction – the Court nevertheless answered it in the negative. It held that granting the injunction would defeat the purpose of the contract's bank guarantees clause. The purpose of the clause was to pass the financial risk of a claim by the Principal to the *Contractor*, pending final resolution of the claim. In accepting those terms, the Contractor had agreed to accept the risk of being *out of pocket* in the interim.

Fire safety remediation costs – leaseholder protection provisions come into force in England and Wales

New rules protecting leaseholders from costs for remediating existing fire safety defects under the Building Safety Act 2022 (the **Act**) are now in force. The Act, which covers England and Wales, received Royal Assent on 28 April 2022. The leaseholder protection provisions (section 116 – 125 and Schedule 8 of the Act) came into force on 28 June 2022, and the secondary legislation (Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022) came into effect on 21 July 2022. The UK Government has also released guidance on the application of the leaseholder protection provisions and the impact for developers, building owners and leaseholders.

Most leasehold properties are sold under leases which make the leaseholder liable for a share of

all maintenance and repair costs for the building. The leaseholder protection provisions in the Act override this in relation to fixing relevant historical fire safety defects on higher risk buildings (those over 11m or 5 storeys). The aim is to ensure that the financial burden of remediation works falls on building developers (even where they no longer own the building) and building owners, and protect leaseholders who purchased properties in affected buildings from these costs.

Only in circumstances where the developer cannot be traced, the building owner is not associated with the developer and has net worth under £2 million can a contribution be sought from leaseholder's. The amount of a qualifying leaseholders' contribution is capped, dependent on property value, and only non-cladding remediation costs can be claimed (such as fire alarms and fire doors). Any costs for cladding system remediation cannot be passed on to qualifying leaseholders.

Standards NZ scraps plans for interim revised NZS 3910 construction contract

In July 2020, Standards New Zealand (Standards NZ) initiated a comprehensive review and update of the NZS 3910: 2013 Conditions of contract for building and civil engineering (the **Standard**). The Standard, now 10 years old, is a widely used model contract for construction and civil engineering projects in New Zealand. The review aims to incorporate the legislative changes since 2013 and address widespread industry dissatisfaction with the Standard's current conditions on risk allocation between principal and contractor.

A scoping report was published in March 2021 to identify the issues, and in October 2021 Standards NZ established a committee of sector-wide stakeholders (the **Committee**) to carry out the review and draft a revised standard. The project is currently still in development phase, with the Committee expected to publish its proposed revised standard in February 2023 for public consultation. The final revised standard is expected in July 2023.

Standards NZ was due to publish an interim revised standard in August 2022. However, in its latest progress update report, the Committee has announced that it will not proceed with this. It reasoned that an interim standard at this stage and without public consultation could cover only the uncontentious matters such as the legislative changes – it would not include interim revisions on the contentious matters under review, and so would not offer subscribers value for money.

Instead of an interim standard, the Committee has confirmed it will release a special guidance and advice document in September 2022. This will not be a standard, but will include the legislative changes, an optional pandemic clause and a liability cap clause. At this stage, the guidance document is yet to be released, but keep an eye on the Standards NZ website in the coming weeks for further updates.

New South Wales cladding claim fails due to expert's reliance on wrong combustibility testing certificate

In the Supreme Court of New South Wales' decision of *Strata Plan 92450 v JKN Parra 1 Pty Ltd [2022] NSWSC 958*, a high-rise building owner's $5 million claim to replace a banned cladding product failed. While the case turned on its facts, the claim failed partly on account of the expert witness' erroneous reliance on the wrong combustibility testing certificate.

The Paramatta Rise building in Sydney (the **building**) was built in 2017 by owner-developer JKN Para 1 Pty Ltd, and design and construct contractor Toplace Pty Ltd (the **Defendants**). The building was subsequently acquired by Strata Plan 9240 (the **Plaintiff**).

The Defendants had installed cladding to the exterior, which became a banned product in 2018 under the Building Products Safety Act 2017 (NSW), but it was not banned at the time of installation.

The Plaintiff's claim was based on the Defendants' alleged breach of statutory warranties under section 18B of the Home Building Act 1989 (NSW), on account of the cladding not being compliant with the Building Code of Australia 2013 (**Building Code**). A critical limb of this claim was that the cladding did not comply with the Building Code because it is classed as a combustible material.

The Plaintiff's expert witness had based his opinions and conclusions on the cladding's combustibility by reference to its combustibility testing certificate. However, this particular testing certificate was for an unidentified Vitrabond cladding product, and not the specific Vitrabond cladding product actually installed ('VitrabondFR',

which had some fire-retardant properties).

As a consequence of this underlying error, the Court held that it was unable to place any reliance on much of the expert's evidence and conclusions – the Plaintiff therefore had failed to establish that the cladding was 'combustible' for the purposes of compliance with the Building Code.

While the testing certificate issue was not the only determinant in this case, the decision highlights the necessity in this type of claim of ensuring that the documents provided to expert witnesses correspond to the exact product in question.

Consultation on review of New Zealand building consent system closes

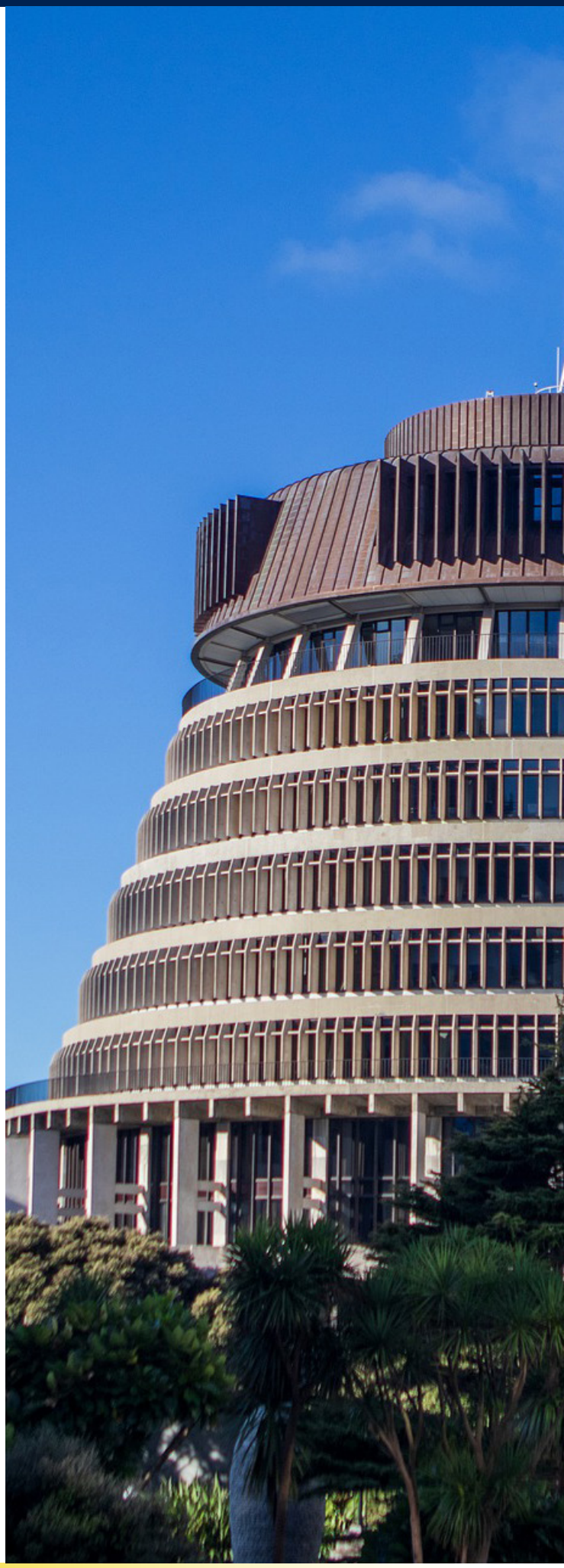
In July 2022 the New Zealand Government commenced an initial public consultation on its review the building consent system, with the publication of an Issues Discussion Document. This document identifies the proposed issues for review and the proposed outcomes to improve the efficiency and effectiveness of the system.

The proposed main issues identified include:

- the various roles and responsibilities across the system are not well understood and there is over-reliance on building consent authorities;
- there are capacity and capability constraints, with increased volume and complexity of building work;
- the current system is not responsive to risk and complexity, innovation or Māori needs;
- MBIE is not the strong regulator it was intended to be and there is insufficient monitoring and information; and
- there is unpredictability in navigating the consent process and inconsistency among building consent authorities on processes and functions.

The initial public consultation closed on 4 September 2022 and MBIE is now analysing the results and submissions received. MBIE is expected to publish a revised issues and proposals document next year, at which point it will conduct a further round of public consultation.

Further information on the building consent review process is available on MBIE's website.



New South Wales Court of Appeal's decision on the effectiveness of the 'one contract rule'

A recent New South Wales Court of Appeal (CoA) case, *BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd* [2022] NSWCA, questioned the validity of the so-called 'one contract rule' under the Building and Construction Industry Security of Payment Act 1999 (NSW) (the Act). The phrase 'one contract rule' was found to be inconsistent with the purpose of the Act, as it fails to address the scope of practical commercial arrangements under which goods and services may be supplied. The purpose of the Act is to ensure that the parties carrying out work seek regular payment.

BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd [2022] NSWCA follows on from the decision in the Supreme Court (SC) case. The dispute was between Ventia (the **respondent**) and BSA (the **appellant**), where the respondent subcontracted the appellant to perform construction works under various work orders. A provision in the contract stated that each work order formed a separate contract.

Due to a conflict, the appellant served a payment claim to the respondent and was successful in obtaining a determination. The respondent sought a review of the determination relying on the 'one contract rule' under section 13(5) of the Act which prevents the service of more than one payment claim. The SC agreed with the respondent, resulting in the appellant appealing to the CoA.

The question for the CoA was whether the 'one contract rule' was a precondition to the validity of the payment claim. The CoA agreed with the appellant that there was no such requirement to contain a precondition of identifying the 'one contract rule.' According to the Court, the Act states that a payment claim is valid if the claim is referrable to one reference date.

The Court further stated that adding a provision in the contract stating that each work order would result in a separate contract was inadequate to discover the legal effect of the work orders.

New South Wales shifts focus from megaprojects to smaller and medium-sized projects

In May 2022, Infrastructure NSW released a report, The State Infrastructure Strategy 2022 – 2042; Staying Ahead (the **Report**), which maps out a 20-year strategy setting out infrastructure priorities to meet the future needs of NSW.

Alongside other recommendations, the Report recommended that the government shift its focus from megaprojects to allow a combination of smaller and medium-sized projects, as they are likely to provide high returns and faster paybacks with a lower budget and delivery risks. The report suggests that any future megaprojects will need to be delivered in a "sensibly prioritised and sequenced manner".

Key features from the Report include:

While acknowledging the long-term benefits of megaprojects that are already in the pipeline, the Report pointed out that the impact of Covid -19 and other world events will make it difficult to deliver any additional future megaprojects in a cost-efficient manner.

The Report recommended the state government reconsider the timing and sequence of megaprojects that are not yet in procurement, including the Beaches Link, the Parramatta Light Rail Stage 2, the M6 Motorway Stage 2, the central tunnel for the Great Western Highway Katoomba to Lithgow upgrade and further major Sydney Metro or rail projects (Sydney CBD to Zetland, Western Sydney International Airport to Leppington or Campbelltown), and major regional dam projects (New Dungowan and Wyangala).

The Report stated that despite the initial plan to delay megaprojects worth up to AU$20 billion, the NSW government sanctioned the Parramatta Light Rail Stage 2 because of the exponential growth in Parramatta and the western region. Other megaproject exceptions may also be considered on a merit basis.

Thailand – new construction adjudication Bill to be passed

In Thailand, construction disputes between contractors and employees can take years to resolve in a court of arbitration. The introduction of a draft bill titled "Act on the Settlement of Disputes regarding Payment in Construction Contracts" may be the answer.

The bill is inspired by the security of payment legislation in Malaysia and Singapore. The objective of the bill is to:

- provide statutory adjudication of disputes relating to construction contracts
- provide a cost-effective method
- have a legally binding contract ensuring the contractors are paid according to the contract.

Key features of the bill include:

Restricts 'pay when paid' clause: section 8 limits 'pay when paid' clauses, where payments to subcontractors and consultants are dependent on the employer paying the lead contractor.

Seek immediate recourse for non–payment: Section 15 will allow contractors to seek immediate alternatives for non–payment.

Codifying the pay now argue later principle: Sections 9 and 39 will allow the parties to litigate a dispute in court or arbitrate the matter in parallel with adjudication proceedings.

Enforcement of the Award: Sections 40 to 42 ascertain that the payment should be granted 15 days after the adjudication determination.

If passed, it is expected that the adjudication bill will allow faster and more cost-effective dispute resolution.

NSW Supreme Court clarifies the duty to avoid an economic loss to owners when carrying out construction work extends beyond work on residential buildings

The NSW Design and Building Practitioners Act 2020 codified a duty on those engaging in "construction work" to exercise reasonable care to avoid economic loss caused by defects to the owners and subsequent owners of the land on which the work is carried out. However, it was unclear whether the duty only applied to those carrying out construction work on apartment buildings (which are Class 2 buildings, or mixed-

use buildings with a Class 2 element under the National Construction Code) or had a broader application.

This has now been clarified in the recent decision of *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Buildings Pty Ltd (in liq)* [2022] NSWSC 624. The Court confirmed that the duty extends beyond construction work on apartment buildings. Stevenson J concluded that the applicable definition of "building" for the purposes of the Act includes "[P]art of a building, and also includes any structure or part of a structure…but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the Local Government Act 1993" (which is the definition under the Environmental Planning and Assessment Act 1979).

As "construction work" includes not only building work but the supervision and coordination of a site, the impact of this decision is broad and means it is a must-read for design and building practitioners, construction lawyers, and insurers alike.

Australian Building and Construction Commission to lose its powers to the "bare legal minimum"

The Australian federal government has delivered on its election promise to put an end to the controversial Australian Building and Construction Commission (**ABCC**). The ABCC has often been used as a political football and been strongly opposed by unions.

On 26 July 2022, the government made amendments to the Building Code via the Interim Building Code. The Interim Building Code applies to any building contractor or building industry stakeholder that tendered for or expressed interest in Commonwealth funded building work on or after 2 December 2016. As a result, many of the ABCC's powers will be transferred to the Fair Work Ombudsman and to other health and safety regulators, while some of its other functions will be removed altogether.

The Interim Building Code removes most of the obligations imposed on building contractors and building industry parties and leaves only those requirements in line with the Building and Construction Industry (Improving Productivity) Act 2016. This also means that the Fair Work Ombudsman (FWO) and heath safety regulators will have to enforce the Fair Work Act 2009 and safety matters in the building and construction industry. Any litigation initiated by ABCC is to be handed over to the FWO.

The changes also mean that the Building Code no longer contains "duplication of matters already covered by Fair Work Act and other Commonwealth, state and territory laws". It will also ensure that construction workers have the same rights as other workers. This would allow workers to freely bargain for agreements like other workers, including contracts that include clauses promoting job security, jobs for apprentices, and safety at work.