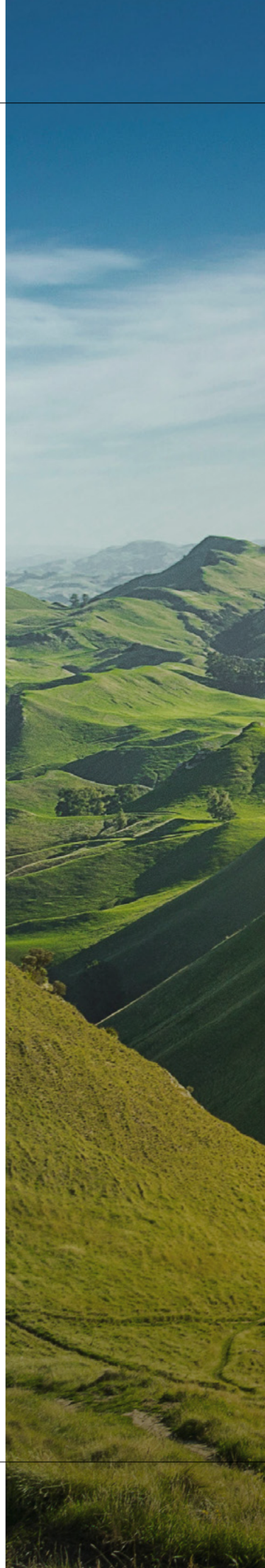
BuildLaw *in Brief:*

Recent key developments in the construction industry



Judicial submission on Natural and Built Environment Bill

In a rare move, Chief Justice Helen Winkelmann has made a *submission* on behalf of the judiciary to a Parliamentary select committee, namely the Environment Committee, on the *Natural and Built Environment Bill*.

The Chief Justice notes that the Bill has *implications for access to the courts, the ability of the courts to perform the functions conferred on them, and the maintenance of public confidence in the courts*. The coming into effect of extensive legislative reform is often followed *by a period in which the meaning and effect of the new legislation is litigated through the courts*.

Her Honour expressed specific concerns:

- Clauses 4 and 6(3) require respectively the observance of the principles of Te Tiriti and mana of each iwi and hapū in accordance with the kawa tikanga and mātauranga. This will have practical difficulties for hearings in the criminal jurisdiction and for matters of proof. *These concerns could be addressed by expressly providing that these clauses apply to decision-makers other than courts*.
- Clause 660 provides for independent monitoring of decisions taken under the Act by the National Māori Entity: *Providing for decisions of the Environment Court to be subject to review by the Entity would be inconsistent with New Zealand's constitutional arrangements*.
- Boards of Inquiry: appointments of judges to boards of inquiry need to be done with the concurrence of the Chief Environment Court Judge in writing and judges need the same judicial immunities they

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would ordinarily enjoy.

- It is not appropriate for the Chief Environment Court Judge to be called upon to appoint the chairperson and other members of the independent hearing panels.
- *Clauses 315 – 327 effectively carry forward the provisions of the COVID-19 Recovery (Fasttrack Consenting) Act 2020 as an "alternative consenting process"*. The limitation of appeal rights to errors of law and prevention of passage to the Supreme Court is undesirable. The right to judicially review decisions should also be preserved where appropriate.
- *The Bill (Part 11) would significantly expand the scope of available enforcement options, including increased civil enforcement provisions*. The scope of authority and jurisdiction between the Environment Court and the District Court needs to be clarified.
- Monetary Benefit Orders need to be made clear as to the standard of proof and the overlap with the Criminal Proceeds (Recovery) Act 2009.
- The Māori Land Court is called upon to perform specific roles of appointment to regional planning authorities under clauses 4 and 12 of Schedule 8 and clauses 684–687. *But the performance of this function will have resource implications for the Court*.
- *The judiciary is responsible for the administration of justice before the courts. Consistent with this constitutional principle, the judiciary considers that rules of court concerning practice and procedure should only be made with the concurrence of the judiciary, and in particular the relevant Head of Bench (clause 858)*.

Standards NZ releases draft revision of NZS 3910 construction contract for public consultation

Standards New Zealand has released its much-anticipated *draft revision of NZS 3910* and opened *a public consultation* on the proposed changes.

The NZS 3910 standard is the most widely used model contract for construction and civil engineering projects in New

Date for the reasonable discovery of defects

The date a body corporate ought to have known about the defects in their building determined from when the limitations provisions ran.

Zealand.

The draft revisions are the latest stage in the review and update project which began in July 2020. The project aims to incorporate legislative changes over the past 10 years and address widespread industry dissatisfaction with the current standard's conditions on risk allocation between principal and contractor. The shortcomings of the standard's current terms results in parties redrafting them and including their own complex special conditions, causing confusion and increasing the risk of litigation. It is hoped that the proposed revisions will achieve a fairer sharing of risk, provide certainty and ultimately improve client-contractor relationships in the industry.

The public consultation on the proposed revisions will close for submissions on 30 June 2023. The final version of the new standard is expected to be published in October 2023.

Further information, including a *comparison document* showing the proposed changes, how to submit feedback for the consultation, and details of the revision project, is available on the *Standards NZ website*.

Leaky homes case survives knockout attempt

In *Body Corporate 449665 v CMP Construction Limited* [2023] NZHC 449, both a strike-out application and a defendant's summary judgment application were attempted based on the Limitation Act 2010. The key issue hinged on the date for the reasonable discovery of defects in the plaintiff Body Corporate units. The first defendant construction company alleged the plaintiffs' agent confirmed his awareness of the defects, the subject of the plaintiffs' statement of claim, by his email dated 20 August 2018. The building work, the subject of the plaintiffs' claim was completed between January 2013 and 23 November 2013.

The focus was therefore on the longstop period as defined by section 11(3)(b) of the Limitation Act 2010. This means the claim filed 6 December 2021 had to show the "knowledge" of facts supporting the claim was obtained after 6 December 2018, being within three years of the

lawsuit being filed.

Specifically, the plaintiffs had no knowledge that by 6 December 2018 or at any earlier date of the fact:

- the act or omission had occurred (section 14(a) of the Limitation Act 2010);
- the act or omission on which the claim is based was attributable to the first defendant (section 14(b)); and
- the plaintiff Body Corporate unit owners had suffered loss (section 14(c)),

such that the late knowledge period did not commence until well after 6 December 2018, being less than three years before proceedings were issued.

The plaintiff succeeded in showing it had an arguable case that it ought to have known the facts underlying the claim by October/ early November 2019, and therefore the plaintiff Body Corporate survived the interlocutory applications, to progress to a trial on the merits in due course.

New Zealand's Construction Contracts (Retention of Money) Amendment Act receives Royal assent

The *Construction Contracts (Retention Money) Amendment Act 2023* (the Act) received Royal assent on 5 April 2023.

The Act amends the provisions in the *Construction Contracts Act 2002 (Subpart 2A- Retention Money)* dealing with retention money (money withheld under a construction contract as security for fixing defective work). The changes will come into force on 5 October 2023 and apply to any new or renewed construction contracts after this date.

Under the old provisions, retention money is at risk where the party withholding the money becomes insolvent or co-mingles it with its other funds. The amendments address this and strengthen protections and transparency for parties awaiting payment of retention money (usually subcontractors).

Some of the most notable changes include:

- **Automatic creation of a trust**
  Retention money will automatically be held on trust by the party withholding it. The creation of a trust will be triggered at the time when the money becomes retention money under the terms of the contract.

  It will only cease to be retention money when paid to the subcontractor, the subcontractor gives up its claim, or the funds are used to remedy defects. If the party withholding

the retention money intends to use it to remedy defects, it must give the subcontractor 10 days' advance notice.

- **Accounting, record keeping and reporting**
  Retention money must be kept separate from the retention holder's other funds, either in a separate bank account or by way of a financial instrument such as insurance or a guarantee/ bond.

  Clear accounting ledgers must be maintained and the party withholding the money must report to the subcontractor as soon as reasonably practicable after the money becomes retention money, and at least every three months thereafter.

- **Offences and penalties for non-compliance**
  There are cumulative penalties for each breach of the rules, including fines for failure to keep retention money as required (up to $200,000), failure to keep accounting records as required (up to $50,000), and failure to provide regular reports (up to $50,000). Company directors can also be held personally liable and fined up to $50,000 each.

Budget 2023 makes allocations for housing and infrastructure

The Government has delivered its "no-frills" Budget of 2023 with a focus on cost-of-living and cyclone recovery. The construction sector is also set to benefit, with several billion dollars being set aside for housing and infrastructure projects. This includes:

- $71b for new and existing infrastructure projects. This will cover the next five years.
- $100m for the new infrastructure agency, Rau Paenga, for a five-year period. Rau Paenga has been repurposed from the Christchurch rebuild agency Ōtākaro.
- $3.6b to minimise cost pressures in the public housing build programme.
- $3.1b to build 3,000 more public housing places by June 2025.
- $6b for the National Resilience Plan. Part of this involves allocating money for the newly released Infrastructure Action Plan. Released in May, the *Infrastructure Action Plan* is an extensive strategy set to deliver, maintain, and improve new and existing infrastructure such as hospitals, roads and waste management facilities. The Government is also setting aside extra funds for weather and climate related issues. The following will likely have a strong impact on the construction sector:
- $1b for the *flood and cyclone recovery package*. This had been partially created to establish infrastructure like stopbanks, to prevent the type of damage seen earlier in the year.
- $370m to increase the resilience of railway infrastructure.
- $50m for renewable energy projects in remote communities.
- $10.7m to establish a renewable energy system on the Chatham Islands.

Government responds to Commerce Commission's report on competition

In our *48th Issue of BuildLaw*, we discussed the release of the Commerce Commission's final report on competition within New Zealand's residential building supplies industry. The Government has now *responded to the report*, establishing that it agrees with eight of the Commission's nine recommendations.

The government agrees with the following:

- **Introducing competition as an objective** – the Government agrees in principle that competition should be a consideration in the building regulatory system. Competition is also important for well-functioning markets, which in turn lead to safe, healthy and durable homes.

- **Better serving Māori through the building regulatory system** – Māori needs can be better served by delivering on Treaty of Waitangi obligations. The Construction Sector Accord Transformation Plan 2022–2025 was designed to provide initiatives to strengthen the Māori economy.

- **Creating additional clear compliance pathways for a broader range of key building supplies –** the Government will work to successfully implement building product information regulations. The CodeMark scheme will track their impact.

- **Exploring ways to remove impediments to product substitution and variations** – MBIE will consider options to remove impediments to making minor changes after a building consent. This may involve amending the Building (Forms) Regulations 2004, increasing the flexibility of the MultiProof scheme, and codifying elements of MBIE's product substitution guidance. The Government has said not only does it agree with the Commission's recommendation but that it should go further. The building consent review will include options to guide builders, architects, and building consent authorities to make decisions about product substitution and variation.

- **Establishing a national system for sharing information about building products and consenting** – on 11 December 2023, new building product information regulations will come into force. These will require designated building products to have a consistent minimum set of information accessible online and available with the product at the time of purchase.

- **Providing education for building consent authorities** – MBIE is progressing work to implement this recommendation. Under the Building Act 2004, it is able to deliver intended outcomes related to coordination approaches for consenting and product approval processes.

- **Creating an all-of-government strategy to facilitate offsite manufacturing** – the Government wants to go further with this by creating a vehicle to bring together representatives from industry to develop an action plan to develop offsite manufacturing. Kāinga Ora has developed a goal to increase the number of offsite manufacturing solutions they use by a minimum of 20% annually.

- **Considering the economy-wide use of various legal instruments** – the Ministry of Housing and Urban Development is reviewing the use of *development-limiting covenants* which may be responsible for restricting the size of housing, thereby restricting urban densification. The broader Resource Management reforms are also leading changes to planning laws.

The Government notes the following, but does not entirely agree:

- **Promoting compliance with the Commerce Act 1986** – the Government supports the Commerce Commission's work to promote and enforce compliance with the Act, and even recently tightened the penalties for non-compliance, but believes the Commission must act independently from the Government.

'The embodiment of chutzpah': Don't apply for set aside with unclean hands

In *Oasis Newman Operations Pty Ltd v Hockley* [2023] WASC 79, the Supreme Court of Western Australia refused an application to set aside an adjudication determination, despite the adjudicator having made multiple wrong findings of jurisdictional fact and law.

Oasis Newman Operations Pty Ltd (**Oasis**) had contracted an electrical contractor (**contractor**) to carry out works on a motel, but a dispute arose after Oasis refused to pay several invoices. The contractor applied for adjudication under the *Construction Contracts (Former Provisions) Act 2004 (WA)* (the **Act**). The adjudicator found in the contractor's favour and ordered Oasis to pay nearly $70,000 plus interest and costs.

Oasis applied to the Supreme Court for set aside of the adjudicator's determination on the basis that the adjudicator lacked jurisdiction. Oasis argued that several jurisdictional preconditions had not been satisfied – the adjudication application had not been brought within 90 business days of the payment dispute arising, and there was no construction contract for the purposes of the Act.

The Court acknowledged that the adjudicator's reasoning was deficient in relation to the jurisdiction preconditions and that they had made multiple incorrect findings of fact and law. But despite these deficiencies, and based on rather different reasons and findings of fact, the Court ultimately found that the adjudicator did have jurisdiction and refused to set aside the

determination.

Notably, the Court went on to state that its power to set aside an adjudication determination is a discretionary one, and applications can be refused where the party seeking the set aside has come to Court with *unclean hands*. The Court held that even if the adjudicator had lacked jurisdiction, it would still have refused to set aside the determination on account of Oasis' bad faith behaviour during the adjudication process – deliberately and repeatedly seeking to avoid and deny service, and tactically electing not to provide their version of events or documents which would have assisted the adjudicator in establishing the facts.

The Court found that Oasis had shown contempt for the Act during the adjudication; and the fact that it was now trying to rely on technicalities within that same Act to try to defeat the outcome was *the embodiment of chutzpah*, which *ought not to be rewarded with the grant of discretionary relief*.

A whodunit mystery for the High Court of England

In *Allianz Insurance plc v The University of Exeter* [2023] EWHC 630 (TCC), the University of Exeter suffered crucial damage after an unexploded bomb dropped during the Blitz was discovered. Owing to the fragile state of the bomb, experts determined the safest option would be to explode it on site. The explosion was enormous and the damage to the halls of residence caused students to be relocated.

The University of Exeter notified a claim under their insurance policy. Allianz declined the claim, pointing out that an exclusion clause existed for damage *occasioned by war*. The question for the Court then was, did the damage result from the dropping of the bomb or from its subsequent detonation? If the former was the case, then the University of Exeter could not be covered under the policy.

To find the *proximate cause* of the damage, the Judge examined the common law on the issue. The Court looked at the classic case of *Reischer v Borwick* [1894] 2 QB 548. This decision discussed the principle of the *reasonable and proper act in the circumstances,* in relation to an initial damaging act. The importance of this principle is that certain actions may be necessary in the presence of an external danger. The Judge found this to be obviously the case when an eroding bomb sat in the middle of a city.

The Court also used the rule in the recent *FCA v Arch* [2021] UKSC 1 to hold that where there are concurrent proximate causes, and one of these is excluded, then the exclusion clause holds. Even if it were true that the bomb was not *the* proximate cause, the explosion resulted from the combination of the bomb existing, and its detonation. The bomb, of course, only existed because of the Second World War. An action excluded by the policy was then, at the very least, *one* of the causes of the damage.

Considering the factors above, the Judge found in favour of Allianz.

Right there in the T's and C's

In the High Court of England's decision in *BDW Trading Ltd v Lantoom Ltd* [2023] EWHC 183, a housing development in Cornwall suffered from what appeared to be substandard materials. The developer, BDW Trading Limited (**BDW**), had used a set of stones from a local supplier, Lantoom Limited (**Lantoom**). BDW had sought a particular type of stone, slate, and it was their belief that this is what the contract between the parties had guaranteed. Lantoom denied that this representation had been made. In coming to a decision, the judge looked at the test on incorporation of terms by reference.

Central to Lantoom's argument was that it had set the contract on its own terms in the form of a counter-offer. This supposed counter-offer had occurred when Lantoom imposed reference to the conditions of sale on the back of a delivery note that BDW then signed. These terms and conditions were found online and did not purport to provide BDW with slate.

Alternatively, Lantoom argued that no misrepresentation had been made as the type of stones provided are often referred to in Cornwall as slate. The Judge found it to be irrelevant what type of stone was intended. The

greater concern should have been the performance of the stone.

The Judge considered whether reference to terms and conditions on a website amounted to incorporation into the contract. The Judge cited at [16] a passage in *Impala Warehousing and Logistics (Shanghai) Co. Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 25 (Comm) stating that in this modern era, a reference to a website is a sufficient incorporation within the agreement.

Unfortunately for Lantoom, the Judge held that its method of making a counter-offer was not sufficient to change the terms. Among the Judge's reasons was that there was absolutely no basis upon which Lantoom could have expected somebody at the delivery site to have authority to accept a counter-offer. Another submission by Lantoom as to why the method was valid was described by the Judge as being *barely articulated and makes no sense*.

The judge found in favour of BDW, holding that it could make a claim under the warranty within the terms of its purchase order.

UK Building Safety Act: High rise building register opens

The *Building Safety Act 2022* (**Act**) came into force last year. It is the most significant change to England's building regulation regime in 40 years. The Act is the UK Government's key legislative response to the London Grenfell Tower tragedy, and focuses on 'higher risk buildings'.

One of the Act's key features is the introduction of a higher-risk building register. Higher-risk buildings cannot be occupied until they have been certified and registered with the Building Safety Regulator. The implementing secondary legislation for this feature recently came into force on 6 April 2023 (*Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023*). The Building Safety Regulator opened the *registration process* on 12 April 2023.

The '*accountable person*' of an 'occupied higher risk building' needs to complete registration by 1 October 2023. Higher-risk buildings are those 18 m or seven storeys high and over, with two or more residential units.

Within 28 days of registration, the accountable person must follow up by submitting the information set out in the *Higher-Risk Buildings (Key Building Information etc.) (England) Regulations 2023*, including details of ancillary buildings, the building's use(s), staircase access, evacuation plans, energy supplies, and the materials used in the structure, external walls, insulation and roof.

BDO releases construction sector reports

BDO has recently released a pair of reports detailing crucial information about the construction sector.

Beyond Boom and Bust: A Construction Sector Taking Control of an Uncertain Future is BDO's fifth annual report and measures the sector's environment since August 2021. Since then, the bulk of Covid-19 restrictions have ended, but New Zealand now faces economic uncertainty. The report addresses how this is being felt by the construction sector. Having surveyed construction businesses, the report details what challenges exist, and how these are being met by the different sub-sectors. While the report notes real challenges, it also points to signs of optimism, with many businesses experiencing sustainable cashflow and margins.

BDO's *Construction Sector overview* focuses on the human side of the industry – exploring the relationship between mental wellbeing and business performance among NZ's construction sector business leaders and owners. The overview shares construction sector findings of the April 2023 measure of the biannual BDO Wellbeing & Performance Index - Te Rangahau o Ngā Hauora Pai. By surveying over 500 business leaders, the overview is able to monitor wellbeing and business performance, as well as showing the link between them. The results of the survey are measured against the WHO-5 Index, the World Health Organisation's globally recognised measure of mental wellbeing. The overview shows that the score has declined considerably from this point last year. The lower WHO-5 score aligns with the businesses' financial performance sentiments, troubled by declining margins and an uncertain work pipeline.