BuildLaw *in Brief:*

So long and farewell – Parliament replaces RMA

In the 48th issue of BuildLaw, we covered the proposed changes to New Zealand's resource management laws. The often-controversial Resource Management Act 1991 (the RMA) is being replaced by three laws with the goal of making it easier to obtain building consents whilst protecting the environment. In August, two of these bills passed their third reading in Parliament, becoming the Natural and Built Environment Act (the NBE Act) and the Spatial Planning Act (the SP Act).

The legislation will create a new regime with the aim of reducing the number of plans councils are required to produce. Provisions from both Acts will contribute to this new regime. A National Planning Framework will be created by the NBE Act setting out national priorities and environmental limits. One of its features is a mechanism where targets and limits can be set for environmental elements such as water quality, air pollution, or noise.

The SP Act provides for the Regional Spatial Plans. These establish the long-term planning priorities for each region. This will see up to 15 regional spatial strategies which are intended to provide long-term and high-level strategic direction for integrated planning.

The third of these laws replacing the RMA is not scheduled to go through Parliament until next year. The Climate Change Adaptation Act is expected to establish systems to protect communities against the impact of climate change and establish the source of the funding for the systems.

Voting against the legislation, both National and Act have separately indicated they will replace the Acts should they form a government at the upcoming election.

Council accept financial support package – the hard work continues

Councils for areas impacted by the Auckland Anniversary Weekend floods and Cyclone in early 2023 have accepted financial support packages by the New Zealand Government (the **Government**).

The cost-sharing arrangement between the Government and Auckland Council will see an $877 million contribution from the Government towards recovery. $387 million of this will be used to purchase Category 3 residential properties, those being the homes impacted worst by the storms. This sum covers 50 percent of the net cost of the homes. This net cost is measured by subtracting any insurance payments the homeowner receives from the buyout value of the property.

The Government will also make a separate contribution towards investment in flood protection works. $380 million will be used to mitigate the risk of floods in areas deemed Category 2.

Auckland Council has applied for further funding to assist with restoration of the transport network. The application is for a further $200 million and is currently being reviewed by Waka Kotahi.

Similar agreements have been reached between the Government and Gisborne District Council. The cost sharing package will further support the Gisborne region, that has been devastated by Cyclone Gabrielle. With so much of the damage related to roads, the package will contribute $125 million to recovery for transport initiatives. $64 million from the package will go towards work intended to protect Category 2 properties from future flooding.

Part of the agreement is that the Government will facilitate a 10-year $30 million loan at zero interest to Gisborne District Council. The Government made this allowance in recognition of the fact that Gisborne District Council will naturally have cashflow challenges as a result of the extreme damage.

The agreement is subject to community consultation.

Climate change and the construction industry

Feedback is being sought for a new *Operational Efficiency Assessment: Technical Methodology* which has been

The hard work continues

The Government has announced further relief for regions hit by Cyclone Gabrielle.

developed by MBIE to sit alongside the earlier created *Whole-of-Life Embodied Carbon Assessment: Technical Methodology*. The Operational Efficiency Assessment tool is a method for calculating the operational efficiency of a New Zealand building. Operational efficiency measures carbon emissions from the use of energy and water in buildings as well as improving indoor environmental qualities for occupants.

The building and construction industry is calculated to be responsible for around 15% of New Zealand's greenhouse gas emissions and the Operational Efficiency Assessment is geared towards helping New Zealand achieve its net zero 2050 goals.

Technical methodologies are not regulatory documents but represent high-level models for the technical basis of future regulation in the area. The Operational Efficiency Assessment does refer to an energy modelling process that MBIE is presently developing in consultation with technical experts in the sector.

Alleged sign-off fraud

In July 2023 a situation came to light that an engineering technologist has been drafting and signing off on designs using the identities of chartered professional engineers without their consent. The impact could affect around 1,000 properties spread across 40 district councils in New Zealand. The alleged fraudulent sign-offs could mean that numerous buildings have not been designed or constructed to the specifications of the Building Code.

The issue emphasises the need for the reform MBIE has begun, with the release of an Options Paper on the Review of the Building Consents System in June 2023. The reforms include mandatory registration for all engineers and setting of offences for unregistered and unlicensed engineering work. The options paper includes consideration of the role producer statements should play in the building consent system, this type of document being included in the allegedly fraudulent sign-offs central to the above situation.

'Chartered professional engineer' is a protected title and quality mark for engineers who have undergone a competency assessment, and one that councils should be able to trust. Engineering New Zealand is working with the affected local authorities to gauge the impact of the alleged fraud, and individuals can ring their local council as a first port of call.

Queensland Supreme Court holds contractor cannot terminate contract due to own default

In *Veesaunt Property Syndicate 1 Pty Ltd v Alliance Building and Construction Pty Ltd* [2023] QSC 129, Veesaunt Property Syndicate 1 Pty Ltd (Veesaunt) entered into a contract with a construction company, Alliance Building and Construction Pty Ltd (Alliance). As contractor, Alliance was to design and construct residential townhouses on the Gold Coast. The contract contained special conditions. Among these were conditions concerning bank guarantees and insurance. Alliance did not provide these and consequently challenged the enforceability of the contract.

Alliance argued that because the special conditions had not been met, the contract ought to be terminated. Veesaunt wanted the contract to continue. Veesaunt argued that although the conditions had not been met, it had issued a notice through its agent to continue with the works. This, in its opinion, amounted to a waiver against the need to fulfil the special conditions, as described in the contract. Veesaunt also argued that as a principle, Alliance should not be able to essentially take advantage of its own default. Alliance denied that this is what it was doing and also argued that the waiver was not presented in a deliberate, clear and unequivocal manner.

The Supreme Court held that the waiver had not been properly issued. Veesaunt had only given a notice to proceed with the works. This did not contain an acknowledgement by Veesaunt's principal that the special condition had not been met. Looking at the dynamic between the parties, the Court said Veesaunt could have issued the waiver by unequivocally communicating its decision to abandon the right to insist on satisfaction of the special condition.

Despite the finding that Veesaunt had not properly issued a waiver, the Supreme Court held that the contract remained on foot. An assessment of earlier case law revealed that a party cannot take advantage of the fact that they were the ones who caused the conditions not to be met in the first place.

Queensland District Court finds construction contract void due to unfair pricing mechanism

In *Perera v Bold Properties (Qld) Pty Ltd* [2023] QDC 99, purchasers of a new home entered into a contract with the construction firm, Bold Properties (QLD) Pty Ltd (**Bold Properties**). The contract affirmed that Bold Properties was to build the purchasers' home for $645,370. Although the price was considered fixed, the contract contained a special condition (**Special Condition 7**). This clause stated that Bold Properties had at its discretion the right to change the current base price of the build. This eventuated when two months prior to the scheduled date of the build, Bold Properties informed the purchasers that there would be a $51,342 increase in the price.

The purchasers then argued that Special Condition 7 was void and unenforceable at law. The purchasers focused on three points to make this argument. In their view, Special Condition 7 was

- void due to its uncertainty;
- not accompanied by a sufficient price escalation warning elsewhere in the contract; and
- contrary to the *Australian Consumer Law* (**ACL**) and consequently void. Specifically, section 25(f), which provides an example of an unfair term.

The Court listed situations that make a contract void for uncertainty. These situations were identified as ones where the parties do not agree on a fundamental term, where there is no real obligation to perform the contract, and where a vital matter has been left to the determination of one of the parties. The Court believed that in this instance, this last situation was present. The clause allowed Bold Properties to be left with the sole discretion to change the pricing of the project. While the contract did contain criteria on which this assessment would be made, that being the "builder's current base price", this itself was vague. How this price would be determined was not set out or referred to in the condition.

In assessing the contract's suitability under the ACL, the Court focused on section 24(2) of that legislation. Section 24(2) asks the Court to take into account the transparency of a contract's term. The Court found that the term was not transparent for several reasons. The contract was

regulated by the Queensland Building and Construction Commission Act and it did not contain any of the elements required by this legislation. Furthermore, the Court found that the special condition caused a significant imbalance in the parties' rights and obligations. Its drafting provided Bold Properties with a unilateral right to change the upfront price of the contract, but did not give the purchasers the opportunity to negotiate. This meant Special Condition 7 could not work under section 24(1)(a) of the ACL.

Letter of demand

Questions of whether a valid payment claim was made under the Building and Construction Security of Payment Act 1999 (NSW) (the **Act**) were raised in *Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd* [2023] NSWSC 309. Piety Constructions Pty Ltd (**Piety**) subcontracted with Megacrane Holdings Pty Ltd (**Megacrane**) for the provision of tower cranes and labour for a project. The administrator for Megacrane issued a demand which annexed invoices amounting to $258,976.18, with each invoice endorsed per section 13(2)(c) of the Act rather than the letter itself.

Piety responded with a letter denying liability and refusing to make payment. The issue later arose as to whether this letter constituted a payment schedule for the purposes of the Act.

The adjudicator and Justice Richmond in the Supreme Court of New South Wales found for Megacrane. First, the adjudicator denied the argument that he lacked jurisdiction as the payment claim was not valid. Piety claimed that even if there was a valid payment claim, there was no payment schedule and Megacrane needed to serve a section 17(2) notice to Piety prior to commencing the adjudication. This argument was rejected. Megacrane then registered the adjudication certificate in Court and obtained a judgment. This was on the basis that the letter of demand when viewed as a whole was a valid claim and the response was effectively a payment schedule.

Piety sought judicial review before Justice Richmond to set aside the adjudicator's determination. The Judge made it clear that the substance rather than form of the documentation was key and again found for Megacrane. The totality of the documentation was determinative.

Victorian building reform

The Building Legislation Amendment Act 2023 (Vic) has become law in Victoria, Australia, having received royal assent on 6 June 2023. The Act is yet to come into force, but will do so no later than 1 February 2024. The Act is the first step of a staged reform called the Building System Review. Stage 1 was formulated by the reports of the expert panel behind the Review and is focused on practitioner registration, building approvals, regulatory oversight and consumer protection.

The reform includes the major new elements of:

- Data sharing: between Victoria's myriad building agencies there will be enhanced data sharing so as to encourage greater transparency and to be able to more readily gauge the health of the overall sector.
- Building manuals: building manuals are intended to be a single repository of all relevant information relating to the design, construction, and ongoing maintenance of a building. A draft building manual will be necessary to obtain the approval of building surveyors prior to obtaining occupancy permits.
- New categories of building practitioner: "building practitioner" now includes building consultant, building designer, site supervisor and project manager. Penalties in forthcoming regulations will apply for work undertaken without relevant registration.
- Building monitor: this role will operate as an advocate for consumers as to systemic issues and for domestic building owners (and adjoining owners).
- State building surveyor: this position will be able to give binding determinations on the laws applicable to building and plumbing standards, to provide technical guidance and training on work in the sector and to engage with regulators.

There has been some delay in enacting the reform, with the three stages yet to be fully implemented. The incremental approach will have caused some frustration for building

practitioners, but the new Act represents progress.

Victoria's balcony problem

Cladding Safety Victoria (**CSV**), the entity established by the Victorian Government, has released its research paper on the state of balconies in Victoria. The paper provides a summary of CSV's findings. It contains a focus on the external wall systems lying behind the external layer of cladding on the 339 buildings subject to rectification funding in the state's recent Cladding Rectification Program (**CRP**). The key findings are that:

- Nearly half of all buildings funded through the CRP were identified as having defects unrelated to building.
- Leaking was noticed in balconies, balustrades and terraces in 25% of the buildings funded. This has caused structural damage.
- 64% of impacted buildings were constructed over 10 years ago.

CSV notes that buildings are more likely to contain balcony defects when their timber structural beams are screwed into timber frames. However, problems related to leaking were also found in concrete slab balconies. Generally, the causes of defects in balconies can be varied. The problem can arise from poor architectural design, defective construction by builders, or maintenance issues.

CSV will soon begin a paper focused on the presence of mould in balconies.

English Court of Appeal: Building Safety Act case

In *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772 three related appeals under the Defective Premises Act 1972 and Building Safety Act 2022 (the **Act**) were bundled together and determined. The first appeal was a substantive one from a decision of the High Court on preliminary issues and the second and third appeals were from a further High Court Judge who had permitted amendments to the pleadings which altered the limitation period pursuant to the Act.

This was the first Court of Appeal decision on the Defective Premises Act after the Act was enacted. Following the Grenfell Tower disaster in June 2017, the developer BDW Trading Ltd (**BDW**) undertook a survey of its developments as to structural and design safety. For two developments, one in London and one in Leicester, negligent design flaws were discovered in 2019. The developments had been sold to purchasers of flats, but the purchasers were asked to vacate while remediation occurred (both at BDW's cost). Although the buildings were defective, they had not suffered

any physical damage.

URS maintained BDW never suffered any actionable damage, either because they sold the buildings for full value before the problems came to light and/or BDW were not liable to carry out any remedial works and had a complete limitation defence to any claim brought against them by the purchasers, so their losses were outside the scope of URS's duty of care.

In the substantive appeal URS pursued three grounds, with ground 3 parasitic on grounds 1 and 2. Ground 1 related to the scope of URS's duty of care. This revolved around the delay in the discovery of the defects, meaning BDW no longer had a proprietary interest in the developments at the relevant time and that the purchasers' claims were statute barred. This had the unusual feature of the defendants seeking to delay the timing of the claim, which is unusual in limitation-based actions. Ground 2 was related in so far that the damages claimed by BDW were not recoverable due to the lack of BDW's proprietary interest.

Ground 3 only arose if grounds 1 and 2 were successful, focusing on the fact the Judge erred in not striking out BDW's claim so that the claim would be deemed "finally determined by a court" under section 135(6) of the Act. The Act would not apply to a finally determined claim. The Act provided for a 15-year longstop limitation period from the date the cause of action accrued, which enabled the negligence to be caught in this claim.

The claim was a tortious claim for economic loss and the Court found no proprietary interest was needed for the cost of remedial works to be recoverable. The cause of action accrued from practical completion in any event as the inherent design defect had not caused any damage. This was when BDW still owned the two developments. Under UK law, a builder who goes back to rectify defective work can cover the relevant cost, even if he is under no obligation to carry out such remedial works. The 'knowledge' test is not a feature of English law, as it is in New Zealand, and there are statutory differences (see the Latent Damage Act 1986 which was enacted to extend the limitation period in certain circumstances).

Grounds 1 and 2 were rejected and the Court moved to the amendment appeals, being the second and third appeals, as ground 3 did not arise for consideration. After permission to make the substantive appeal had been granted, BDW sought permission to amend their pleadings to include references to the claims under the Defective Premises Act and contribution and express reference to the extended limitation periods for claims arising as a result of section 135 of the Act.

The High Court Judge found the amendments reasonably arguable and he declined to decide the specific points of law, leaving them for trial, much to URS's ire, who submitted the Judge should have decided the points of law. URS also argued that section 135 of the Act did not apply to parties who were engaged in ongoing litigation when the Act came into force, as it would have a retrospective effect. The Court rejected this argument as the Act was quite clear this was exactly what was intended. There was no carve-out in relation to current proceedings.

URS argued against other amendments to BDW's pleadings under the Defective Premises Act, first to state that only lay purchasers were protected, not commercial developers, and then that as BDW plainly owed duties to the purchasers under section 1(4) of the Defective Premises Act, they could not also be owed a similar duty by URS. These arguments were rejected by the unanimous Court, led by Lord Justice Coulson and the longer limitation period available under the Act applied.

This left the amendments in respect of the Civil Liability (Contribution) Act 1978. BDW successfully argued that nothing in the Civil Liability (Contribution) Act suggested that the receipt of a claim from the third party purchasers was a condition precedent to the making of a claim under this Act. BDW commenced remedial works before claims by the purchasers and could then claim a contribution against URS. The Court found to rule otherwise would be to reward indolence.

The three appeals were dismissed but it remains to be seen if this case will proceed to trial for determination of the substantive issues.