# BuildLaw *in Brief:*

**Court of Appeal denies leave for annoyed neighbour**

In *Lewis v Hamilton Cosmopolitan Club Incorporated* [2023] NZCA 484, the Court of Appeal considered a claim of nuisance against a Hamilton club by their neighbour. The dispute was originally heard in the District Court. The District Court found that the club had committed a nuisance in numerous ways, particularly the club's attempts to prevent the neighbour's legitimate access to her residence. This point of access was a strip of land running through the club's property.

The High Court reversed the District Court's decision. The neighbour did not in fact have an actionable right to cross the club's land. In so far as this did exist, the right could *at best* be described only as oral permission revocable at will.

At the Court of Appeal, Justice French also found against the neighbour, declining her leave to appeal.

Justice French reiterated points on the tort of nuisance. It is *well established* that an occupier of land can be strictly liable for nuisances created on their land by people under their direct control, such as guests and employees. The class of persons causing annoyance for the neighbour were arguably all under the direct control of the club. However, in this case it was not enough to allow for a substantive appeal to be heard.

**Further tiny homes case**

In *Dalton v Reeves and others* [2023] NZHC 2779, Justice Anderson revisited Justice Venning's decision in *Maginness v Tiny Town Projects Ltd (in liq)* [2023] NZHC 494, [2023] 2 NZLR 828. In *Dalton* the liquidator


also sought directions of the High Court pursuant to section 284 of the Companies Act 1993. The focus was on cladding and plywood that were held by the liquidator, and whether the Reeves Family Trust had an equitable lien over them. The Trust did not; and *Maginness* was distinguished on the following basis:

- *Maginness* concerned tiny homes that were constructed at the company's facility and only delivered to the customer on payment in full.
- In *Maginness* there existed identifiable subject matter to which the equitable liens could attach, whereas here the goods were generic in nature and could have been used for other builds. They were not yet applied to construction of the Trust's house.
- The contract here was for the construction of a house using the materials, not for the materials themselves.
- In *Maginness* (as well as the case it relied on, namely *Hewett v Court* (1983) 149 CLR 639, 46 ALR 87) and the later cited *Francis v Gross* [2023] NZHC 1107, the subject matter appropriated to the contract was specifically designed, or custom made for the claimant

The three cited cases in *Dalton* did not support an equitable lien. Neither party considered those cases to be wrongly decided, but they contested the application of the law to the facts.

**High Court grants injunction over expert appointment procedure**

In *AC/JV Holdings Ltd v General Construction Group Ltd* [2023] NZHC 2212, the High Court considered a clause determining a time limit in the NZS3915 contract. The clause detailed how an expert would be determined in the event of a payment dispute. When this occurred, AC/JV sought to restrain General Construction Group (**GCG**) from proceeding with an expert determination. AC/JV argued that based on a time limit within that clause on when an expert is to be appointed, the process could not occur.

In considering AC/JV's application for an injunction, the High Court was to consider whether:

1. a serious question was to be tried;
2. the balance of convenience favoured the granting of the injunction; and
3. the overall justice of the case required the injunction.

The Court granted an injunction after finding that these elements were present.

On the first point, the Court

held *Rooney Earthmoving Ltd v Infinity Farms Ltd* [2022] NZHC 2078 to be clear authority that an expert can only be invited to make a determination at a time when the contractor is on site and engaging in physical works. The Court also rejected an argument from GCG that the NZS3915 contract could be interpreted to read that the expert was appointed at the time the contract was entered into. In fact, the process does not commence until written notice is given.

In discussing the balance of convenience, the Court recognised that the timeframe for dispute resolution by an expert put AC/JV in an almost impossible situation. The matter to be determined was not the kind envisioned by the contract. The overall justice of the issue would be best served by granting an injunction.

## Defining 'Structure'

→ The Western Australia Court of Appeal determined the definition of "structure" in the context of an insurance policy.

**Top Western Australia Court opens the dictionary**

In *AIG Insurance Australia Ltd v McMurray* [2023] WASCA 146, the Court of Appeal of the Supreme Court of Western Australia determined the definition of "structure" in the context of an insurance policy.

The McMurrays had lodged a claim with their insurer, AIG, following a fire at their property. AIG declined the claim based on their reading of the policy's exclusion clause. This reading centred the presence of the term "contract work" in the relevant clause. That being, damage caused by "contract work" would not be indemnified. "Contract work" was defined in the clause as including *all structures construed or in the course of construction*. In AIG's view, the fire had been caused by an oily rag used to stain timber panels and doors. These items were all part of construction works.

In the lower court, Justice Smith rejected AIG's argument after looking at the meaning of the term within the context of the policy. In Justice Smith's reading, "structure" within that definition meant more than mere components of a structure. Alternatively, if Justice Smith could not make a decision on the definition of the term, then the *contra proferentem* rule would apply, whereby an ambiguous clause is interpreted against the interests of the drafter. In this case, "structure" would be read in a way which favoured the interpretation taken by the McMurrays

At the Court of Appeal, the Court determined that "structure" should be read in accordance with its ordinary and natural meaning. Looking at several

dictionary definitions, a structure could be considered a:

- *mode of building, construction or organisation; arrangement of parts, elements or constituents*; and/or
- *something built or constructed; a building, bridge dam, framework, etc*.

Building materials, such as an oily rag, could not be described as a "structure" within the ordinary use of the word. The McMurrays were accordingly successful.

### Supreme Court of Victoria lists ways vendor did not disclose crucial information

In *Asia Digital Investments Pty Ltd v Mara Dextra Pty Ltd [2023] VSC 565*, the Supreme Court of Victoria considered whether Mara Dextra Pty Ltd (the **vendor**) had properly notified Asia Digital Investments Pty Ltd (the **purchaser**) that construction was needed on the purchased property. Under sections 9AB(2)–(4) of the Sale of Land Act 1962 (Victoria) (the **Act**), a vendor is to disclose to the purchaser in an off-the-plan contract whether there are works impacting the natural surface levels of the land. The Act instructs that this disclosure takes the form of a copy in the contract of the plans. When there are updates to the plans, the vendor is to provide to the purchaser written notice as soon as practicable. The scope of these requirements became the focus of contention for the parties.

In the vendor's view, disclosure had been made. The vendor had contacted the purchaser's builder via email with plans containing the works. The Court then had to determine whether this was an act of disclosure to the purchaser, as intended by the Act.

Section 30(1) of the Act includes agents and nominees of the purchaser within that definition. However, that does not include *all* agents or nominees, and the Court held that authority to act should be expressly conferred. While the builders may have been expressly conferred that role in some respects, this did not mean they could act for the purchaser in all capacities. There was no evidence that express authority had been given to the builders to receive plans.

The Court also found against the vendor under the requirement that disclosure is made as soon as practicable. The practicable condition partially refers to disclosure occurring once the vendor has knowledge of any aspect of a proposed plan. The vendor argued that knowledge occurred once they were satisfied that a proposed plan would not then change. The Court rejected this argument.

### East London Council wins cladding removal court case

Newham Council has successfully prosecuted Chaplair Limited for a delay in removing flammable cladding. In the shadow of the Grenfell Tower disaster, Councils have sought accountability from building owners. Newham Council became the first local authority in Britain to successfully prosecute under the Housing Act 2004.

The Council issued an Improvement Notice in September 2020 which gave Chaplair a deadline of 31 March 2021 to remove the cladding from its Lumiere building in East London. Work eventually began in May 2021, with dangerous cladding removed by February 2022. Through its legal action, the Council successfully argued that there was no reasonable excuse for the delay.

In the City of London Magistrate's Court, Chaplair was found guilty of the offence on 18 October 2023 and sentenced on 31 October 2023 to a £30,000 fine and £30,000 costs.

### 2023 *CRUX* report

In a report entitled *Forewarned is Forearmed*, (the 6th Annual CRUX insight report), global consultancy firm HKA has quantified the damage done to engineering and construction projects worldwide. The firm analysed over 1,800 projects in 106 countries. It set out the recurrent causes of damage, which were often predictable and avoidable and include (percentage of projects globally which had this cause – top 5):

1. Change in scope 38.8%
2. Design was incorrect 23.0%
3. Contract interpretation issues 19.8%
4. Design information was issued late 22.5%
5. Design was incomplete 21.7%.

In Oceania, HKA posited that late access to sites was elevated. The region had the lowest averages for claimed time and costs. A fifth of projects were affected by inaccurate, late and incomplete design. A change in government policies was also foreshadowed, with imperatives to deliver

results amid tougher economic conditions.

Emerging from the COVID-19 pandemic, the report noted that *resilience, project outcomes, and competitive advantage all hinge on effective mitigation of more immediate risks over the next 12-24 months*.

**Summary judgment for payment claims**

Genesis Residential Ltd (**Genesis**) contracted with Keith Bullock Contracting Ltd (**KBC**) to carry out earthworks at a residential development in Lower Hutt. Associate Judge Skelton determined KBC's three payment claims in *Keith Bullock Contracting Limited v Genesis Residential Limited* [2023] NZHC 2887, by way of summary judgment. The causes of action were dismissed and directions were made for a statement of defence to be filed. Notably, only a real question to be tried had to be raised.

There was a dispute over timely compliance with the contract; and Genesis issued a notice to rectify within 14 days. KBC responded as to why it felt the notice was invalid. On 4 November 2022 Genesis terminated the contract based on the alleged default. KBC disputed the termination and cancelled the contract on 14 December 2022.

In the summary judgment application, KBC sought payment of claim 14 ($110,277.35 including GST), payment claim 15 ($95,218.18 including GST), a retentions invoice ($43,870.26 including GST) and payment claim 16 ($773,758.11 including GST, pursuant to section 24 of the Construction Contracts Act 2002 (**Act**)).

Genesis relied on clause 5 of the special conditions of contract which provided for performance of the contract. The Judge maintained there were material conflicts of evidence as to whether or not Genesis had validly terminated the contract and whether it had a substantial claim for liquidated damages and other losses against KBC. Was KBC four weeks behind schedule? Was any delay due to factors beyond KBC's control? These were issues for trial.

There were issues as to whether payment claim 15 was served before the purported termination of contract. In terms of payment claim 14 and the retentions invoice, the Judge held there was a reasonably arguable defence of equitable set-off. As to payment claim 16, Genesis argued there was no valid payment claim (a payment schedule had been served) as no contract existed. The Court actually held that it was unclear whether Genesis had served the payment schedule within the time allowed by section 22(b) of the Act, as required by section 24(1)(b). No claim for a debt due could be granted.

The Court's preliminary view was that costs should be reserved until after trial, with its processes for discovery and cross-examination.

**High Court decision in Bianco Apartments**

Following an eight week trial, Justice Andrew has delivered his decision in *Body Corporate 406198 v Argon Construction Ltd and Auckland Council* [2023] NZHC 3034 regarding a unit title development in central Auckland known as Bianco off Queen. Argon completed construction around January 2009 and the Auckland Council issued code compliance certificates late that month. A 2017 report illuminated defects.

It is a leaky building, and Argon and the Council were sued in negligence and for weathertightness defects. The development comprises 157 principal units in two tower blocks. Some units are used as residential apartments, while others are used as part of a hotel/short-term accommodation business. Body Corporate 406198 (**Body Corporate**) is the body corporate for the development and first plaintiff (**plaintiff**).

The case focused on two defects in the building: alleged defective waterproofing to the cantilevered balconies, and also to the ground-level podium and basement levels. Both defects were deemed actionable. Two other defects had settled pre-trial. The claim at trial was for $40.74 million.

The extent of damage and what might be a reasonable scope of repair were central issues. The Judge determined that the damages which reflected the actual and reasonable loss were the costs of bringing the defective work up to building code compliance. It was wrong, however, to *rigidly conflate*

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*reasonableness with the least expensive method*.

The Judge insisted that the serious allegations must be supported by cogent evidence to establish the extent of the alleged damage, breaches to the building code, and the scope and cost of repair. Much of the plaintiff's expert evidence regarding systemic defects was rejected. The scope and cost of repairs was a central issue. While the Court found for the plaintiff on liability, the Court rejected the plaintiff's remediation approach which called for a full reclad. Justice Andrew preferred Argon's and the Council's much less costly approach.

The judgment is notable for its treatment of:

- *Sections 17 and 112 of the Building Act 2004*: all alterations to existing buildings must comply with the building code; but while the "new work" is the replacement and removal of the membrane and is governed by section 17, the balustrades, joinery and cladding sheets are all parts of existing works and do not need to be upgraded to comply with the code, they simply need to comply as before.
- *A builder's non-delegable duty of care*: the Judge imposed a non-delegable duty of care on Argon based on its particular role in the construction and the relevant contractual documents. Argon could not rely on having engaged a specialist water-proofer or upon the Council's inspecting the water-proofer's work.
- *The Body Corporate's standing to sue*: the Council challenged the standing of the Body Corporate to sue as a representative agent of owners in respect of the individual units. The Judge found that the Body Corporate had standing to sue for its repairing responsibilities under section 138 of the Unit Titles Act 2010, but as to claims outside this section (alternative accommodation, mental distress), this finding was not determinative of the Council's affirmative defence of contributory negligence. The Judge further held that the defendants owed concurrent duties of care to the Body Corporate and the individual owners. Who the plaintiff was did matter for GST implications, contributory negligence and limitation issues.
- *Expert evidence*: the Court accepted the alternative scope of repair prepared and proposed by the experts for the defendants. It was viable and realistic. As to quantum, the preferred approach was the scope identified by Argon's building surveyor and quantity surveyor (expert witnesses). There was no requirement for any of the plaintiffs to move out of the apartments for the remedial works to be carried out.

The High Court found Argon and the Council were liable in an 85%:15% ratio for the two defects. The quantum of damages is to be determined, likely on the receipt of further submissions, but it is expected to be around $5 million to $6 million. This may not leave a substantial sum for the cost of repair, depending in part on the costs award, which is also to be determined.