
The Construction Verdict - August 2021

Construction Verdict highlights some of the most important legal developments during the last few months relating to the building and construction sectors.

Construction Contracts (Retention Money) Amendment Bill

In early June Parliament introduced the Construction Contracts (Retention Money) Amendment Bill which, if passed, will further amend the retention regime under the Construction Contracts Act 2002 (CCA). The proposed changes address shortfalls in the current regime, such as situations where an insolvent contractor has co-mingled retention funds with its working capital, and its subcontractor is barred from recovering the full sum.

The headline changes are:

- Retention money must be held on trust in a New Zealand bank account established and used solely for the purpose of holding retention money (or held in the form of complying instruments such as a bond or guarantee). Bank account names must include “retention money trust account” and identify for whom the money is held. The bank must also be notified that the account is holding retention money under the CCA;
- Contractors must disclose information to subcontractors regarding retention monies when money is first retained, and then at least every three months thereafter; and
- The introduction of offences for failing to comply with the new requirements. Contractor companies can be liable to fines for up to \$200,000 whereas directors (or persons who act as a director) can be liable for up to \$50,000.

The Bill is currently with the Select Committee, their report being due 11 November 2021.

New legislation addresses inefficiencies in modular consenting

The current consenting process as it relates to modular construction requires a separate consent for each component produced. If a component is produced in a different council region to where it is delivered for assembly, then consent is required from both councils.

The Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Act 2021 (Act), aside from having a catchy name, recently received royal assent and seeks to address these issues.

The Act establishes a new scheme for certification, registration and monitoring of modular component manufacturers (MCMs). MCMs will be able to obtain certification to

manufacture a modular component from a registered certification board. Certification then enables that MCM to produce the modular component without the need for inspection each time a component is produced.

Under the Act, building consents will only be required for the installation phase, with processing times reducing to 10 working days (down from 20 working days).

The Act is effectively a framework and MBIE is currently consulting with the industry regarding necessary regulations to support and implement the Act. The Act and the supporting regulations will come into effect no later than 15 months from the date of royal assent of the Act (so September 2022).

The hope and expectation is that this removes a barrier preventing the uptake of modular construction in New Zealand and that housing supply can be speed up as a result.

Proposed regulation of the engineering profession

The Ministry of Business, Innovation and Employment (MBIE) recently opened consultation on options to increase regulation on engineers in light of reports following the CTV building collapse and contamination of Havelock North's drinking water.

The broad concern is that membership of CPEng and Engineering New Zealand is currently voluntary and any engineer wanting to avoid competence checks or disciplinary processes can simply opt out from these private entities. This places the burden on consumers to determine engineers' competence.

MBIE have developed three proposals:

1. All persons who provide professional engineering services must be registered. This would ensure all professional engineers obtain a practicing certificate and are subject to a code of conduct, mandatory CPD, and a complaints and disciplinary process;
2. The introduction of a licencing regime for high risk engineering disciplines. Discipline classes would be established based on the potential for significant harm resulting from subpar engineering work. MBIE recommend making it an offence to practice in a restricted field without a licence, which could be issued by examination, evaluation of work, interviews, and track records; and
3. Establishment of a regulator to oversee the regime. This independent regulatory board would be accountable to the Minister for Building and Construction and monitored by MBIE. Funding for the regulator would come from registration and licencing fees as well as levies.

Submissions have now closed and a cabinet paper has been submitted to the Cabinet Economic Development Committee for discussion.

Case Law

Contract interpretation: *Bathurst Resource Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85

The Supreme Court has unanimously confirmed that, in principle, both pre-contractual negotiations and subsequent conduct can be admissible evidence when interpreting a contract.

As a check on this, the Court clarified that relevance and probative value are yardsticks for the admissibility of such evidence, which must be examined in accordance with the Evidence Act 2006.

Primacy remains in the written words when interpreting a contract, however ancillary conduct may assist courts in determining a contract's objective meaning to a reasonable

person having all background knowledge available to the parties. For prior negotiations, the conduct must be mutual; one party's subjective belief as to the meaning of the words which isn't communicated to the other party is inadmissible. Conversely, subsequent conduct need not necessarily be mutual, however it must demonstrate evidence of the parties' objective intention as to the meaning of the contract at execution.

Contract, set-off: *Asphalt Supply Company Limited v Cole John Limited* [2021] NZHC 1257

Cole John (Principal) engaged Complete Limited (Contractor) to undertake construction work on the Principal's property. The Contractor subcontracted the asphalt works to Asphalt Supply (Subcontractor) who provided the Contractor with a written warranty in favour of the Principal upon completion.

The Contractor said that the asphalt work was defective and withheld payment to the Subcontractor totalling \$80,040 (Balance). The Subcontractor sued the Principal for the Balance, the Contractor having gone into liquidation. The Principal counterclaimed for breach of warranty.

The Subcontractor, acknowledging it had no contract with the Principal, discontinued its claim. The Principal's counterclaim went to trial in the district court. One of the key issues was whether the Subcontractor could set off Balance against the Principal's counterclaim for damages (under s 18(2) of the Contract and Commercial Law Act 2017 (CCLA)).

The District Court held that the Subcontractor was not entitled to set off the Balance against the Principal's counterclaim for damages (on the basis that the Balance was due on completion and that the Subcontractor had not completed the works).

On appeal Campbell J allowed the Subcontractor to set-off the Balance for breach of warranty against the claim for damages, overturning the District Court Judge's ruling that the Balance was only due on completion, and the Subcontractor had not completed the works.

The basis for the decision was that s 18 (2) of CCLA enables a party in the Subcontractor's position (i.e. conferring rights in respect of a contract to a third party) to set-off (amongst other defences) any claim it has against the party to the underlying contract against any claim brought by the third party beneficiary (i.e. the Principal).

The High Court held that the normal measure of damages available to a Principal for incomplete or defective work under a construction contract is the cost of completing the work or remedying the defects, less any sum that would have been payable to the contractor had the work been properly carried out.

Accordingly, they allowed the Subcontractor to set off the Balance to reduce the damages award payable.

Please contact our [Construction](#) team for more information.

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