PROJECTS AND REAL ESTATE NEWS

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WELCOME

to Issue No. 5 of Projects and Real Estate News, Bell Gully's monthly digest on regulatory developments, together with cases and news of interest in the **projects** and **real estate** sectors.

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Projects and Real Estate News is a monthly digest on regulatory developments, together with cases and news of interest in the projects and real estate sectors.

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CASE NOTES

✱ REAL ESTATE

Body corporate managers and committee members and their duty of care
Singh v Boutique Body Corporates Limited [2019] NZHC 1707

In summary: The issue of whether, and to what extent, body corporate managers and body corporate committee members owe a duty of care to individual owners in a unit title development is not explored often in New Zealand courts.

This decision highlights the limited recourse that individual owners in a unit title development have against the conduct of the body corporate manager and alleged negligence of body corporate committee members. Shortfalls in the law regulating body corporate managers' standard of conduct has already been recognised, with calls for reforming the sector by lobby groups such as the Unit Title Working Group, and National MPs Judith Collins and Nikki Kaye's attempted introduction of a bill this year to, amongst other matters, strengthen body corporate governance and increase the professionalism and standards of body corporate managers. The bill has not been progressed further by the government and has been introduced as a private member's bill at this stage.

Relevant facts: Ms Singh was one of the owners in a unit title development in Auckland. Weathertightness defects in the development were discovered. The body corporate sued those it alleged were responsible for the defects and settled, but the settlement funds were insufficient to meet the remedial costs.

The body corporate applied to the court under section 74 of the Unit Titles Act 2010 (**UTA**) to approve a scheme whereby the body corporate would levy the unit owners to meet the shortfall of the remedial costs. The court approved the scheme.

The body corporate delegated its duties and powers to the body corporate committee, which contracted with Boutique Body Corporates Limited (**BBCL**) to carry out those duties. BBCL's duties included advising and assisting the committee to administer its powers under the scheme.

Ms Singh had, since 2017, disputed (unsuccessfully) the levies raised to cover the remediation shortfall. In this proceeding she raised three causes of action:

a) failure by BBCL and the committee members to supply adequate reports as required by the scheme;
b) negligence by BBCL in advising and assisting the body corporate and the committee in administering the scheme; and
c) gross negligence or wilful misconduct by the committee members in administering the scheme.

BBCL and the committee members in turn argued that Ms Singh had no reasonably arguable cause of action and the proceedings were an abuse of process. They applied to the court to strike out Ms Singh's claims.

Failure by the body corporate and committee members to supply adequate reports under the scheme

The scheme as approved under section 74 of the UTA gave unit owners substantial rights to information about the repairs and costs, which Ms Singh as a unit owner could enforce. However, the court noted that it was the body corporate alone that had the duty of disclosure. As a result, Ms Singh's first cause of action failed on the ground that she can only enforce those rights against the body corporate, not BBCL nor the committee members.

Negligence claim against BCCL: Did the body corporate manager owe a duty of care to individual owners?

In respect of Ms Singh's negligence claim against BBCL, the court found that in general, the body corporate manager assumed a duty of care only to the body corporate, not to individual owners.

This was because differences in opinion between members of a body corporate are common, and the body corporate manager could not be expected to cater and be responsible for every point of view. The provisions in the UTA makes it clear that decisions are made by the body corporate as a whole (by votes in general meetings or committees with delegated authority), not by individual owners.

In this context there are strong policy reasons to support the view that unless evidence to the contrary is present, a body corporate manager does not owe a duty of care to individual owners. To hold a body corporate manager to account would require the body corporate itself bringing the cause of action.

Ms Singh's negligence claim against BBCL was therefore struck out because the court found no evidence that BBCL assumed a duty of care to her personally.

Gross negligence/ wilful misconduct claim against committee members: Did the committee members owe a duty of care to individual owners?

The court noted that ordinarily, committee members do not owe a duty of care to individual owners. The committee members were appointed by the body corporate as a whole and were its agents. An individual owner could hardly take the committee to task for a decision approved by the body corporate, as those decisions are decided on the vote of the majority in general meetings.

The court considered that committee members do owe duties to the body corporate, and only the body corporate has standing to sue the committee for breach of those duties. This general position is subject to exceptions: unit owners may have personal claims against the committee members if the committee's decision is ultra vires (acting beyond one's legal power or authority) or illegal.

Ms Singh's claim did not allege the committee members made a decision that was ultra vires or illegal. Accordingly, her negligence claim against the committee members was also struck out.

The takeaways:

- As a general rule, body corporate managers owe a duty of care to the body corporate as a whole, not to individual owners. A body corporate can hold the manager to account but the decision to do so would need to be approved by a majority vote in a general meeting or by those acting with the body corporate's delegated authority.

- As a general rule, body corporate committee members owe a duty of care to the body corporate, and individual owners may have a personal claim against the committee only under limited grounds, such as where the committee members' decision was ultra vires or illegal.

- As a result, if an individual owner wishes to allege breach of a duty of care, they must prove that the body corporate manager and/or the committee members had assumed responsibility to them personally.

Bell Gully advises regularly on all aspects of real estate law, including unit title matters. Please contact one of our real estate lawyers if you have an issue that requires attention – we would be happy to assist.

■ PROJECTS

Disagreement with an adjudicator's decision under the Construction Contracts Act
Target Painters & Decorators Limited v Fehl [2019] NZHC 3237

Practical points: A party who disagrees with an adjudicator's decision under the Construction Contracts Act 2002 (**CCA**) can either submit the underlying merits of the dispute to binding resolution through litigation or arbitration or apply for judicial review on the grounds of jurisdictional error or procedural errors. The courts are generally reluctant to disturb an adjudicator's determination of a dispute by judicial

review. Applications have been available in cases where there had been a significant breach of natural justice in the way the adjudication was conducted or error of the law. There is a high hurdle to persuade the Court to intervene through judicial review.

The courts rarely grant relief through judicial review out of deference for the statutory intention for the CCA scheme to be a "pay now, argue later" process. That is, adjudication is not the final forum for dispute determination but rather a provisional process designed to facilitate payments so that cash flow can continue for a project. The courts are therefore generally reluctant to intervene in adjudication determinations.

Relevant facts: Target and Omid are painting contractors. They entered into a construction contract whereby Omid agreed to undertake work as a subcontractor for Target in three apartment development projects.

Disputes arose a few months after the contract was entered into. Omid served a notice of adjudication in relation to the disputes on Target. Mr Fehl was an adjudicator who served a document purporting to be a notice accepting the appointment (**the acceptance notice**) as an adjudicator in this dispute. The acceptance notice was not in the prescribed form. Target asked for more time to respond but did not object to the process going forward.

Mr Fehl issued a determination holding that Target was liable to pay Omid the sum of approximately $75,000 plus GST within five days of receipt of the determination. Omid issued a statutory demand against Target the following day. Target applied to the court to set aside the statutory demand on the basis that the adjudicator's decision was disputed.

Target's primary ground of judicial review was the adjudicator's acceptance notice was not in the form prescribed under the CCA. Specifically, the acceptance notice required payment of security for the adjudicator's costs in the dispute.

The Court found that the acceptance notice was flawed because it should not make the adjudicator's acceptance of the appointment conditional on payment of security for costs.

The Court nevertheless dismissed Target's application for judicial review because the error was immaterial. The Court concluded that the error was immaterial because Target was aware of Omid's claim, had an opportunity to participate, and acquiesced to the refusal of its requested adjournment of the adjudication. The Court therefore considered there was no procedural or substantive unfairness sufficient to justify setting aside the adjudication application. The Court was also fortified in reaching this view by the fact that the CCA expressly provides that an adjudicator's notice is of "no effect" if a notice fails to confirm that the adjudicator meets the eligibility criteria under the CCA. The notice in this case provided the necessary confirmation to avoid invalidity under the CCA.

Bell Gully has lawyers with specialist experience in construction law and procurement projects. Please feel free to contact one of our team if you need assistance with a construction law related matter.

REGULATORY UPDATES

✱ REAL ESTATE

Significant real estate-related legislation initiatives planned for 2020

The Government has a busy programme planned for 2020 in terms of legislative initiatives. The reforms planned to laws affecting the real estate sector in the next year include:

- **Overseas investment:** A new "national interest" test to screen investments that "pose a significant risk to national security or public order". A "call in" power to apply to the sale of strategically important assets, such as investments in significant media entities if they are likely to damage national security or democracy. Red tape around the consent process to be reduced, including by setting specific application timeframes and exempting some low risk transactions, such as companies that are majority owned and controlled by New Zealanders. For more details on these proposals, please click here to read Bell Gully's commentary.

- **Resource Management Act 1991 review:** This year the Government announced a two-stage approach to reforming the resource management sector.

  Stage 1, addressing discrete issues with the Resource Management Act 1991 (**RMA**), is now underway with the Resource Management Amendment Bill now at select committee stage in Parliament. The bill aims to improve RMA processes and enforcement provisions.

  Stage 2 involves a much more comprehensive review of the RMA to address "widespread criticism that the resource management system is not fit for purpose" (as stated in a cabinet paper from the Office of the Minister for the Environment). A panel was formed to initiate this review and the panel has now published an issues and options paper titled "*Transforming the resource management system: Opportunities for change".* Comments on the paper are accepted until 3 February 2020. The panel is required to issue a final report on the reform proposals by mid-2020.

- **Residential tenancy laws:** A bill is expected to be introduced in the first half of 2020 to make amendments to residential tenancy laws. The amendments include making it illegal for landlords to terminate periodic tenancies unless they use one of several specified reasons in the new legislation, longer notice periods if landlords wishes to terminate a periodic tenancy, and allowing landlords to increase the rent only once every 12 months (currently it is once every 6 months).

- **Land Valuations Proceedings Bill:** A bill to re-enact the Land Valuations Proceedings Act 1948 (**the Act**) in modern form without changing the substance of the law. This bill is part of the Government's 2018-2020 revision programme. The Act deals with objections relating to property valuations undertaken by district councils and the taking of land under the Public Works Act 1981. An exposure draft of the bill was released and feedback on it is accepted until 28 February 2020.

■ PROJECTS

New tool to levy landowners to fund infrastructure projects

A new tool to help councils fund infrastructure could mean some housing developments happen a decade earlier than currently planned, Urban Development Minister Phil Twyford announced.

The tool reflects concerns from developers that efforts to develop land, particularly in high growth areas such as Auckland and Hamilton, are obstructed by a lack of supporting infrastructure. Council access to funding was viewed as the main bottleneck to getting that infrastructure – typically water, roading and community amenities – built.

The tool will provide for the ability to ring-fence infrastructure projects from the relevant council's balance sheet, so that there is no financial or moral recourse to the council if the project fails.

The other core elements of the tool include the ability for finance for the infrastructure project to be raised by a special purpose vehicle (**SPV**). The SPV could raise finance for the project by collecting a multi-year levy to repay the finance, and contract for the delivery of the infrastructure.

The levy would be paid by those who are expected to benefit from the infrastructure. The council will collect the levy on the SPV's behalf, via the council's normal rates collect mechanisms. The timeframe for the levy is expected to typically last between 25-50 years, and ends once the infrastructure is paid for.

A Government support package would cover certain tail risks that can't be managed by either the SPV or the local authority. Infrastructure assets built using the tool would transfer to the relevant public body (the council in most cases), which will be responsible for ongoing operation and maintenance of the assets.

An example of where this model had already been applied was the Milldale development in the north of Auckland. A Crown Infrastructure Partners SPV was used in 2018 to raise around $50 million to fund infrastructure. The levy is to be paid by landowners over 30 years to the Auckland Council, which collects it on behalf of the SPV.

At Milldale, this approach was negotiated with the landowner. To overcome the impracticalities of negotiation with a large number of landowners, the Government intends by mid-2020 to pass legislation enabling the new tool.

Click here for the Government's press release

Bell Gully's projects and real estate team is across the current developments and trends in the industry. If you have an issue related to construction or real estate law that requires attention, we would be happy to assist.

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