PROJECTS **REAL ESTATE NEWS**

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WELCOME

to Issue No. 10 of Projects and Real Estate News, Bell Gully's regular digest on regulatory developments, together with cases and news of interest in the **projects** and real estate sectors.

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***** REAL ESTATE

Court considers effect of deemed assignment of lease

Tempest Litigation Funders Ltd v Zhang [2022] NZHC 170

Key Takeaways:

For parties who are on leases based on previous editions of the standard form Auckland District Law Society (**ADLS**) lease (in use until the current edition was released in 2012), the tenant is likely to be subject to a "deemed assignment" clause. This clause provides that any change in ownership resulting in a change in the effective management and control of a non-publicly listed tenant company is a deemed assignment of the lease.

It was argued in this case that a change in the tenant company's shareholding constituted an assignment of the lease from the tenant company to the new shareholders, so that the new shareholders are personally liable as assignee for arrears and other default under the lease (notwithstanding that the shareholders did not give a personal guarantee or signed any lease documents in their personal capacity). One of the shareholders resisted this interpretation.

The court found the shareholder has a substantial ground of defence to this argument, being that the purpose of the "deemed assignment" clause could be solely to trigger the tenant's obligation to obtain the landlord's consent to the change in shareholding or control, rather than operating as an automatic assignment to the new shareholders.

The position under the current edition of the ADLS lease is clearer. It does not say that any change in ownership resulting in a change in the effective management and control of a non-publicly listed tenant company is a "deemed assignment". Instead, it simply states that such change will require the landlord's written consent.

In summary: This case is likely relevant for parties who are still on leases drafted using the last edition of the standard form ADLS lease. It concerned the effect of the "deemed assignment" clause in that edition. That edition had been in use before it was superceded in 2012 by the current edition of the ADLS lease.

Paul and Shirley Coleman were the owners of a commercial property. Around September 2012, they leased these premises to Raister Limited pursuant to a deed of lease in the current edition (at the time) of the standard form ADLS lease. Two years later, Raister Limited assigned the lease to MTZJ Limited pursuant to a deed of assignment of lease. Just short of two years later, in August 2016, MTZJ Limited assigned the lease to Shineton Trading Limited (**Shineton**).

At the time it was assigned the lease, Tian Tian (Shineton's sole shareholder) and Xiang Zou (a director of Shineton) were recorded as guarantors of Shineton under the deed of assignment of lease.

In December 2017, the shareholdings and directorships of Shineton were amended. Tian Tian was removed as the sole shareholder. The new shareholders were Kelly Yin (**Ms Yin**) and Shuang Qin. Ms Yin was also appointed a director.

In 2018, it was alleged that Shineton defaulted and breached the lease by non-payment of rent, rates, and failure to maintain the premises. Shineton was placed into liquidation in 2019. The landlords assigned all rights and interest in the amount owing under this lease to Tempest Litigation Funders Limited (**Tempest**).

The "deemed assignment" clause in the lease is central to the issue in this case. The clause provides:

"Where any Tenant is a company which is not listed on the main board of a public stock exchange then any change in the legal or beneficial ownership of its shares or issue of new capital whereby in either case there is a change in the effective management or control of the company is deemed to be an assignment of this lease."

The standard ADLS lease form also provides that the landlord's written consent is required to any assignment of the lease.

Tempest argued that the change in Shineton's shareholdings and directorship in 2017 constituted a "deemed assignment" under this clause and operated to assign the lease to Ms Yin and Shuang Qin, to the effect that they are now personally liable for the amounts in default. Tempest filed claims in the High Court against Ms Yin for rental arrears and outstanding labour for repair to the premises. The hearing proceeded on a formal proof basis, which happens when the defendant (Ms Yin in this case) did not file any defence.

The judge accepted that the "deemed assignment" clause operated to assign the lease from Shineton to Ms Yin, and Ms Yin was therefore liable under the lease terms as an assignee.

Ms Yin subsequently filed an application to set aside this judgement, or in the alternative, seek an order staying enforcement of the judgement pending appeal.

In deciding whether to set aside the judgement, the court had to consider (1) whether Ms Yin has a substantial ground of defence, (2) whether her failure to take any steps earlier is reasonably explained, and (3) whether Tempest will suffer irreparable harm if the judgement is set aside.

The court was satisfied that Ms Yin had a substantial ground of defence, for the following reasons:

- Contrary to the previous judgement, there was no suggestion in the cases that considered the "deemed assignment" clause (or its equivalent), or in the wording of the clause itself, that the "deemed assignment" would be an assignment to the new shareholders. Rather, it could be argued that the change of shareholders is itself deemed to be an assignment which brings the landlord's consent requirements into operation. The purpose of deeming an assignment under the lease is to engage the consent requirements to enable the landlord to take steps to protect its own interests.
- There is a difference between a deliberate assignment and a deemed assignment triggered by a change in shareholders or effective management or control of the tenant company. A deliberate assignment requires a transfer from one entity to another. In the case of a deemed assignment, Ms Yin may be able to argue that when Shineton amended its shareholdings, the lease was effectively transferred between Shineton under its original shareholder and director structure, to Shineton under a new structure. It was open for her to argue that it was not an assignment to her as a shareholder.

On the facts, the court was also satisfied that Ms Yin made out the other grounds, so that the judgment was set aside.

For parties who are still on leases drafted using the previous edition of the ADLS lease, this case demonstrates that it is arguable whether a "deemed assignment" under the lease constitutes an automatic assignment of the lease to the new shareholders of the tenant company. Rather, it could be argued that the effect of the "deemed assignment" is solely to trigger the landlord's consent requirements, and does not require a transfer from one entity to another.

The position is clearer under the current edition of the ADLS lease, which was released in 2012. This edition does not say that any change in the ownership of a non-publicly listed tenant company that results in a change in the company's effective management or control is a "deemed assignment". Instead, it simply states that such a change will require the landlord's written consent, which shall not be unreasonably withheld or delayed.

PROJECTS

Validity of payment claims - "technical quibbles" or not?

Nicholls Group Projects Ltd v Plan Design Build Homes Ltd [2022] NZHC 56

Key Takeaways:

Strict timeframes are in place under the Construction Contracts Act 2002 (**CCA**) for a principal to dispute a payment claim issued by a contractor. If the principal does not issue a payment schedule to dispute a valid payment claim within the specified time, then the principal must "pay the claimed amount now and argue later".

Payment claims must be compliant with the CCA to be valid. However, courts have found that "technical quibbles", such as incorrect due dates that did not prejudice the principal, should not be permitted to invalidate payment claims.

A possible breach of contract, or the existence of a genuine dispute between the parties, does not necessarily invalidate a payment claim. It is important for the principal to issue a payment schedule in time in these instances to avoid falling into the harsh "pay now and argue later" regime under the CCA.

In summary: Nicholls Group Projects Ltd (the **Principal**) engaged Plan Design Build Homes Ltd (the **Contractor**) for a building work contract in Auckland. The Contractor agreed to provide labour for the project.

In accordance with the CCA, the Contractor issued payment claims over the course of the project to the Principal for payment of its work.

Under the CCA, the Principal must either pay the claimed amount by the due date or, if it wishes to dispute the payment claim, issue a payment schedule to the Contractor within the specified time. If the Principal does not do either of these things, then the Contractor can recover any unpaid portion from the Principal as a debt due, and the Principal must simply "pay now, and argue later".

This case concerned four invoices issued by the Contractor. The Principal did not issue any payment schedules to those claims within the prescribed time. The Contractor thus served a statutory demand on the Principal seeking payment of those sums. The Principal applied to set aside the statutory demand, on the basis that the Contractor's payment claims were invalid.

Under the CCA, a valid payment claim must be (1) in writing, (2) contain sufficient details to identify the construction contract to which the payment relates, (3) identify the construction work and the relevant period to which the payment relates, (4) state a claimed amount and the due date for payment, (5) indicate the manner in which the payee calculated the claimed amount, and (6) state that it is made under the CCA.

The court dismissed the Principal's application and held that the Contractor's payment claims were valid, for the following reasons:

• Technical quibbles and trifling errors should not be permitted to invalidate a payment claim and frustrate the purpose of the CCA.

The Principal argued that some invoices did not specify the period to which the payment relates, pointing to double-charging by the Contractor and charging for a public holiday on which no work was done. The Contractor explained some invoices incorrectly recorded the days worked as being in April when they in fact occurred in May. Once that correction was made, it was clear there was no double-charging and no charge was imposed on the public holiday.

The court said this was a "trifling error" that should have been obvious to the Principal when it received the invoice, from the invoice date and the days of the week recorded beside each entry.

The Principal also argued that due to delayed delivery of the payment claims, the due dates recorded on some invoices were incorrect, to the effect that the actual due date was four days later than the stated due date on those invoices.

The court similarly found that the incorrectly stated due dates were "minor errors in the category of a technical quibble". There was no evidence that the Principal was prejudiced by the errors. It should have been obvious to the Principal that the due dates were wrong because of the delayed delivery.

• Failure to identify builders' identities did not invalidate payment claims.

This issue was central to the dispute between the Principal and Contractor. The Principal said that it understood the Contractor will provide "qualified and experienced builders" as per the building work contract. It later became aware that some builders were inexperienced apprentices.

The Contractor claimed the contract did not require the builders to be "qualified". The Contractor maintained that it complied with the building work contract by providing five "builders".

The payment claims did not specify the identity of the builders – they did however state the number of builders on site and the hours that each builder has worked, multiplied by the rate in the contract, to arrive at the claimed amount.

The Principal said that because the central dispute was about the level of the builders' experience, it was incumbent on the Contractor to provide the builders' names to enable the Principal to understand the payment claims, recalculate the charges and serve a payment schedule.

The Principal contended that the absence of the builders' identities on the payment claims was a breach of the CCA, in that they did not "indicate the manner in which the payee has calculated the claimed amount".

The court rejected the Principal's submissions. It found that, among other things, the payment claims clearly indicated how the Contractor calculated the claimed amount. While setting out the builders' identities would have enabled the Principal to make more precise calculations, at the relevant time the Principal had sufficient information to serve a payment schedule in time to either dispute the payment claims in their entirety, or indicate the amount that it propose to pay based on the number of builders it considered to be experienced based on its on-site observations.

• Number of labour hours worked and rate for each builder where the contract was for labour only was a sufficient description of the work undertaken.

The Principal complained that the payment claims did not contain a description of the work undertaken, in breach of the CCA. The court rejected this submission.

The court noted the contract between the parties is for the Contractor to undertake "building work", which is defined in the contract as being labour only for the items detailed in a specific email from the Contractor's representative. In that email, the Contractor's representative outlined the supply of labour only with five builders at the agreed rate.

The court considered that stating the number of labour hours worked and the rate for each builder in the payment claim was sufficient in this case to comply with the CCA.

Stating the incorrect payment period (in possible breach of the building work contract) on the
payment claim did not invalidate it, but it was for the Principal to raise this in a payment schedule
within the specified time.

The Principal complained that one of the invoices was issued for a five week period in breach of the building work contract, which the Principal claimed required weekly invoicing.

The court found, on the wording of the contract, that it is arguable that the contract created an *expectation* rather than a *requirement* on weekly invoicing.

Even if it did require weekly invoicing, the issuance of an invoice for a longer period amounts to a breach of the contract, rather than the requirements for valid payment claims in the CCA. The appropriate course for the Principal was to raise this possible breach of the contract through a payment schedule in response to the payment claim. This is the purpose of a payment schedule.

Bell Gully specialises in a range of real estate and projects transactions, including complex and largescale sales and purchases and developments. Please contact one of our real estate or construction lawyers if you have an issue that requires attention — we would be happy to assist.



REGULATORY UPDATES

***** REAL ESTATE

Consultation opens on regulation of residential property managers

The government has unveiled plans to regulate residential property managers and residential property management organizations. A discussion document outlining the proposals and regulatory options was released this month, with submissions closing on 19 April. Property owners who self-manage their residential rental properties are not within the scope of the proposal.

Some key aspects outlined in the proposals are:

• Registration and licensing

To be employed or trade as a residential property manager, individuals would need to hold a licence issued by a regulatory authority that determines the licensee meets specified licensing requirements.

While residential property management organisations would not need to hold a licence to trade and employ property managers, they would be subject to industry standards and the complaints and disciplinary arrangements established under the legislation.

The regulator would maintain a public register of residential property management organisations and licensed property managers. Licences would be renewed annually.

Professional entry requirements

To obtain a residential property management licence, applicants will need to be at least 18 years old, meet a "fit and proper person" test, and provide evidence that they meet the minimum training and education requirements.

These requirements are expected to include satisfactory completion of a training course, which could cover:

- o legislative and regulatory requirements related to residential property management;
- o knowledge about maintaining a property;
- o managing relationships with tenants;
- o conduct expected from a property manager; and
- o financial and trust account management.

Industry practice standards

Residential property managers and residential property management organisations will need to comply with professional and industry practice standards. These standards will include:

- o continuing professional development (CPD) requirements of about 20 hours annually;
- operating in accordance with a Code of Conduct;
- o holding professional indemnity and public liability insurance;
- o operating trust accounts, and ensuring they are subject to independent annual review; and
- ensuring accounts are available for periodic audit as may be required by the regulator.

• Complaints and disciplinary

The regulatory system will incorporate an independent complaints and disciplinary framework, modelled on the framework that applies to real estate agents.

The framework provides a process for the regulator to triage complaints. This involves determining whether a complaint involves a breach of the property management legislation or should be referred to another organisation. The regulator can also proactively identify, investigate, and initiate disciplinary proceedings in its own right.

Complaints covered by the legislation can be resolved through mediation, a Complaints Committee for cases that may involve 'unsatisfactory conduct', or a Disciplinary Tribunal for more serious cases that may involve 'misconduct'.

Either the Real Estate Agents Disciplinary Tribunal (**REA Disciplinary Tribunal**) or the Tenancy Tribunal could have their mandates extended to provide an independent disputes and disciplinary service. On balance, it is proposed to extend the mandate of the REA Disciplinary Tribunal to cover residential property management issues.

• Offences and penalties

A number of offences with penalties would be included to ensure compliance with regulatory requirements. General maximum penalties would be:

- o for an individual a fine not exceeding \$40,000;
- for a company a fine not exceeding \$100,000.

Regulatory management

The government propose a regulator independent of the property management industry. Two options are under consideration – either the Real Estate Authority's mandate will be extended, or the regulatory management functions will be administered by the Ministry of Business, Innovation and Employment.

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