PROJECTS AND REAL ESTATE NEWS

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WELCOME

to Issue No. 12 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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Projects and Real Estate News is a regular 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

Court considerations in granting relief against landlord refusal to renew lease

In summary: If a landlord refuses a tenant's request to renew their lease, in most cases[1] the tenant may apply to the Court for relief against that refusal (i.e. an order that the renewal is granted) under the Property Law Act 2007. The tenant must make its application to the Court within three months after the date of the landlord's refusal to renew the lease.

The matters that the Court may consider in deciding whether to grant relief are fairly broad. While each case will turn on its own facts, two recent cases provide a useful reminder of the principles that the court will typically consider in such applications:

- **Where a commercial landlord's refusal to renew is due to the tenant being in arrears in rent, the Court will typically grant relief if the arrears are paid.**

- **However, in exceptional cases relief may still be refused if there has been significant bad tenant conduct.** For example, where the tenant has committed ongoing breaches of the lease (beyond simple non-payment of rent), which involved "elements of nuisance, disturbance and damage caused to the landlord's adjacent land".[2]

- **The threshold for bad tenant behaviour can be high.** In *SGAH Investments Ltd v Mei Enterprises Ltd*,[3] the tenant engaged in combative behaviour to pressure the landlord into renewing the lease. This included deliberately withholding rent on the (wrongly held) belief that the tenant was entitled to set-off rent against a misrepresentation claim that the tenant had initiated against the landlord. The tenant also threatened to advise the local body of building defects in the premises, then served the landlord with a trespass notice when the landlord tried to access the premises with a builder to check the complaints. In addition, the tenant applied to liquidate the landlord when the landlord applied for possession of the premises. The landlord refused to renew the lease due to the rental default and other alleged breaches.

  By the time the tenant's application for relief against the landlord's refusal to renew was heard in the High Court, the tenant had paid the rent and cleared all arrears. The tenant had also dropped its application to liquidate the landlord. The Court granted relief to the tenant, noting that although the tenant's behaviour "had come close to the tipping point", the balance lied in the tenant's favour when the breach was economic and had been remedied, and taking into account the parties' previously uneventful relationship (which showed that the tenant was capable of behaving sensibly).

  When the landlord appealed this decision, the Court of Appeal upheld the High Court judgement and noted the material breach in this case – non-payment of rent – while deliberate and extended, was singular and premised upon a misconceived right and had been rectified. The Court distinguished this from other cases of continuous and unremedied tenant breaches, where relief against non-renewal was declined.

- **The Court is likely to grant relief if the tenant's failure to renew the lease within the required time was inadvertent.**

[1] See section 261(1) of the Property Law Act 2007 for the requirements before an application for relief can be made.
[2] *Sibra Co Ltd v Kanters* (2008) 9 NZCPR 356 (HC)
[3] [2022] NZCA 103

In *Kuoch v Ganda (as trustees of Morar Family Trust),*[4] the tenant overlooked the notice period and did not renew the lease prior to its expiry. Despite this, the landlord did not raise the issue of renewal until disagreements arose, more than a year later, about an unrelated matter. The tenant quickly purported to renew the lease once the landlord raised the matter, but the landlord declined to renew since the tenant's renewal notice was out of time. The tenant applied to the Court for relief against the non-renewal.

During the Court hearing, it emerged that after the landlord declined to renew the lease, the landlord subsequently offered a new lease to the tenant on materially more onerous terms than the existing lease.

Against this background, the Court observed that it was clear that the landlord's opposition to the tenant's application for relief was "fundamentally an opportunistic attempt" to take advantage of the tenant's inadvertent failure to renew the lease in time, in order to strengthen the landlord's own position. The Court noted therefore it had "no hesitation in concluding the [tenant's] application should be granted".

Comments

The Property Law Act 2007 confers a wide jurisdiction to the Court to grant relief to the tenant (by way of ordering the renewal of a lease) in circumstances where the landlord has refused to renew a lease, including where the tenant is in breach of the lease or has not given notice to renew the lease in the specified time or manner. The Court will typically undertake a balancing exercise, in order to seek to avoid a disproportionate outcome for the tenant. The Court will take into account the nature of the tenant's breach (and whether it has been remedied), and whether any failure to give the required notice to renew was inadvertent. However, tenants should be mindful that they only have three months after the date on which the landlord gives notice of rejection of the renewal to apply to the Court for relief, so it is important that tenants seek legal advice as soon as possible after receiving any such notice.

REGULATORY UPDATES

✱ REAL ESTATE

Cartel prohibition extended to land covenants

The Commerce Amendment Act 2022 (the **Act**) was passed into law on 5 April 2022. Read Bell Gully's publication on the key changes here.

The Act extends the cartel prohibition in the Commerce Act 1986 to land covenants, so that no person may give, or require the giving of, a covenant that contains a 'cartel provision'. Previously, this cartel prohibition only applied to contracts, arrangements or understandings arrived at by the parties and did not expressly cover land covenants.

A 'cartel provision' is defined as a provision that has the purpose, effect, or likely effect, of price fixing (agreement between competitors to fix a price for goods or services or not to compete on price), restricting output (agreement between competitors to limit the acquisition or supply of goods or services), or market allocating (agreement between competitors not to sell to or buy from certain suppliers or customers, or in particular areas). These provisions are further defined in the Act but, in broad terms, they cover conduct between two or more competitors who agree not to compete with each other.

[4] [2022] NZHC 452

It is important to note that a key element of a cartel provision is that the parties to the relevant contract, arrangement or understanding, and now covenant, must be "in competition" in respect of the relevant good or service to which the restriction relates. Accordingly, it is not expected that many covenants would create or implement a cartel provision (and this was recognised by MBIE when consulting on the amendments). Rather, this is seen as "closing a loophole".

Parties bound by existing covenants will need to cease giving effect to any cartel provisions in those covenants, or have them modified or extinguished under the Property Law Act 2007, by the end of the 12-month transitional period in the Act.

It should also be noted that the Commerce Act 1986 already prohibits covenants which have the purpose, effect or likely effect of substantially lessening competition in a market. With the extension of the cartel prohibition to covenants, it becomes more important for parties to obtain specialist advice if seeking to give, require the giving of, or enforce a covenant against a competitor bound by it.

These changes differ from those contemplated in response to the Commerce Commission's study on the retail grocery sector. In the retail grocery sector study, the use of restrictive land covenants and exclusivity lease covenants was noted to create a significant barrier preventing competitors from accessing sites for development of retail grocery stores. The Commission's recommendation to prohibit these covenants would apply to all such covenants, not just those between competitors. Click here to read Projects and Real Estate News' coverage of the Commission's property-related recommendations from the retail grocery sector study.

Build-to-rent developments under the overseas investment rules

The Overseas Investment Office (**OIO**) has published guidance on their approach to considering applications for overseas investments in build-to-rent developments. Build-to-rent is a term for medium to large-scale residential housing developments built to provide long-term rental accommodation to tenants. It generally encompasses both the development and professional management of the dwellings by institutional investors and developers. The OIO has observed that such developments are popular overseas and are becoming increasingly attractive to investors in New Zealand.[5]

The Overseas Investment Act 2005 (the **Act**) specifically provides for build-to-rent developments of 20 or more dwellings, where the developer is 'in the business of' providing new residential dwellings through shared equity arrangements, rent-to-buy arrangements, or rental arrangements. The term 'in the business of' in this context does not require the applicant to already have an established build-to-rent business – the OIO will consider what overt steps the applicant has taken to commence providing residential dwellings by one or more of the specified arrangements.

The consent pathways for establishing a **new** build-to-rent development depend on the type of land being acquired, as noted in the following table prepared by the OIO:

Land type	Pathways	Criteria
Residential land that isn't sensitive for any other reason	Increased housing pathway Significant business assets pathway (if >$100m)	Increase dwellings by at least one, for a total of at least twenty Investor test
Land that is sensitive for another reason (whether it includes residential land or not)	Benefit to New Zealand pathway Significant business assets pathway (if >$100m)	Benefit to New Zealand test Investor test National interest test if applicable (refer to s 20A and 20B)
Non-sensitive land	Significant business assets pathway (if >$100m)	Investor test

[5] Overseas Investment Office newsletter *Panui:* February 2022 (https://mailchi.mp/linz/panui-feb-2022)

If an overseas person wishes to acquire **existing** build-to-rent developments on sensitive land (whether the land is sensitive on the basis that it is residential, or for any other reason), the consent pathway will generally be the 'benefit to New Zealand' pathway (where the investor must demonstrate that their investment with deliver benefits against seven broad 'benefit factors'). The 'increased housing' pathway may also be available if the developer intends to expand the existing development by at least 20 dwellings and the land being acquired is sensitive on the sole basis that it is residential land.

A key risk here is that overseas persons may be discouraged from seeking to acquire existing build-to-rent developments due to the requirement to obtain consent under the Act via the 'benefit to New Zealand' pathway. This has the potential for build-to-rent developments being 'illiquid assets' for the developers of them (i.e. the lack of a market to sell the completed developments to in future), and therefore may be prohibitive in terms of build-to-rent developments getting off the ground. The government has therefore directed the OIO to consider the 'reduced risk of illiquid assets' factor as a potential benefit to New Zealand which may be considered in the case of applications for consent under the Act to purchase build-to-rent developments via the 'benefit to New Zealand' pathway.

Read the OIO guidance on build-to-rent developments here.

Changes to Healthy Homes Standards finalised

Amendments to some of the Healthy Homes Standards for residential rental properties have been finalised through the Residential Tenancies (Healthy Homes Standards) Amendment Regulations 2022, and will become law on 12 May 2022.

The Healthy Homes Standards were introduced in 2019 to improve the quality of residential rental properties. Minimum standards for heating, insulation, ventilation, moisture ingress and drainage, and draught stopping were introduced for residential rentals. The rollout was phased over five years, although most of the requirements have already come into force.

The changes coming into effect on 12 May 2022 mainly relate to the heating standard. In particular, the formula set out in the heating standard will be updated to generally allow smaller heaters to be installed for properties built to the 2008 building code requirements for insulation and glazing, and for apartments in a building of at least three storeys and containing six units or more. Landlords with these properties will have until 12 February 2023 to comply with the revised heating standard.

Developers will also be able to use new and different heating technologies (than were previously permitted), in order to comply with the heating standard. This requires a specialist to estimate the housing needs according to specific criteria, including that the heating system must be able to heat the living room to 18ºC on the coldest day of the year in the particular region. It is recognised that in many new housing developments, a heating specialist will already be engaged for code compliance certificate and/or design purposes.

The trigger point to top up or replace existing heaters installed before 1 July 2019 has also been revised, and amendments to the ventilation standard have been enacted which will support the use of continuous mechanical ventilation in certain circumstances.

See the summary of the changes published by the Ministry of Housing and Development here, and its table setting out additional technical information to changes to the various standards here.

OTHER NEWS

✱ REAL ESTATE

Fast-track legislation sees more projects approved

The government has approved three more projects – NZ Windfarm's Te Rere Hau windfarm repowering project near Palmerston North, an approximately 58-lot residential development project in the Auckland suburb of St Heliers, and a medium-density housing development in the Lake Hayes area in Queenstown – under the fast-track process for resource consents in the COVID-19 Recovery Fast-track Consenting Act 2020. This Act provides alternative pathways for fast-tracking decisions on resource consents, but does not replace or circumvent the necessary environmental tests under the Resource Management Act 1991. According to Minister for the Environment David Parker, the fast-track process have saved applicants 15 months per project, on average. The fast-track legislation will be repealed by 9 July 2023. Other major reforms to New Zealand's resource management legal framework are underway, with a suite of new laws currently being designed to replace the Resource Management Act 1991.

Read the government's media release here.

■ PROJECTS

Emerging innovative approaches to fundamental building materials

In one of its recent features, BRANZ looked at how high quality research, designs and a new mindset focused on designing for reuse/recycling are all helping New Zealand manufacturers, architects and engineers take a different approach to the manufacture and use of three of the most fundamental building materials – concrete, steel and timber.

Concrete

Concrete currently has a large carbon footprint, despite its substantial benefits in strength and durability. The New Zealand concrete industry is working hard to reduce this, including by the use of alternative kiln fuels and improving manufacturing efficiency. This has seen emissions from Portland cement production/consumption reduced by 15% between 2005 and 2018, despite concrete production increasing by 13% during this period. The industry is targeting another 15% drop by 2030, where a real difference is expected from replacing some Portland cement in concrete mixes with low-carbon supplementary cementitious materials (**SCMs**). The domestic supply of natural SCMs is currently being commercialised through a programme of mix design research. Once complete, this will enable strong market demand for low-carbon concrete to be met.

Steel

Exciting prospects are being explored at Victoria University of Wellington to replace coal with hydrogen as the fuel behind steelmaking. The key benefit is that this process releases water vapour, instead of carbon dioxide, which will help immensely in reducing greenhouse gas emissions from the steel industry. The research team has received NZ$6.5 million from the government's Endeavour Fund to look at scaling up hydrogen steelmaking in New Zealand.

Timber

Timber, including engineered timber, is a very carbon-friendly building material due to trees absorbing carbon dioxide from the atmosphere as they grow. Where timber is used on a building, it typically reduces its carbon footprint. The limits and fire risks in timber use are slowly changing, with engineered timber behind some big advances. The weight of timber is only 1/5th that of concrete, but engineered timber has similar compressive strength as concrete. In Australia, an industry-led research initiative co-funded by the

Australian Government is looking into a low-carbon suspended floor system capable of spanning 8 metres or more. The idea is to enable large-scale application in multi-storey mass timber projects.

Tools to assess environmental impact of materials

In New Zealand, government agencies such as Kainga Ora now have specific requirements around greenhouse gas emissions and environmental impacts in their work with construction companies. Fortunately, the number of resources available to help engineers, architects and designers to select materials in this regard are also growing. Environmental product declarations (**EPDs**) are independently verified public statements of the environmental performance of the products. Not all manufacturers publish EPDs, but the number that do is growing. BRANZ has also recently released online carbon tools.

Commerce Commission signals next steps in residential building supplies study

The Commerce Commission has released an Additional Paper providing further details on its approach to its current market study of the residential building supplies sector. The study focuses on whether competition in the sector is working well and, if not, what can be done to improve it. Competition can affect the range and quality of available building materials, and directly contribute to the cost of house construction in New Zealand.

This study follows the Commission's report on the retail grocery sector, completed last month, where a number of recommendations were made to improve competition in the retail grocery sector. Click here to read Projects and Real Estate News' coverage of the Commission's property-related recommendations from the retail grocery sector study.

For the Commission's current study on the residential building supplies sector, three key building supplies – concrete, plasterboard, and structural timber – have been selected for closer examination.

The study will also seek to identify the conditions of entry and expansion for key building supplies, including whether suppliers are facing challenges in expanding or trying to bring in new and innovative or "green" products/approaches to the market.

Between April and July 2022, the Commission will continue to engage directly with stakeholders to gather information. In addition, submissions specifically related to regulatory barriers affecting the supply of key building supplies are sought by mid-May, online surveys will be undertaken with key stakeholders, and a hui will be hosted to seek Māori perspectives in the study's focus areas. The Commission's draft report is due to be released in July 2022, with the final report expected in December 2022.

Development of new occupational regulatory regime for engineers

New Zealand currently has no mandatory regulatory regime for engineers. The Chartered Professional Engineer (CPEng) credential was established as a voluntary occupational regulatory regime, administered by Engineering New Zealand (the largest engineering professional body in New Zealand), with oversight from the Chartered Professional Engineers Council. Engineering New Zealand also administers a self-regulatory regime for its members. However, since these schemes are voluntary, engineers who choose not to belong to the regime have minimal checks on their professionalism and few means to hold them to account should standards slip.

In 2021, the Ministry of Business, Innovation and Employment (**MBIE**) consulted on a proposal to reform the occupational regulation of engineers. Based on feedback received on the proposals, in March 2022 the government announced its intention to develop a new regime that will replace the voluntary nature of the current regime.

The new regime will require all persons providing professional engineering services to be registered. The new registration scheme will ensure all engineers are subject to minimum professional standards and requirements, and introduce a disciplinary process for work or behaviour that falls short of those

standards. The requirement to be registered will apply across all engineering disciplines, but there will be the power to exclude some engineers to avoid duplication with other regulatory regimes or if their work is routine in nature.

A new licensing scheme will also be established to regulate who can carry out or supervise engineering work in specified high risk fields, such as structural engineering. A new regulator will be set up to oversee the registration and licensing schemes and investigate complaints.

The changes will take time to effect. The next steps are for a bill to be drafted and introduced to Parliament, and it is anticipated that it will take up to six months from the passage of the bill before the regime is fully operational.

For further information, please see the MBIE page and associated documents here.

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 real estate or construction law that requires attention, we would be happy to assist.

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