PROJECTS AND REAL ESTATE NEWS

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WELCOME

to Issue No. 14 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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Need more information?
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

Due diligence clause in the spotlight in Supreme Court decision

In summary: A due diligence clause was in the spotlight in the recent Supreme Court decision *Melco Property Holdings (NZ) 2012 Limited v Hall.*[1] The decision highlighted that a party's right to avoid a contract (based on non-satisfaction of a condition) might be defeated if that party's actions amounted to a default that 'materially affected' the other party's prospect of satisfying the condition. When both parties have contributed to some extent in the non-satisfaction of a condition, the Supreme Court clarified that 'material' in this context must be construed as meaning 'substantial and operating'.

Background

In this case, Mr Hall (**Vendor**) signed a sale and purchase agreement to sell a commercial property to Melco Property Holdings (NZ) 2012 Limited (**Purchaser**). The agreement contained a due diligence clause, under which the Purchaser had to be satisfied that the property was suitable for its requirements.

For various reasons, which were in dispute between the parties, the Purchaser did not get access to the property to obtain a seismic report as part of its due diligence. A site visit was agreed on the day before the due diligence condition was due to be satisfied, but the Vendor cancelled the visit at the last minute.

The Purchaser's solicitor sought an extension to the due diligence condition on the day that it was due to be satisfied. The Vendor asked his solicitor not to respond and to cancel the agreement as soon as he was able to do so. When the Purchaser did not satisfy nor waive the due diligence condition on the due date, the Vendor purported to cancel the agreement on the basis of non-satisfaction of the condition.

The Purchaser did not accept cancellation. It argued that the Vendor's actions put the Vendor in default of the agreement, so he had no right to cancel it. The Purchaser lodged a caveat against the property and later applied to the High Court to sustain its caveat. The central issue was whether the Purchaser could show a reasonably arguable case that the Vendor did not validly terminate the agreement.

The Purchaser failed in both the High Court and the Court of Appeal. Both Courts agreed that it was arguable that there was an implied term for the Vendor to provide the Purchaser with reasonable access to complete its due diligence. Whether the Vendor met this obligation was an issue for trial. But both Courts considered the Purchaser must show a reasonably arguable case that, if the Vendor had given access, the Purchaser would have either satisfied or waived the due diligence condition in time. Without evidence on what would likely have happened if the Vendor had granted access on the relevant day, the Purchaser's case was speculative at best.

Supreme Court decision

The Supreme Court overturned the decisions of the High Court and the Court of Appeal. The Supreme Court agreed that it was arguable that, in certain circumstances, the Vendor's failure to facilitate access might defeat the Vendor's right to avoid the contract.

At issue was the link required between the Vendor's actions and the Purchaser's ability to satisfy or waive the condition. The Purchaser argued it was sufficient to show the defaulting party's actions substantially impeded the other party from satisfying the condition. The Vendor maintained that the Purchaser must show that the alleged default formed a causal link leading directly to the Purchaser's failure to satisfy or waive the condition.

[1] [2022] NZSC 60

The Supreme Court concluded that the necessary link should require evidence that the default "materially affected the prospect of satisfaction of the condition". When both parties have contributed to some extent in the non-satisfaction of a condition, 'material' must be construed as meaning 'substantial and operating'.

As this decision concerned an application to sustain a caveat, the Purchaser only had to show at this stage that it is reasonably arguable that it had a caveatable interest. On the evidence available, the Supreme Court considered it was reasonably arguable that the Vendor's failure to allow access had the necessary material effect on the Purchaser's prospect of satisfying the due diligence condition. On that basis, the Court considered the matter should proceed to trial, and ordered the Purchaser's caveat not to lapse.

Key takeaway
If a party wishes to avoid a contract based on non-satisfaction of a condition, it should be mindful that it has not done anything that had a detrimental and material effect on the other party's prospect of satisfying the condition. Otherwise, a party could lose its right to avoid the contract based on non-satisfaction of the condition.

REGULATORY UPDATES

✱ REAL ESTATE

Possible change of rules ahead for overseas investment in forestry

Overseas investment in certain forestry interests may be subject to more stringent rules in the future with the introduction of the Overseas Investment (Forestry) Amendment Bill (**Bill**) to Parliament.

Currently, overseas investors wishing to purchase existing forestry land, or sensitive land on which they wish to plant a forest, can apply for consent to do so under a streamlined 'special forestry test' under the Overseas Investment Act 2005 (**Act**).

The Bill proposes to amend the Act so that overseas investments in sensitive land for conversion to production forestry (**forestry conversions**) will be considered under the more stringent 'benefits to New Zealand test' instead. This test is more complex than the special forestry test, and involves assessing a potential investment against seven broad factors in order to determine if the investment is likely to benefit New Zealand. If the Bill is enacted as currently proposed, the special forestry test will remain available only for overseas investments in sensitive land that is already being used, and will continue to be used, for forestry activities.

In addition, a higher threshold for approvals also applies if the overseas investment involves the acquisition of sensitive land that is or includes farm land that exceeds 5 hectares. The Bill makes it clear that the higher threshold will not apply to acquisitions of farm land if it will be used for forestry conversions, provided some conditions are met.

Other changes proposed in the Bill include:

- the repeal of the "modified benefit to New Zealand test" for forestry activities, which is currently available for forestry investments that cannot be considered under the special forestry test;
- a widening of the options available for using forestry land for residential purposes;
- amendments to the 'forestry activities' definition, to confirm that the activities must relate to trees to be harvested to provide wood (and not, for example, in respect of a permanent carbon forest); and
- currently, overseas investors do not need consent under the Act if they acquire less than 1,000 hectares of forestry rights annually. The Bill provides that forestry rights which have been acquired pursuant to OIO consents, are excluded when calculating this annual cap.

The Bill proposes that the old rules will continue to apply to any applications, transactions and standing consents that were (as the case may be) lodged, entered into or granted before the Bill comes into effect.

The Bill has passed the first reading, and has been referred to the Finance and Expenditure Committee. The Select Committee report is due on 1 August 2022.

Bill introduced to progress Three Waters reforms

The government's Three Waters reforms are progressing with the introduction of the Water Services Entities Bill (**Bill**) to Parliament. Three Waters comprise an extensive programme to reform the drinking water, wastewater and stormwater services that are currently provided by local authorities.

The Bill establishes four publicly-owned water services entities (**WSEs**). Each WSE will be a body corporate, and will be co-owned in shares by territorial authorities in a service area. For example, the Northern WSE's service area will include the Auckland Council, Far North District Council, Kaipara District Council and Whangarei District Council. The shares will be allocated and reallocated based on the population of the territorial authority's district on specific dates.

The function of a WSE will be to provide safe, reliable, and efficient drinking water, wastewater, and stormwater services in its service area. The Bill sets out the objectives of a WSE, which include delivering water services and related infrastructure in an efficient and financially sustainable manner.

There will be a 2-tier governance arrangement for WSEs: (1) a regional representative group, made up of an equal number of territorial authority representatives and mana whenua representatives from the WSE's service area, and (2) an independent board that provides a corporate governance function. The regional representative group is to provide general oversight, and the appointment and removal of board members for the WSE. The Bill outlines further detail on this governance arrangement, including matters that a WSE's constitution must cover, and the board's accountability and reporting obligations.

The Bill also contains provisions addressing the Treaty of Waitangi and Treaty settlements. Amongst other matters, the Bill provides that where there is inconsistency between the legislation and a Treaty settlement obligation, the Treaty settlement obligation prevails.

Other issues that the Bill addresses include safeguards against privatisation or loss of control of water services and significant infrastructure, and provisions designed to ensure the independence (including financial independence) of a WSE.

The Bill is only one component of the extensive Three Waters reforms package. The government has indicated that further legislation will be introduced to provide for additional matters as part of the reforms. This includes legislation detailing arrangements to transfer assets and liabilities from the local authorities to the new WSEs, and the establishment of regulatory regimes relating to the new water service system.

Bell Gully is monitoring the reforms closely. Read our previous update on this topic here.

■ PROJECTS

New regulations to support offsite manufacturing construction

New regulations were made to support the implementation of the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Act 2021. This Amendment Act will come into force on 7 September 2022 and, amongst other things, introduce a new modular component manufacturer scheme and improvements to New Zealand's existing building product certification scheme.

The new modular component manufacturer scheme aims to increase the use of offsite manufacturing and prefabrication approaches. Under the scheme, manufacturers can become certified to produce modular building components. Certified manufacturers will benefit from a streamlined consenting pathway and fewer inspection requirements.

"Offsite manufacturing construction methods can deliver precise, repeatable and consistent construction and lead to higher quality products. This new scheme has the potential to lift productivity, improve quality and contribute to better environmental outcomes," says Amy Moorhead, Manager Building Policy at the Ministry of Business, Innovation and Employment (**MBIE**). MBIE will have a range of new responsibilities to oversee the new scheme.

Read MBIE's full media release here.

OTHER NEWS

PROJECTS

Infrastructure Commission examines opportunities to leverage energy resources

The New Zealand Infrastructure Commission/Te Waihanga (**Te Waihanga**) has released a technical report which examined what would be required to develop New Zealand's abundant energy resources to decarbonise our electricity system and unlock new export opportunities.

Enabling net-zero carbon emissions is one of the key strategic objectives outlined in Te Waihanga's 30-year Infrastructure Strategy, which was unveiled last month. Read our previous update summarising the key objectives and recommendations in the Infrastructure Strategy here.

"We have abundant untapped wind, solar, hydro and geothermal resources that, combined, are treble the amount identified by the Climate Change Commission for achieving net-zero carbon emissions by 2050. However, the issue is whether they can be developed at prices investors are willing to pay", says Te Waihanga chief executive, Ross Copland.

The report reveals that New Zealand has wind speeds that are on average faster than most other places around the globe, meaning that our wind farms can produce more energy per unit than the global average. Other low-emission energy resources are also abundant in New Zealand. While most of the best sites for hydro generation are already being used, there are opportunities to increase geothermal electricity generation and develop large-scale solar farms.

However, the report identifies that some major barriers must first be addressed to fully leverage the opportunities that the country's energy resources can provide. In particular, the report suggests that "our resource management system needs to keep up with changing technology. We need to be able to consent and build larger-scale wind farms and use new turbine technology to generate electricity at a lower cost. We also need a sound regulatory approach for offshore wind farms, which could become cheaper than onshore wind farms in coming decades, if current trends continue."

Read the full report – Leveraging our energy resources to reduce global emissions and increase our living standards – here.

Read Te Waihanga's full media release 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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