PROJECTS AND REAL ESTATE NEWS

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WELCOME

to Issue No. 4 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.

For more information, please contact Sonia Ng, or your usual Bell Gully contact, or visit our website.

CASE NOTES

✱ REAL ESTATE

Does a real estate agent (as the vendor's agent) owe a duty of care to the purchaser?
Johnston v Colliers International NZ Ltd [2019] NZHC 2711

In summary: This was a case where the High Court held it is possible for a real estate agent to owe a duty of care to the purchaser of a property, at least specifically in relation to negligent misstatements. That is an interesting aspect, given real estate agents are generally engaged and paid by vendors and act as the vendor's agent in property transactions.

In this case, the purchaser of a property sued the real estate agent involved in facilitating the transaction. The agent was the vendor's agent. The purchaser contended that the agent failed to give them correct and adequate GST advice about the implications of the purchase, and failed to advise them to seek legal advice about GST before finalising the offer.

The Court ultimately did not rule definitively on whether the agent was liable to the purchaser, given this was a summary judgement application where the agent sought the Court's order to strike out the purchaser's claim. At that stage, the Court only had to decide whether the purchaser had a reasonably arguable cause of action in negligence, and if not, whether the purchaser's other causes of action can succeed. If the Court is satisfied that none of the purchaser's causes of action can succeed, then it must strike out the purchaser's claim.

Relevant facts: The agent had prepared the purchaser's offers on the subject properties using pre-prepared template sale and purchase agreements. The template was pre-formatted to indicate that the vendor was GST-registered, and that the purchase price would be *"plus GST, if any"*. Schedule 2 of the agreement, which must be completed if the vendor indicates they are GST-registered, had not been completed. The purchaser did not seek legal advice prior to signing the agreement.

The purchaser alleged that the agent knew GST was payable, as he knew that the vendor was GST-registered and that the transaction did not qualify for zero-rating of GST. In those circumstances, the purchaser claimed the agent was negligent in failing to delete the "*if any*" caveat when indicating the purchase price was *"plus GST, if any"* on the agreement. The effect was the purchaser was under the mistaken impression that GST might not be payable.

The Court's analysis: Whilst acknowledging that it was "extraordinary" that the purchaser did not obtain legal advice before signing the agreement, the Court refused to strike out the purchaser's claim. It considered that on the facts and legal principles applicable, it is possible to hold that the parties were in a sufficiently proximate relationship, where the agent had assumed (or could be deemed to assume) responsibility for the statement about GST in circumstances where he knows or ought to know that his words are such to engender a reasonable reliance by the purchaser. These are the key considerations to establish a claim of negligent misstatement.

The Court found it was possible to argue that the agent had assumed responsibility to ensure the GST description was correct in relation to the purchase price, in circumstances where he knew the purchaser had not received independent legal advice. In those circumstances, it was also both foreseeable and reasonable that the purchaser would rely on the agent's representations, the Court held.

The final ruling on whether the agent in fact owes a duty of care to the purchaser for the alleged negligent misstatement in this case remains to be seen. The issue will need to be definitively decided at trial. It has been argued for the agent that it is not fair or reasonable to bestow an obligation or impute knowledge of GST liability on an agent, especially since in this case, the vendor's solicitors themselves were unaware until just before settlement that GST was payable.

Practical points: For now, it is noteworthy to point out:

- Although real estate agents are usually appointed and paid by the vendor and act as the vendor's agent, it is possible that they could be considered to owe a duty of care to a purchaser in some circumstances. Agents could also be disciplined by the Real Estate Authority for failing to exercise the requisite skill and standard required of agents, although they are not usually ordered to pay compensation to affected parties unless the breach is of a more serious nature;

- It is important that vendors and purchasers obtain legal advice prior to entering any sale and purchase agreements for a property. The purchaser in this case had not done this and was met with expensive consequences in relation to GST liability, and will have to go through technical legal hurdles in court proceedings if they wish to prove the agent was vicariously liable for the GST liability;

- In the standard ADLS/REINZ sale and purchase agreement form that is widely used in property transactions, "*plus GST, if any*" clauses are commonly used to denote whether the purchase price is inclusive or exclusive of GST, if any GST is payable. It does not usually act as a confirmation of whether any GST in fact is payable. That is a question best addressed to a lawyer experienced in the area or a tax specialist.

Bell Gully advises regularly on all aspects of real estate law, including title reviews and due diligence on property purchases and tax issues. Please contact one of our real estate lawyers if you have an issue that requires attention – we would be happy to assist.

Interim injunction granted for ignoring right of way terms
A C Rhodes Ltd v Bush Inn Shopping Centre Ltd [2019] NZHC 877

In summary: Two neighbours that own adjoining commercial properties in Christchurch were embroiled in a dispute where the plaintiff, A, contended that their neighbour, B, committed the tort of nuisance by disturbing rights of way that were granted to A by way of two easements registered over the title.

For over 22 years, the easements have given A and A's tenants and invitees the right to use part of B's land for uninterrupted vehicle and pedestrian access for the benefit of A and the significant businesses operating from A's land. There were four areas of B's land which were the subject of the rights of way.

Relevantly, the easements entitled B to relocate the rights of way, but B must "provide similar access rights" to A.

In 2017, B decided to demolish an existing building on site to build a larger building in its place. However, B did not put in place similar rights of way for A when construction fences, installed around the building site, effectively closed off at least two of the four rights of way granted to A.

The Court was critical of B's conduct, especially due to the evidence which appeared to indicate B had deliberately chosen to commence its building project without putting in place similar access arrangements for A and A's tenants. There were considerable negotiations between the parties over the access matters before construction took place. Nothing finally appeared to have been concluded or resolved. However, the evidence indicated that after some period of silence or inaction, B had in early 2019 simply fenced off the building site and shut down access for A and its tenants without any detailed reference to A.

The Court granted the interim injunction, ordering B to stop blocking A's rights of way until alternative replacement access is created. The Court suggested that where replacement alternative access for A is not possible then the parties may need to consider some other suitable arrangement, such as a compensation agreement.

Practical points: It is important to be aware of any easements and rights created over your property before undertaking any development works. A lack of understanding or disturbance of those rights can cause tense neighbourly relations, and commencing any development or construction works without reference to those terms can create undesirable consequences, as in this case where B's construction plans had to be suspended to address the access rights issue first.

PROJECTS

Failure to specify due date in payment claim invalidates demand for payment
Cromi Investments Ltd v CMP Construction Ltd [2019] NZHC 2142

In summary: The Construction Contracts Act 2002 (**the CCA**) established a strict payment regime between parties to a construction contract. To recover payments under a construction contract, the payee must make a payment claim and the payer must respond by means of a payment schedule within the prescribed time.

If the payer does not pay the claimed amount before the due date or provide a payment schedule within the specified time, the payee may recover the unpaid portion indicated in the payment claim as a debt, and no dispute between the parties can generally affect the payee's entitlement to be paid in this situation. In short, the payer must simply "pay up", and pursue any disputes later.

The CCA also prescribes the formal requirements for a payment claim. This case is an example where non-compliance, even for one aspect of a payment claim, can invalidate it and affect a payee's entitlement to recover the amount claimed from the payment claim.

Relevant facts: The principal in this case engaged the contractor for construction of a large Auckland development. The construction contract was in the New Zealand standard contract form NZS 3915:2005, as amended by special conditions.

The parties were engaged in a prolonged dispute over remedial works required at the development, and the release of the final tranche of retention monies held by the principal under the contract.

According to the principal, the contractor did not issue a valid payment claim, failed to attend to all the notified defects, and the cost to remedy the outstanding defects was (arguably) more than the amount of the retention monies. The contractor contended that its payment claim was valid and the principal failed to provide a payment schedule in response within the prescribed time under the CCA.

Against this backdrop, the contractor served the principal with a statutory demand under the Companies Act 1993 to recover the amount of the unpaid retention money deliverable on completion of the contract. The principal applied to the Court to set aside the statutory demand.

Legal principles: In considering whether to set aside the contractor's statutory demand, the Court noted:

- Under the strict payment regime under the CCA, if the contractor's payment claim was valid and the principal had failed to provide a payment schedule in time, then the principal must simply "pay up" and pursue any dispute later;

- If, as the principal contended, the contractor's payment claim was indeed invalid, then the Court must set aside the statutory demand if it is satisfied that, amongst other things, there is a substantial dispute about whether the debt is owing or due.

The Court's analysis: Having set out the relevant legal framework and principles, the Court then found:

- The contractor's payment claim was invalid for the purposes of the CCA. The claim failed to indicate the due date for payment, which is a mandatory technical requirement under the CCA.

  - The contractor pointed out that its payment claim was accompanied by a copy of the principal's Proposed Final Account Certificate, which contained the note "certified payment is due as per contract terms". The contractor argued the text "certified payment is due as per contract terms" is sufficient to indicate a due date.

  - The contractor also relied on previous cases, where payment claims were considered valid if, rather than containing a specific due date, they contained a process for determining the due date instead. The contractor argued its payment claim should be treated similarly.

  - The Court rejected the contractor's argument because, unlike the previous cases that the contractor relied on, the contractor's payment claim simply contained an overarching reference to the "terms of the contract", instead of containing a contractual formula for determining a due date. The text "certified payment is due as per contract terms" was also on the principal's proposed final account, attached as an overleaf to the contractor's payment claim. The Court was not convinced that the principal, as recipient of the payment claim, could reasonably be expected to identify that text as part of the contractor's own message.

- Having found the contractor's payment claim was invalid, the Court was open to consider whether there was a substantial dispute sufficient to set aside the contractor's statutory demand. That depended on whether the principal had established it has an arguable case that the cost of the incomplete remedial works exceeded the amount claimed by the contractor's demand. On the facts, the Court found there was a genuine dispute as to the amount that is due and when it is due. It opined that the dispute resolution process in the contract was the appropriate forum to resolve the outstanding dispute.

Practical points: Compliance with the technical requirements of the CCA is mandatory if a party wishes to rely on the CCA's strict "pay now, argue later" payment regime. A payee issuing a payment claim should ensure their claim contains all the information prescribed by the CCA.

An overarching reference to the "terms of the contract" in a payment claim may not, as indicated by this case, be sufficient to indicate a payment due date. The claim should contain either a specific date, or a clear process for determining the due date.

Failure to include all the required contents in a payment claim may invalidate the claim, thereby affecting a payee's entitlement to be paid under the "pay now, argue later" regime.

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

New "National Interest Test" and other changes for overseas investment regime

Associate Finance Minister David Parker announced on 19 November that the Government will introduce a number of changes to the Overseas Investment Act 2005 (**the Act**). A bill implementing the changes is expected to be introduced in early 2020.

According to Minister Parker's press release:

- A "National Interest Test" will be introduced to screen investments that "pose a significant risk to national security or public order". This will see that assets which may not currently be screened under the current law, such as ports and airports, telecommunications infrastructure and other critical infrastructure, be screened through a national interest lens.
- A "call in" power will apply to the sale of strategically important assets, such as firms developing military technology or investments in significant media entities if they are likely to damage national security or democracy.
- Assessment of the impact of water quality and sustainability of water bottling enterprises will be required when considering an investment in sensitive land.
- The new law will reflect an existing Ministerial directive requiring that overseas investment in farmland must show "substantial" benefit to New Zealand.
- Red tape around the consent process is proposed 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.
- Maximum penalties for breach of the Act will increase from $300,000 to $10 million for corporates.

Increased thresholds for Australian investments in significant business assets

The thresholds for Australian investors needing consent for investments in significant business assets under the Overseas Investment Act are also being increased. From 1 January to 31 December 2020, the thresholds will increase to:

- For Australian non-government investors, NZ $537 million;
- For Australian government investors, NZ $113 million.

For more details, please click here to read Bell Gully's commentary.

Read the Government's press release here.

Government introduces another suite of residential tenancies law reform

The current Government has passed a number of changes that impact residential tenancy law since it came to power.

These changes include the banning of letting fees, passing the Healthy Homes Standards which prescribe minimum standards for the condition of residential rental housing, and passing the Residential Tenancies Amendment Act 2019 which related notably to tenants' liability for damage and the renting out of premises that are unlawful for residential use.

This month the Government has announced another set of reforms to the Residential Tenancies Act 1986 (**the Act**). It is expected that they will be drafted in a bill to be introduced in the first half of 2020.

The key proposed changes include:

- Landlords will not be able to terminate a periodic tenancy without a reason. The legislation will contain specified reasons that a landlord may use to terminate a periodic tenancy. Currently, landlords can give 90 days' notice to terminate a periodic tenancy without giving any reasons.

- Fixed term tenancies will automatically become periodic tenancies at the end of the fixed term, unless the landlord and tenant agree otherwise, the tenant gives notice, or the landlord gives notice using one of the specified reasons.

- Notice periods to end a periodic tenancy will increase to 63 days when the landlord or their family member requires the property to live in, or 90 days where the landlord has sold the property with a requirement for vacant possession.

- Tenants will be able to add minor fittings to the premises where installation and removal is low risk. Tenants must ask for permission, but landlords can only decline using specified reasons.

- The minimum period for increasing the rent will increase from 6 months to 12 months.

The proposed change to end no-cause evictions has in particular generated debate and controversy. The New Zealand Property Investors Federation warned that requiring landlords to give a specific reason to terminate a periodic tenancy could make it "extraordinarily hard" for landlords to evict anti-social or aggressive tenants, as they – and possibly the tenant's neighbours – would have to testify against the tenant in the Tenancy Tribunal.

Read the Government's press release here.

IRD numbers required for main home transfers from 1 January 2020

From 1 January 2020, those who buy and sell their main home will need to provide their IRD number and overseas tax residency details (if applicable) prior to settlement of the transfer. The information is provided on a Land Transfer Tax Statement, which is usually arranged by lawyers for their clients to complete prior to settlement.

Currently, most property transfers require buyers and sellers to provide their tax details, unless an exemption applies. An exemption exists for transfers of a main home. However, this exemption will be removed from 1 January 2020.

The change was enacted to address concerns from an IRD cabinet paper that exempting the provision of tax details for main home transfers creates an information gap that decreases the IRD's ability to enforce compliance around property tax rules.

A transitional period applies so that the main home exemption can continue to be used for agreements entered into before 1 January 2020, where the transfer is lodged on or before 1 July 2020.

OTHER NEWS

✱ REAL ESTATE

New standard sale and purchase agreement form for property transactions

The sale and purchase agreement form published jointly by the Auckland District Law Society (**ADLS**) and Real Estate Institute of New Zealand (**REINZ**) is widely used as the base form in New Zealand for the sale and purchase of properties.

A new edition of the sale and purchase agreement form has been released, following a revision that took place over nearly two years.

Some key changes reflected in the new edition include a wider range of circumstances under which a party can claim compensation and seek an interim determination in the event of a dispute during the course of the agreement. The GST clause has also been revised with input from the IRD, and faxes as a primary means of sending notifications to the other party under the agreement have been replaced by emails.

Bell Gully regularly advises on many transactions involving the sale or purchase of property. If you need assistance or advice in this area, please contact one of our specialist real estate lawyers or your usual Bell Gully advisor.

■ PROJECTS

Infrastructure Commission publishes updated pipeline on infrastructure spending

In May 2019, the Infrastructure Commission published its initial pipeline of infrastructure spending, which covered 174 projects with an expected value of $6.1 billion. The initial pipeline was based on data from five government agencies.

This month, the Commission published an updated pipeline which covers more than 500 projects with an estimated value of $21.1 billion. The updated pipeline is based on data from 15 government agencies.

Transport projects make up the largest proportion of the forecasted spending, accounting for about a third of it.

Stuff.co.nz reported that the list of organisations contributing to this latest estimate still appeared far from comprehensive.

"As with any tool of this kind, it is only as valuable as the information it contains. We welcome the 10 additional contributors to this version and encourage all government agencies and councils to share their plans," said Commission Chairman Allan Bollard. Notwithstanding this, Mr Bollard believed the latest estimate would provide "some useful guidance to the market."

By providing data and insights into anticipated infrastructure spending, the pipeline assists the infrastructure sector to be better prepared on delivering on the Commission's vision to produce high quality infrastructure outcomes for the country.

Click here for the full article.

Construction lender launched for builders and developers

Building Today, the magazine of the Registered Master Builders Association, reported on the launch of construction financier OmegaBuild. The financier joins a growing market of lenders seeking to provide finance for smaller builders undertaking residential development projects.

Developments financed by the company range from $300,000 to $4 million.

“We’re a non-bank finance provider targeting the industry. Over the past two years the bigger banks have pulled back quite a bit where there is construction risk. They have less of an appetite for developers wanting to buy sections to build on, and much less of an appetite for mum and dad developers,” said Tony Condon, senior broker from OmegaBuild.

Click here for the full article.

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

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