PROJECTS AND REAL ESTATE NEWS

FEBRUARY 2020

WELCOME

to Issue No. 7 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

Vendor liable for misrepresentation and breach of the Fair Trading Act for statements by agent *Mitchell v Murphy* [2019] NZHC 3262

In summary: The purchasers in this case brought claims against the vendor for selling them a leaky home. The property was part of a block of seven townhouses.

The purchasers said the vendor's real estate agent told them the property was not a leaky home, and that it had been built with extra care and included some superior features as the vendor and her husband were the original developers for the block of townhouses, and the property in question was built for the vendor and her husband to live in and they had lived in it.

The claims

The purchasers said the agent's representations on the vendor's behalf were untrue and had induced them into the purchase, causing them loss as a result. They brought two causes of action against the vendor:

1. misrepresentation, under section 35 of the Contract and Commercial Law Act 2017 (**CCLA**), and
2. engaging in misleading and deceptive conduct in trade, under section 9 of the Fair Trading Act 1986 (**FTA**). The purchasers alleged the vendor was "in trade" when she sold the property to them, as she had rented it out for a large part of the time she owned it. Alternatively, that she was liable under section 43 of the FTA for being knowingly concerned with the contravention of the FTA by her agent.

In defence to the misrepresentation claim, the vendor primarily relied on a "no reliance" clause in the sale and purchase agreement, which also stated the purchasers are buying on an "as is, where is" basis. The vendor in any event denied any misrepresentation and said her agent was only expressing opinions and not representations of fact.

In defence to the misleading and deceptive conduct claim, the vendor claimed she was not "in trade", and that the purchasers could not prove the property was defective.

The purchasers also brought a claim against the real estate agency for misleading and deceptive conduct under the FTA. However, they settled out of court and reached a confidential settlement sum.

In addition, the purchasers brought a claim under the FTA for misleading and deceptive conduct against the building inspector who inspected the property for them prior to purchase. The building inspector took no steps in advancing a defence in the proceedings.

The misrepresentation claim

The court heard from other residents in the complex of how they had been dealing with leaks in their unit with the vendor and the nature of the work that the vendor herself had done to the property prior to sale.

Were they misrepresentations?

Firstly, the court found the statements by the agent that "the owner says it is not a leaky home" and that the property was "built with particular care" were representations of fact, not opinion. By the vendor describing herself as the developer, without qualifying her expertise, she had held herself out as knowledgeable both about the construction and history of the property. There was also the fact that the vendor had herself lived in the property, had rented it out for some time and then had returned to live in it.

The court further found the vendor misrepresented the condition of the property by failing to advise the purchasers of the allegations of leaks and repairs to the other units in the complex.

Both the vendor and the purchasers had called in their own expert witnesses to aid the court in deciding whether the property was a "leaky home", which the judge confirmed is understood to mean a house or building prone to leak as a result of design and construction defects. By and large, the court preferred the evidence of the purchasers' expert witness and was satisfied the property was a leaky home.

The representations that the property was "not a leaky home" and that "it was built with extra care" were therefore false, the court held.

Did the misrepresentations induce the purchasers to enter into the purchase?

The court was satisfied that the purchasers had established the misrepresentations were made to induce them to the purchase. The statements that the vendor and her husband were the developers, that the property was built for them to live in and the vendor was a long-standing owner all added weight and would have induced a reasonable person to enter into the purchase.

Although the purchasers did obtain a building report, the court preferred the purchasers' evidence that "one of the most important factors for [them] was that the person who had been living in the property was partly responsible for the development and knew the property well, [and had] given it a clean bill of health". The purchasers further said the "builder's report was a backup or confirmation that there were no problems. That was not the prime reason we purchased the property."

The court accordingly found the misrepresentations made by the agent had a material effect on the purchaser's decision to purchase the property.

What about the "no reliance" clause?

The sale and purchase agreement contained a clause (**the "no reliance" clause**) which in essence stated the purchasers are buying on an "as is, where is" basis, and that the vendor provides no representations and warranties in respect of the construction, cladding and weathertightness issues and shall not be liable for any claims, costs and losses incurred by the purchasers relating to those matters.

As the "no reliance" clause was drafted by the vendor's agent, the vendor was responsible for proving the clause applies to the present circumstances. On balance, the court did not consider the vendor had proved this point adequately, as the clause did not expressly rule out oral representations, and did not preclude reliance on, and liability for, matters to do with the vendor's knowledge. As the vendor made it known through the agent that she was the developer and knew the property well, the court found the "no reliance" clause could be interpreted as leaving open oral representations in matters to do with the vendor's knowledge of the property's construction.

In case the court's conclusion in this respect was wrong, it also went on to consider a provision in the CCLA which states that even if a contract contained a clause that purported to prevent a court from investigating whether a statement or promise constituted a representation that was relied on, the court can nevertheless still investigate the matter, unless it determines it is fair and reasonable that the clause should be conclusive between the parties.

Weighing all the evidence, the court did not find that the "no reliance" clause should be conclusive between the parties. The bargaining position of the parties was not equal, as the vendor held relevant information as to weathertightness issues with the property and other units in the block, and she did not provide that information to the purchasers.

The Fair Trading Act claim

The court did not find the vendor was acting "in trade" in relation to the FTA claim.

It made this finding in the context of facts which included that the vendor and her husband originally built the property to be their home, while the vendor had for some time moved out, her intention had been to

move back into it, and the trust that owned the property (of which the vendor was a trustee) was not regularly buying and selling properties.

However, the court did find the vendor was liable under the purchasers' alternative claim under section 43 of the FTA, namely, that she was "knowingly concerned" in a contravention of the FTA through her agent.

She gave her agent incomplete information about leaks that she knew or ought to know occurred in the property, and did not disclose weathertightness allegations from the owners of other units in the complex, despite being directly asked about these matters in the agent's disclosure form. This form provided the basis for information that the agent would pass on to potential purchasers. The vendor was therefore misleading and deceptive to provide information that was both incomplete and inaccurate in that form.

The claim against the building inspector

The building inspector was found liable under the FTA for engaging in misleading and deceptive conduct in trade. His report did not raise any red flags and described the property was in "good" condition.

The court took into account the purchasers' evidence that although the vendor's representations about the condition of the property remained an influential factor in the decision to purchase, they also relied on the building inspection report as confirming what the vendor had told them through the agent.

The building inspector's liability was apportioned at 20% of the final judgement sum against the vendor.

Key takeaways:

- When selling a property, be careful of what is said to potential purchasers and fully brief your real estate agent in what claims they can and cannot make in relation to the property, as the representations they make can be attributed back to the vendor as their principal. Consider qualifying statements by saying (for example) that they are limited to the vendor's experience while they lived or owned the property, or clearly express the statements are opinions only.

- Be aware that real estate agents have duties of disclosure to purchasers under the Real Estate Agents Act 2008, which has eroded somewhat the "buyer beware" principle in real estate transactions. Be transparent with your agent about any issues relating to the property, so they can discuss what they consider must be disclosed to potential purchasers under their professional obligations.

- As this case demonstrates, a "no reliance" or "as is, where is" clause and the fact that the purchaser obtained their own building report does not automatically mean the vendor has no liability for any representations they make. The outcome is also dependent on how the clause is drafted, and may also be affected by the CCLA. Under the CCLA, a court may still investigate the matter unless it considers it is fair and reasonable that the clause should be conclusive between the parties, having regard to certain matters such as the respective parties' bargaining strengths. Discuss with your lawyer prior to signing an agreement to ensure it is appropriately drafted and to cover off any legal issues of concern.

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

PROJECTS

Adjudicator's decision quashed due to conflict of interest and failure to consider relevant matters

Youssef v Maiden [2019] NZHC 3471

In summary: Parties to a construction contract (as defined under the Construction Contracts Act 2002 (**the CCA**)) can refer any dispute arising from the contract to adjudication under the CCA.

One option for a party who disagrees with an adjudicator's decision is to apply to the courts for judicial review. However, case law has shown that the courts are generally reluctant to disturb an adjudicator's determination by judicial review, and strong grounds must exist before the courts will intervene.

This case is an example of the court being satisfied that circumstances exist for it to order the adjudicator's decision be quashed.

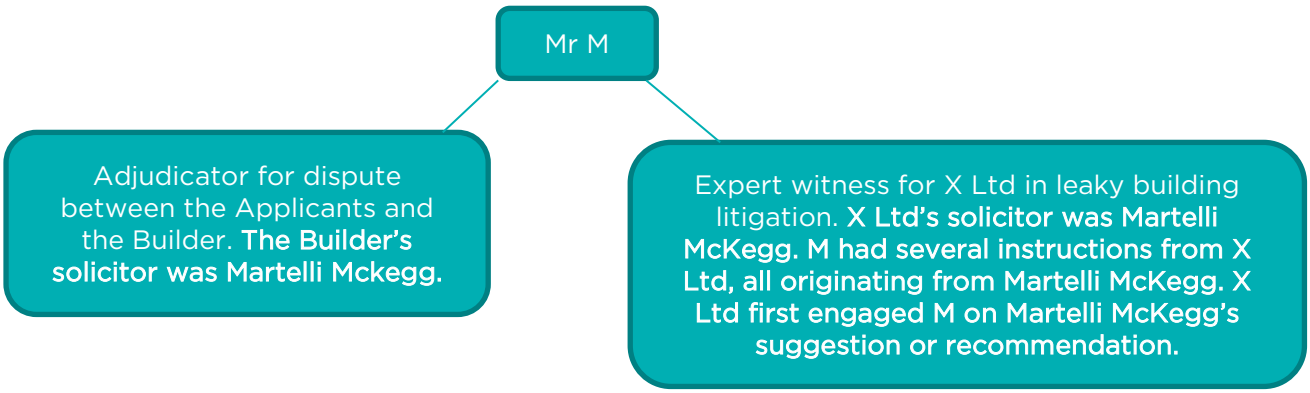
The adjudicator was found to have a conflict of interest that he did not disclose, and was disqualified from adjudicating due to the presence of apparent bias towards one party in the dispute. In addition, the court found the adjudicator failed to take into account relevant matters and made errors of law in one aspect of his determination.

Relevant facts: Y (**the Applicants**) engaged B (**the Builder**) to build a house on their property. Differences between the parties arose during the course of the project, and the Applicants advised the Builder that they would not pay for costs that they considered resulted from inefficiencies. Further to this correspondence, the Builder's solicitor notified the Applicants that the Builder was suspending work on site with immediate effect.

The Applicants then cancelled (or purported to cancel) the contract through their solicitor, on the basis that the Builder had repudiated the contract. A few days later, the Builder rejected the Applicants' cancellation, and itself cancelled the contract.

The parties referred the dispute to adjudication. M was appointed as the adjudicator. He determined in favour of the Builder, holding that the Builder's cancellation was lawful whilst the Applicants' cancellation was unlawful.

The adjudicator had an existing relationship with the Builder's solicitor as summarised below:



In other words, M had a relationship with the Builder's solicitor, Martelli McKegg, via a different matter.

The court found M's relationship with Martelli McKegg gave rise to a conflict of interest that should have been disclosed. The court noted that M was first referred work as an expert witness for X Ltd by Martelli McKegg (and X Ltd had subsequently continued to give M repeat instructions), and that as litigation progresses, a party and their solicitor and expert witnesses invariably develop a close working relationship. Under the CCA, M should have disclosed this conflict of interest and refrained from accepting the appointment as adjudicator until the parties to the adjudication had agreed to him acting.

The court also found M was disqualified from adjudicating the dispute due to the presence of apparent bias. The Applicants were concerned that M may have subconsciously favoured the Builder (as Martelli McKegg's client) due to a (subconscious) desire to maintain, and possibly enhance, his relationship with Martelli McKegg, from which he derived income. It is important to note that there was no suggestion that M in fact favoured the Builder in any way. Apparent bias is concerned with whether a fair-minded lay observer might reasonably be apprehend a risk of bias, rather than whether there has in fact been any actual bias.

Finally, the court was also satisfied that M's consideration of whether the Applicants were entitled to cancel the contract "fell short of what was required". In particular, the court found M did not determine this issue fairly as he did not refer to a suspension clause in the contract that specifies when the Builder can suspend work, and it was not apparent on the face of the determination that he had regard to information that both parties presented as to when a party's actions constitute a repudiation or breach of an essential term that entitles the innocent party to cancel.

The court quashed the adjudicator's determination for the above reasons.

Key takeaways: Courts do not intervene lightly with an adjudicator's determination, and this reflects the statutory intention for the CCA scheme to be a "pay now, argue later" process (rather than a final forum for dispute determination) designed to facilitate payments so that cash flow can continue for a project.

However, as this case demonstrates, a conflict of interest that should have been disclosed but was not, the existence of apparent bias on the part of the adjudicator, or an adjudicator's failure to take into account relevant matters can result in the court intervening. Adjudicators should take care in ensuring that arguments which the parties make, particularly on important issues, are sufficiently considered and answered in the determination.

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

Overseas Investment Act: new wave of reforms and other relevant updates

A second wave of reform to New Zealand's overseas investment rules is set to round out the most significant overhaul of the Overseas Investment Act in 15 years. Bell Gully has produced a concise summary of the key areas of reform together with our commentary on these proposals here.

Overseas Investment Office issues reminder of need to notify of change in director

The Overseas Investment Office (**OIO**) has issued a reminder that when it is processing an application, and there is a change in the directors of the relevant overseas person, it is the responsibility of the applicant (or their representatives) to advise the OIO. This will need to be done as soon as the applicant is aware of the change. If the applicant only notifies the OIO at the end of the application process, the investor test will need to be redone, which will result in a delay of the application.

Criminal conviction for overseas investor who misled the OIO

The OIO reports that for the first time, a person has been convicted of an offence under the Overseas Investment Act. The overseas investor has pleaded guilty to a charge of obstructing an OIO investigation. He and his lawyer are said to have provided false information and created a false loan agreement to hide the true circumstances of a purchase where a property was bought by a company associated with the overseas investor. The investor's lawyer has pleaded guilty to the same charge and is due to be sentenced.

Bill released for next phase of residential tenancy law reforms

As flagged last year by the government that further reforms to residential tenancy laws will be proposed, the Residential Tenancies Amendment Bill (**the Bill**) has been introduced this month and has had its first reading in Parliament. It is currently at Select Committee stage.

The Bill amends the Residential Tenancies Act (**the Act**). Some of the key changes proposed are:

- prohibiting landlords from terminating periodic tenancies without a reason. Currently, landlords can terminate periodic tenancies by giving 90-days' notice without giving any reasons. The Bill removes this ability and provides a range of justifications that landlords must use if they wish to terminate a periodic tenancy. The new justifications include:
    - if the landlord is putting the property on sale within 90 days after terminating the tenancy;
    - the landlord has sold the property unconditionally and is required to give vacant possession;
    - extensive alterations or refurbishment are to be carried out and it would not be reasonably practicable for the tenant to remain while the work is undertaken; and
    - the premises are to be converted to commercial premises by the landlord.

  Landlords may also apply to the Tenancy Tribunal to terminate a periodic tenancy on the basis that the tenant repeatedly fails to pay the rent on time or repeatedly engages in antisocial behaviour;
- adjusting how fixed term tenancies convert to periodic upon expiry. Currently, fixed-term tenancies of more than 90 days become periodic when the term expires, unless the parties extend or renew the agreement or unless either party gives notice to discontinue. The Bill proposes to restrict the landlord's ability to give notice to discontinue. For the most part, the landlord may give notice to discontinue only by using one of the justifications prescribed for terminating a periodic tenancy;
- limiting rent increases to once every 12 months (currently, it is once every 6 months);
- increased options for enforcement in the event of breaches – this includes increasing the financial penalties, and introducing an infringement offences regime which provides for the issuing of infringement notices. New provisions will also allow for the regulator to enter into enforceable undertakings with a person who has breached the Act;
- higher infringement fines and fees will apply to landlords with 6 or more tenancies. Those landlords can also be liable for pecuniary penalties. In terms of working out how many tenancies the landlord has, the regulator can take into account the tenancies of persons "associated" with the landlord. "Associated" is broadly defined and includes the landlord's parent, child or spouse/de facto partner, or if the landlord is a company, a person who is the company's director or is able to, directly or indirectly, exercise control over the company's affairs;
- prohibiting landlords from inviting bids for rent; and
- holding that it will be unreasonable for landlords to deny consent to tenants who want to carry out minor changes to the premises. "Minor change" is defined.

The reforms are not without controversy. The Bill's general policy statement expresses that the reforms are intended to more evenly balance the rights of landlords and tenants in the country, while advocacy groups for landlords have expressed concern that some proposals go too far and may in particular make it difficult for landlords to evict tenants for antisocial behaviour. Under the Bill, landlords will need to apply to the Tenancy Tribunal in order to remove tenants who repeatedly display antisocial behaviour.

You can read the Bill here.

Public submissions on the Bill are being accepted now and closes on 25 March 2020.

■ PROJECTS

Fundamental issues with the proposed National Policy Statement on Indigenous Biodiversity

The government has released a draft National Policy Statement for Indigenous Biodiversity (**NPS-IB**) for public consultation. The draft NPS-IB sets out the provisions to identify, protect and manage indigenous

biodiversity under the Resource Management Act 1991, including developments in significant natural areas (**SNA**).

In our view, there are several key issues with the proposed NPS-IB that merit further consideration:

No developments in significant natural areas rated as "high"

There is no consenting pathway for developments within SNAs that are rated as "high". Furthermore, the criteria for identifying SNAs are broad, meaning that most areas of indigenous vegetation will qualify as SNAs, and many SNAs will also have at least one of the 16 attributes to be rated as "high".

The practical effect is that nationally significant infrastructure proposals and other types of necessary development are precluded in a broad category of areas which will be rated as "high" SNAs. We assume the government did not intend for the proposed NPS-IB to be this far-reaching and prevent decision-makers from considering the merits of such developments in these areas.

Consenting pathway only available in limited situations

The consenting pathway for nationally significant infrastructure is only available for SNAs rated as "medium". As outlined above, this is likely to be of limited application because most SNAs will include attributes rated as "high". In addition, certain tests will need to be satisfied, such as demonstrating a need for the development to be in that particular location and that there are no other practicable alternative locations available, before offsetting or environmental compensation is an option.

Definition of "nationally significant infrastructure" is inadequate

The definition of "nationally significant infrastructure" does not encompass some infrastructure which are critical for areas to function, such as arterial roads. This means there is no consenting pathway for such infrastructure and most effects of such projects on SNAs will need to be avoided.

Closing date for submissions

Consultation on the proposed NPS-IB closes on 14 March 2020.

Click here for further information from the Ministry for the Environment's website.

Government aims to fast-track urban development

The Urban Development Bill (**the Bill**) is part of a suite of legislative changes proposed by the government to address challenges resulting from population growth, inadequate supply of housing, and the need for infrastructure to enable urban development.

The Bill establishes a specified development project (**SDP**) process, which allows selected urban development projects to access special development powers to 'fast-track' urban development. The Bill also provides that a development plan may set out modifications to the objectives, policies, methods or rules in planning instruments to enable the project objectives to be achieved.

On establishment of a development plan Kāinga Ora will enjoy significant powers in monitoring urban development projects. These wide-ranging powers seek to claim back much of the control from local government and place this firmly with a government agency. While we expect there to be benefits in these functions being undertaken within one organisation, the Select Committee will need to carefully consider whether these powers adequately consider other competing interests and constraints, including those of other infrastructure providers.

More information is available here.

Our resource management team regularly assist with regulatory approvals and processes for a wide range of projects and provides advice and input into policy at district, regional, and national levels.

OTHER NEWS

✱ REAL ESTATE

Has urban design features in development contributed to higher crime rates?

NewstalkZB reported on Addison, a South Auckland suburb that featured a number of design features which were experimental at the time construction initially began (in 2003), and how these design features had, combined with several other factors, led to it becoming a suburb with one of the highest burglary rates in the country.

According to a report by the Auckland Council's research unit, the rear lanes that are a design feature of the suburb had made it easier for criminals to break in undetected. The narrow streets filled with parked cars also made it difficult for emergency services to quickly access properties. Large, unmaintained oak trees had also grown to obscure lights and made surveillance difficult.

The number of burglaries and car break-ins in Addison had grown to such an extent that in 2018, police contacted Auckland Council due to the amount of resourcing the area was taking up. A police intelligence report said that the neighbourhood's location was part of the problem, being a relatively affluent suburb surrounded by poorer ones. However, the council researchers considered the design features have compounded the issue.

The council report recommended that further work be taken on designing rear lanes, and planners and developers are being urged not to replicate the same problematic design features in new developments.

Despite the high burglary and car break-in rate, the article reported that many residents still spoke warmly of their neighbourhood, with many willing to trade off concerns about crime with the area's sense of community. The developer that led the construction of Addison said the finding that design features contributed to the crime rate was "subjective" and believed a suburb in a similar location with different design features was likely to have a comparable crime rate. The council's research unit could not make a direct comparison on this point as they do not have the intelligence reports on surrounding suburbs.

Click here for the full article.

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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