Russell McVeagh

Breaking Ground

Russell McVeagh
Construction Quarterly

Issue 12 | Autumn 2024 | russellmcveagh.com

Breaking ground Autumn 2024 edition

In this edition of Breaking Ground we cover:

- the difficulty of obtaining mandatory injunctions when a party is looking to terminate an agreement;
- how climate change claims could be coming for the construction industry;
- stakes are high with the service of payment claims and payment schedules – so it is important to get it right; and
- even where there is a clear multi-tiered dispute resolution provision, it may be possible to skip a step.

Case Law Update - NZ

Court refuses to order parties to continue to work together *Reed Roading Ltd v Higgins Contractors Ltd*

The High Court *declines* to issue an interim injunction requiring a head contractor to continue to perform its obligations under an exclusivity agreement.

Background

Reed Roading and Higgins Contractors entered an exclusivity agreement, in which Higgins promised to subcontract with Read, if Higgins won a bid to be the head contractor on a proposed wind farm project for Mercury New Zealand Limited. At around the same time, Higgins also appointed Reed as a subcontractor for a separate project (the Rangiuru Project).

The relationship between Higgins and Reed deteriorated as the Rangiuru Project progressed. Issues arose relating to Reed's performance of the contract and Mr Reed's actions as the sole director.

Higgins gave Reed notice that it was exercising its right to terminate the exclusivity agreement. Higgins claimed that, given the issues regarding the Rangiuru Project, it believed that Reed would not be able to perform its obligations in relation to the project for Mercury.

Reed sought an interim injunction preventing Higgins from terminating, arguing that Higgins was not contractually entitled to do so.

Outcome

The High Court assessed the balance of convenience and declined to grant an interim injunction because (among other things):

- Reed's claim for breach of contract against Higgins faced significant hurdles; and
- it would be difficult for the Court to supervise a contract between parties whose relationship had deteriorated.

Observation

The decision reinforces the Court's traditional reluctance to compel reluctant commercial parties to work together. In our view, it is a more orthodox decision than *Rau Paenga Ltd v CPB Contractors Ltd* (discussed in the last edition of Breaking Ground). There were, however, many differences to the situation there.

Case Law Update - NZ

Climate change court action could be coming for construction industry - *Smith v Fonterra Co-operative Group Ltd*

At the start of February, the Supreme Court issued its much-awaited decision in *Smith v Fonterra*, the first case to be brought in New Zealand seeking to hold private parties liable in tort for damage caused by climate change. By unanimous decision, the Supreme Court has determined that Mr Smith's claim may proceed to trial.

Background

Mr Smith brought a claim in tort against seven New Zealand companies, including a proposed tort for climate system damage. He alleged that each company had contributed materially to the climate crisis and had damaged his whenua and moana, including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau.

The claim was struck out in the High Court and Court of Appeal. Mr Smith appealed the decision to the Supreme Court.

Outcome

In allowing his appeal, the Supreme Court held that Mr Smith's primary cause of action - public nuisance - was tenable and on that basis the other two causes of action - negligence and a novel climate system damage tort - could also proceed to trial as they were unlikely to add materially to costs, hearing time and deployment of other court resources.

The Court anticipated that the "fundamental battleground" would be whether there was sufficient connection between the pleaded harm and the respondents' activities. That, however, would depend on the evidence presented at trial.

Observations

Whether any of Mr Smith's causes of action give rise to liability and, if so, the scope of that liability, will be questions for the High Court to determine should the matter proceed to trial.

In the meantime, organisations (particularly those with substantial direct or indirect emissions profiles, such as those in the building and construction industry) should be mindful that the Supreme Court has expressly left the door ajar to the possibility of future liability.

It is safe to assume that we have not seen the end of climate change litigation in New Zealand. The decision may encourage new claims to be brought, whether similarly grounded in tort or seeking to test the boundaries of other potential avenues of climate-related liability.

See our full update on this here.

Case Law Update - Australia

Australian Court takes pragmatic approach to service of payment claim - *Canadian Solar Construction Pty Ltd v Re Oakey Pty Ltd* [2023] QSC 288

A recent decision of the Supreme Court of Queensland held that, in the absence of contractual provisions requiring specific modes of service, payment claims are generally considered to be validly served once a representative who is eligible to be served on behalf of a party receives the claim.

In this case, a payment claim sent by email and copied to multiple recipients was held to be validly served, despite the email bouncing back from the address for the principal's nominated representative.

Background

Canadian Solar (contractor) and Oakey (principal) were parties to a contract for works on the Oakey 2 Solar Farm project. Oakey's nominated representative under the contract was Stanley Wang.

Canadian Solar's representative emailed Mr Wang with payment claim seeking $4 million. The email was copied to five other individuals in the project management team. Three of the five had been involved in valuation and communication regarding previous claims. One of them was the Project Manager's representative.

Mr Wang did not receive the email and Oakey did not respond to the payment claim.

However, the Court was satisfied that the claim was validly served.

Observations

Stakes are high with the service of payment claims and payment schedules, given the possibility of a principal being liable for failing to respond to a claim in time.

It is always a good idea for both parties to take care when issuing claims and schedules to ensure this is done in accordance with the contract, and that evidential records are kept of the claims that have been issued.

The issues with Mr Wang's email address arose from the use of multiple email addresses, and failure to notify the contractor when one of those addresses became defunct. Administrative matters such as changes to contact details can sometimes be overlooked or missed in the context of busy projects. It is important to ensure that any such changes are clearly communicated to the other parties, and confirmation sought for receipt of those communications.

Takeaways

- Take care with notice provisions.
- Notify counterparties when there are changes in personnel and contact details.

Case Law Update – England and Wales

The problem with multi-tiered dispute resolution clauses - *Lancashire Schools SPC Phase 2 Ltd v Lendlease Construction (Europe) Ltd & Ors* [2024] EWHC 37 (TCC)

This decision from the Technology and Construction Court (a branch of the High Court) emphasises that even carefully worded dispute resolution clauses might not achieve the results intended by the contracting parties. Judicial discretion can be used to override such clauses if the Court considers it appropriate in the circumstances.

In this case, the Court declined to exercise its discretion to strike out a claim for failure to comply with a contractual requirement to have all disputes determined by adjudication first (as a precondition to litigation). In doing so, the Court found that the adjudication provision was mandatory, but that it would be impractical to grant the relief sought.

Observations

This case serves as a reminder that:

- Parties should draft dispute resolution provisions as clearly as possible, and be sure to use clear mandatory language if intending that any particular process (such as adjudication) be used as a precondition to other dispute resolution processes (such as arbitration and litigation), with clear timeframes so that disputes can be resolved as quickly and efficiently as possible.
- Even where there is a clear multi-tiered dispute resolution provision, it is possible to seek to cut through them in some circumstances either by:
    - seeking the other parties' agreement (which should always be the starting point); or
    - applying to the Court.
- The case is topical given clause 13.1.1 of the new NZS 3910:2023 standard terms. This clause leaves room for argument about whether negotiation in good faith between the senior members of the respective parties is a precondition for referring a dispute to arbitration, and if so what the consequences of failing to comply are.

Breaking Ground is produced quarterly by Russell McVeagh. It is intended to provide summaries of the subjects covered, and does not purport to contain legal advice. If you require advice or further information on any matter set out in this publication, please contact one of our experts.

Subscribe to Breaking Ground

Key contacts:

Michael Taylor
Partner
Litigation/Construction
+64 9 367 8819
michael.taylor@russellmcveagh.com

Editor:

Michelle Mau
Senior Associate
Litigation
+64 9 367 8713
michelle.mau@russellmcveagh.com

Construction law experts:

Ed Crook | Anna Crosbie | Nick Saxton | Natalie Sundstrom