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NEWSLETTER

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INSIDE THIS EDITION

DIY AND THE LAW

Many New Zealanders are capable of conducting DIY (do-it-yourself) repairs, maintenance and redecorating to their homes. However, it is important to be aware of the restrictions, standards and possible penalties imposed by law.

Under the Building Act 2004 ('the Act'), all building works (whether construction, alteration, demolition or maintenance of new and existing buildings) must comply with the Building Code. Whether you intend to do-it-yourself or engage a professional, all building work must comply with the minimum level of standard imposed by the Building Code.

Before doing any alterations or renovations, it is crucial that you check with your local council to see whether a building consent is required for what you have in mind.

Under the Act, there are certain building works that may be carried out without obtaining a building consent. Schedule One of the Act provides a detailed list of exempted works. Popular examples include: building a patio or deck at ground level or garden trellis less than two metres high, replacing spouting or a piece of weatherboard, building a small garden shed, or replacing a hot water cylinder.

It is important to note that building works exempted under the Act may not be permitted if that building work is in breach of any other act. For example, there is a limited amount of electrical and plumbing work you may complete without a qualified electrician or plumber and gas fitter.

If the intended building work is not exempt under the Act, then it is likely that these works will be restricted building works and a building consent must be obtained and the work carried out or supervised by

Southland New Zealand

a licensed building practitioner. In those circumstances, it is recommended that you inform your insurance provider of the proposed work.

Popular examples of restricted building works include: structural building (additions, alterations, re-piling and demolition), plumbing and drainage (except repair and maintenance of existing components), relocating a building, installing a wood burner or air-conditioning system, building a retaining wall higher than one and a half metres, fences or walls higher than two metres, all swimming pools and their associated fences, and decks, platforms or bridges more than one metre above ground level.

In certain circumstances, you are able to claim an exemption as an owner-builder to carry out restricted building work on your own home when you apply for a building consent. To be considered an owner-builder, you must live in or be going to live in the home, carry out restricted building work to your own home yourself, or with the help of unpaid friends and family members, and have not carried out restricted building work to any other home within the previous three years under the owner-builder exemption.

Failure to adhere to the Act could result in a fine of up to $100,000, plus up to $10,000 for each day the offence continues. You could also be forced to pull down or make changes to the home or building. Furthermore, the sale of the home or building at a later date could be impacted at the owner's cost due to the vendor's warranties provided under the current REINZ/ADLS Agreement for Sale and Purchase of Real Estate.

EXTENDED WARRANTIES AND THE CONSUMER GUARANTEES ACT: ARE YOU THROWING YOUR MONEY AWAY?

You are buying a shiny new top-of-the-range television with a two year warranty. The salesperson asks if you would like an extended five year warranty for only $249.95 extra. Sounds sensible, right?

WARRANTIES IMPLIED BY LAW

Many consumers do not realise the Consumer Guarantees Act 1993 ('the Act') already provides most of the extra protection that they have been offered under an extended warranty. If you purchase consumer goods or services for personal, domestic or household use the Act imposes several warranties or guarantees on the vendor. In particular, the vendor guarantees that the goods sold match their description, are fit for their purpose, are of acceptable quality and will last for a reasonable time having regard to the price. Similarly, any services you purchase must be fit for their purpose, be completed in a reasonable time, be provided with reasonable care and must be a reasonable price.

Consider your new television. Would the ordinary, reasonable consumer consider that a shiny new top-of-the-range television would be free from defects or suitably durable to last five years? Ten years? If so, it's possible that the additional warranty you have been offered is not as valuable as it appears.

BREACH OF WARRANTY

As an example, let's say you bought a television and chose not to buy an extended warranty. Three years later it stops working, and the vendor wants to charge you to replace the failed LCD controller because the television is out of warranty. What now?

You may need to demonstrate that it is reasonable for you to expect your television to last more than three years (and that the failure was not caused by you). It should then follow that the television could not reasonably be considered durable enough – a breach of a warranty implied by the Act. You should then be entitled to require the vendor to remedy the failure.

If it can be fixed the vendor must repair or replace the product within a reasonable time, or provide a full refund. If a remedy is not timely, if the failure is of a substantial nature or if the product is not fit for its stated purpose (or not fit for the purpose you specifically discussed with the salesperson) then you may be entitled to reject the product and require a full refund, replacement, or obtain damages in compensation from the vendor.

DISPUTES TRIBUNAL

If a vendor does not agree with you, you may need to present your case at the Disputes Tribunal to enforce your rights under the Act.

While each case is decided on its particular facts, two examples are noted in particular: in 2009 a fridge-freezer was ruled not to be of acceptable quality when its compressor pump failed after seven years - a full refund was given. In contrast, in 2010 a four year old motor scooter with a failed base gasket was ruled to be of acceptable quality because the damage probably occurred because the annual services were not completed in accordance with the manufacturer's specifications - screws on the base gasket should have been checked and tightened.

CONSTRUCTION CONTRACTS AMENDMENT BILL

The Construction Contracts Amendment Bill ('the Bill') proposes some significant changes to the Construction Contracts Act 2002 ('the Act'). The Act's purpose was to reform the law relating to construction contracts, particularly with regard to how and when payments are made by a party to a contract, dispute resolution, and remedies for recovery of payments under a construction contract. The Bill now seeks to deal with new issues that have arisen since the Act was passed, and three of the proposed changes are summarised in this article.

Removal of the distinction between residential and commercial construction contracts - this change would mean contractors party to a residential construction could also require progress payments, and suspend work where payments are not made.

Removal of this distinction would give any successful party in an adjudication relating to a residential construction contract the right to apply to have the adjudication determination entered as a judgment in the District Court. Under the current Act enforcement in this situation can be difficult.

When sending a payment claim, relating to a progress payment to any consumer, a contractor would have to provide a notice outlining the process for responding to a payment claim, and the effect of not doing so. At present this is only required where the consumer is a residential occupier. Law Society submissions on the Bill supported such an approach for payment claims, and noted the general lack of knowledge within the construction industry about a contractor's notice obligations.

Reduced timeframe for opposing adjudication determinations - at present, a party to a construction contract has 15 working days to make an objection to an adjudicator's determination being entered in the District Court as a judgment. In order to improve cashflow efficiency in the construction industry, the Bill proposes to reduce this time period to five working days, to provide parties with faster access to enforcement and relief.

Extension of the definition of "Construction Work" - the Bill proposes that the definition of "construction work" be extended to include design, architectural, engineering and quantity surveying work. In the past there have been issues relating to some construction work falling outside of the scope of the Act. Some submissions on the Bill have called for greater clarity around this change, with suggestions that the Bill go further and define "design, architectural, engineering and quantity surveying work". There has also been concern as to whether the new definition would actually avoid the issues it is looking to prevent.

SUMMARY

It will be interesting to see the conclusions reached in the Select Committee report on the Bill due on 11 December 2013, and what amendments are suggested in light of submissions. In any case, it is apparent that contractors need to be aware of their obligations, and consumers and contractors alike need to be aware of their rights, as well as any restrictions on these, when it comes to entering into a construction contract.

THE AMERICA'S CUP: BATTLES OFF THE WATER

On 25 September 2013, Oracle Team USA completed a comeback against Emirates Team New Zealand, from an 8-1 deficit, to clinch the 34th America's Cup in San Francisco.

Oracle won 11 races on the water in all, overcoming a two point penalty imposed by the International Jury on 3 September 2013. In the end the penalty didn't decide the winner; but it easily could have. When Oracle became the first to win nine races it was speculated that had Team NZ won at that point, Oracle would appeal the Jury decision and the Cup would once more become embroiled in the court room battles it is now famous for.

It would not have been the first time New Zealand was involved in a legal stoush over the Cup. In 1987, Michael Fay's challenge on behalf of the Mercury Bay Boating Club ended up in the New York Supreme Court. Mercury Bay won the right to challenge, but unfortunately did not win the race. The San Diego Yacht Club (represented by Dennis Conner) was ordered by the Court to meet the challenge on the water. However, as the parties had not agreed to any rules, Dennis Conner entered a

catamaran and easily won. Mercury Bay brought the case back to the Court to disqualify the catamaran. Initially this proved successful and it was awarded the Cup. However, on appeal the decision was overturned.

In reaching its decision the NY Court of Appeals strictly interpreted and applied the terms of the Deed of Gift, the founding document that established the competition after the race around the Isle of Wight in England in 1851.

The Deed sets out default rules for future races if the parties cannot agree. In the Mercury Bay case however, the Court found that the Deed did not specify the type of yacht and on this basis decided the catamaran was legal. On the back of this decision in 2010, when Alinghi and Oracle could not agree on the rules for the 33rd America's Cup, they also adopted multihulls.

In every other America's Cup the parties have been able to agree on the rules, which are known as the Protocol. In San Francisco the Protocol extended to establishing the International Jury, as an arbitral body, to determine any disputes that may arise. These rules provide that any decision of the Jury is final and binding and that if a party refers a dispute to a court rather than the Jury, it would be ineligible to compete.

These provisions effectively removed Oracle's ability to appeal the penalties that had been imposed.

However, Oracle's concern was that members of the Jury that had investigated the cheating allegations had also decided the case. This was arguably a breach of due process and although the Jury was entitled to decide its own procedure, as an arbitral body, the procedure could have been challenged if it breached the applicable US law. While it was unlikely, if that had occurred, for the Court to substitute its own decision for that of the Jury, it is possible the Court could have referred the case back to the Jury to adopt a conforming procedure and decide the matter again. If that had happened, it would have left the Jury ultimately responsible for deciding the winner of the Cup.

SNIPPETS

PROTECT YOUR POSITION AS SUPPLIER – IS YOUR PRODUCT AT RISK?

Some businesses supply their product to shops on credit and are paid later; sometimes only once the product sells.

Problems arise if the shop is then unable to pay its debts, or worse, goes under having sold the products without having paid the supplier. Without proper protection the supplier may be just another unsecured creditor – unable to get the product back and unable to be paid.

Properly drafted Terms of Trade help protect your position as supplier. They can ensure you retain a security interest in, and ownership of your product until it has been paid for.

A vitally important, and often overlooked step, is to then register your security interest with the Personal Property Securities Register (PPSR), prior to dealing with each shop. This elevates your security interest meaning you are more likely to recover your stock or funds owed to you if a shop goes under.

CANCELLING A CONDITIONAL CONTRACT

Most house buyers enter into conditional agreements. For example, the current REINZ/ADLS Agreement includes (if selected) a Builder's Report condition, which allows the purchaser to cancel, if on an objective assessment, they do not approve a Builder's Report.

However, a condition does not of itself grant a purchaser a right to cancel. The Agreement specifically requires each party to do all things reasonably necessary to satisfy a condition that is for their benefit.

Using the example of the Builder's Report condition, the purchaser must disclose the specific reasons for cancellation and there can at times be disagreement as to just what would be an *objective* assessment of the Builder's Report for the purposes of cancellation.

It is important to note that you are not entitled to cancel a conditional contract simply because you change your mind.

If you have any questions about the newsletter items, please contact us, we are here to help.