Society of Construction 2019 Fundamentals in Construction Law Conference

Introduction from the Chair – Industry Perspective by Janine Stewart

1. Introduction

1.1 Welcome to the Society of Construction Law conference on the "Fundamentals of Construction Law" with particular reference to the project lifecycle. We are looking forward to excellent presentations on legal issues that are common across projects of all sizes.

1.2 I first focused on construction law as a practice area 15 years ago, when the testing of the Construction Contracts Act 2002 and associated law was still in its infancy. It has been fascinating since then to see the development of focused practice areas (and in the law itself), in what has always been a sector that is central to New Zealand's economy.

1.3 Rather than cut across any of the sessions, I want to touch briefly on the setting of our projects – in the construction and infrastructure sectors. In particular:

(a) What is the current state of play in the construction industry?

(b) What is going well? and

(c) What as an industry are we seeking to improve on?

2. State of Play

2.1 The discussion below is by no means exhaustive of what is happening in our vibrant construction industry – that contributes 7% to New Zealand's economy. There is a lot going on:

(a) The industry is growing;

(b) The industry is strained;

(c) The industry wants to change – but is it changing?

Growth

The MBIE National Pipeline Report of 2018 confirmed that:

(a) The industry continues to experience 'boom bust' cycles;[1]

(b) Growth of $41b is predicted to 2023 ("moderate and sustained growth" is emphasized);[2]

(c) Auckland, Bay of Plenty and Waikato are the largest non-residential growth areas.[3] We see Queenstown as another key area for non-residential growth;

(d) In residential - national dwelling consents are set to exceed historic highs in 2023.[4]

The report demonstrates, I'm sure, what many of us are experiencing in our respective practice areas. It also echoes the feedback from clients and contractors in the industry itself. There is no shortage of work in the industry, for all participants. But there is a lack of resource, and an abundance of costly disputes that could have been avoided, ultimately making projects more profitable.

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[1] *National Construction Pipeline Report 2018: A Forecast of Building and Construction Activity* (6th ed, Ministry of Business, Innovation and Employment, Wellington, July 2018) at [7.2].

[2] At [2.1].

[3] At [2.4].

[4] At [2.2].

Strain

Over the last few years, contractors have spoken of obvious pipelines of work. They have also highlighted the inability to profitably complete projects including because of the “lowest price wins” mentality and the cost of disputes. This is particularly so in the vertical build construction space. Principals complain of unrealistic pricing from contractors, and then subsequent variation claims.

In the middle of a “building boom”, the insolvency of a number of high-profile construction firms has pushed the construction industry into the spotlight and highlighted industry-wide issues. “Are we in, or about to be in, another “bust?” has been a hot topic at industry forums.

The administration of Arrow International, the liquidation of Ebert Construction Ltd and various Hawkins’ entities in 2018 are red lights highlighting all is not well. The fact that at least two of these followed large scale construction disputes demonstrates that at some point in the project life cycle something went wrong. Whether it was “the relationship”, risk allocation in the construction contract, the quality of design and/or workmanship, or all of the above.

On the other hand, and putting matters into perspective, by its nature, the construction industry faces many unique challenges. There are inherent difficulties due to unpredictable weather, site conditions including unforeseen ground conditions, site access issues and challenges with health and safety. The industry is also affected by commodity price increases, where the cost of building materials has escalated in recent times. It is also common knowledge that the industry is also one of the slowest to take up technological advances. These recent and legacy challenges have sparked much needed dialogue on a national scale between industry participants and Government in an attempt to forge a new and more productive path for the sector.

What is changing?

2.2 The recently launched Construction Accord demonstrates the commitment by Government and Industry to work together to transform the industry. The Accord, in my opinion, has been met with enthusiasm from many in the sector, and scepticism from some (for example some private developers). However, if the Government takes a strong lead on the Accord initiatives it is hoped that pressure from contractors, and potential loss of quality contractors, will force more private client engagement.

2.3 The Accord is split between Government, Industry and joint initiatives and is now in “phase two”. The key focus is to develop the Construction Sector Transformation Plan. This is intended to drive the right behaviours and integrate existing work and new initiatives. It will have a sector-wide mandate when implemented. The Accord Steering Group has been set up to oversee the delivery of the Accord across all the priority work areas:

- Industry-led;
- Government-led; and
- Shared.

2.4 Industry will lead the three work areas of enhanced industry leadership, collaboration and organisation, better business performance, and improved culture and reputation.

2.5 Government will lead better procurement practices and improved pipeline management, improved building regulatory systems and consenting processes.

2.6 Four work areas will have shared leadership, namely to:

- grow workforce capability and capacity;
- better risk management and fairer risk allocation;
- improved health and safety at work; and

- more houses and better durability.

2.7 A key part of the health and safety initiative is mental health. This extends beyond the Accord and is also the focus of other established bodies including the Business Leaders Health and Safety Forum. It has been encouraging to see the spotlight shone on the pressure our people and our projects are under, and an acknowledgement that mental health is a major issue, with suicide in men in the construction industry being 6.9%, (which is higher than the farming and forestry industry suicide rate of 6.8%).[5] Builders comprise the greatest proportion of suicides in the construction industry, accounting for twice as many suicides as any other trade.[6]

2.8 However, on a better note, I have personally seen an increase in push back from parties including consultants and principals on bullying behaviour on construction sites. Engineers and Principals are taking steps to exclude such behaviour, utilising the construction contract to do so, where there is a clear health and safety impact.

3. What next?

3.1 Some sceptics have said “We’ve been here before”, “I’ve heard it before”. So why is the current climate for change any different?

3.2 That is a difficult question to answer, but the consistent message from Government and Industry leaders is “We can’t carry on as we are”, so we have to stop moaning and make the most of the current transformation platform. We have already seen action from the Government on the new Rules of Procurement, the proposed reforms to the Building Act and the establishment of the Accord. The Accord asks the industry, “What are you doing about it?” and calls for action (with Government) based on clearly articulated principles. There is a growing drive for change and progress in play.

3.3 I have been challenged/questioned by many contractors – what role do lawyers (and consultants) have to play in the transformation, and will you have a role in the future if the Accord does what it says it will? In my view, any party who has had a role to play in significant construction projects will have insights to share. As lawyers, for example, we have the opportunity to look through the lens of hindsight when dealing with disputes and/or problems for our clients, and help identify what might have been done better to create better outcomes.

3.4 We look forward to the sharing of insights from various important project participants at the upcoming conference.

[5] Kate Bryson and Anne Duncan *Mental health in the construction industry scoping study* (BRANZ, Study Report 411, 2018) at 2.

[6] Kate Bryson, Janette Doblas, Christopher Stachowski and Andy Walmsley Suicide in *New Zealand’s Construction Industry Workforce: Factors Identified in Coronial Reports* (BRANZ, 2019) at at 27.