Constructioninsight

December 2009

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Genuine and good faith negotiations

Expressions such as "genuine and good faith negotiations" have been the subject of a significant number of cases and learned Journal articles. It appears that whilst there may be some general agreement as to the place in contracts of words such as "good faith" there is no comprehensive agreement on the enforceability of an obligation to "negotiate in good faith".

United Group v Rail Corporation NSW

In *United Group Rail Services Ltd v Rail Corporation New South Wales*[1], the Court of Appeal of New South Wales was required to consider whether, in a dispute resolution clause, the obligation to "undertake genuine and good faith negotiations with a view to resolving the dispute or difference" could be said to be legally binding and "if so whether it has a sufficiently certain content to be enforceable".[2]

The subject contract was one whereby Rail Corporation New South Wales (RailCorp) required United Group Rail Services Ltd (the contractor) to design and build new rolling stock for RailCorp.

Contained within the contract was a dispute resolution clause of some detail with a number of requirements to be complied with before the dispute or difference was arbitrated. One of those requirements was one to refer the dispute to expert determination. The determination was to be final and binding unless one of the parties gave to the other party what was called a Notice of Appeal. In that event the contract required that before the dispute or difference went to arbitration, "the dispute is to be referred to a senior representative of each of the Principal and the Contractor who must: … (c) meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference" (cl 35.11(c)), and that if they cannot resolve the dispute then the dispute was to be referred for mediation to the Australian Dispute Centre for Mediation (cl 35.11(d)). The parties accepted that there was no such body and that thus the relevant clause requiring mediation was void for uncertainty.

1 United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177

2 United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177 at [29] (Allsop P).

Genuine and good faith negotiations (continued)

Clause 2.14, entitled "Severability of Provisions" provided:

> If at any time any provision of this Contract is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that it will not affect or impair,
>
> 1) the legality, validity or enforceability in that jurisdiction of any other provision of this Contract, or
>
> 2) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Contract.

The contractor asserted that that cl 35(11)(d) as well as the clause requiring negotiations in good faith (cl 35.11(c)) were both void as the two obligations, ie to negotiate and to mediate were not severable. RailCorp on the other hand asserted that while cl 35(11)(d) (the obligation to mediate) was void for uncertainty, the obligation to negotiate in cl 35.11(c) was severable and thus enforceable.

For the contractor, it was argued that the obligation to negotiate was void for uncertainty relying on the decision in *Laing O'Rourke (BMC) Pty Ltd v Transport Infrastructure Development Corp*.[3] In that case, Hammerschlag J had regard to what Giles J said in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*[4] and where Giles J followed what was said by Lord Ackner in *Walford v Miles*.[5] Lord Ackner held that a mediation agreement which provided that "[e]ach party confirms that it enters into this mediation with a commitment to attempt in good faith to negotiate towards achieving a settlement of the dispute" was not sufficiently certain to be enforceable.

(2009) 25 BCL 368 at 369

Hammerschlag J also had regard to what was said by Handley JA in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*:

> Negotiations are conducted at the discretion of the parties. They may withdraw or continue, accept, counter offer or reject, compromise or refuse, trade off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or as slow as they think fit. To my good mind (sic) these considerations demonstrate that a promise to negotiate in good faith is illusory and therefore cannot be binding.[6]

The judge at first instance in *United* (Rein J) came to the conclusion that cl 35(11)(c) was certain and enforceable and that, notwithstanding the fact that the mediation cl 35.11(d) was void for uncertainty, the reference of the dispute or difference bestowed by cl 35.12 was severable. His Honour said:

> In my view, 35.11 is severable (and 35.11(c) as well if it is void for uncertainty) for the reasons I have given. I must now construe clause 35.12 having regard to the fact that clause 35.11(d) (and, I shall presume, (c)) as well, have not been included.[7]

3 Laing O'Rourke (BMC) Pty Ltd v Transport Infrastructure Development Corp [2007] NSWSC 723.

4 Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd (1995) 36 NSWLR 709 [PDF].

5 Walford v Miles [1992] 2 AC 128 at 138.

6 Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1 [PDF] at 41-42.

7 United Group Rail Services Ltd v Rail Corporation New South Wales [2008] NSWSC 1364 at [49].

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Genuine and good faith negotiations (continued)

His Honour stated his view that the disputes which had not been resolved by the senior representatives, should be referred to arbitration.

On appeal, Allsop P had due regard to the decision of Rein J and the reasons that he gave for coming to that decision and said "I agree with his Honour's conclusions, both as to the sufficient certainty and enforceability of subcl 35.11(c) and the severability of cl 35.12".[8] However, as he pointed out, to ascertain whether there was an error in the approach of the primary judge "will be demonstrated in an appeal by way of rehearing by the appeal court considering the question for itself and reaching a different or the same conclusion".[9]

His Honour then dealt at length with the relevant authorities, starting with a reference to the opinion expressed by Lord Wright in *Hillas & Co Ltd v Arcos Ltd*[10], namely, that a contract to negotiate was enforceable.

But in *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*[11], Lord Denning and Lord Diplock, in the words of Allsop P, "expressed their blunt and forceful views that Lord Wright was wrong".[12] Lord Denning said "I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract".

The significant decision that appeared to impact on the facts of *United* was the decision of the New South Wales Court of Appeal in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*. That was a matter where the facts disclosed that the parties had entered into heads of agreement about a proposed joint venture. The heads of agreement contained a clause that "[t]he parties will forthwith proceed in good faith to consult together upon the formulation of a more comprehensive and detailed Joint Venture Agreement (and any associated agreements)".

Negotiations took place and several drafts of the joint venture agreement were prepared without agreement. The detailed negotiations lasted for some 16 months. Thereafter the matter of agreement struggled on for some years and eventually one of the parties withdrew from negotiation.

The agreement to negotiate was held to be too vague or uncertain to be enforceable.

Kirby P said that he did not share the opinion of the English Court of Appeal that no promise to negotiate in good faith would ever be enforced by a court. To the contrary, Kirby P said that he agreed (2009) 25 BCL 368 at 370 with the speech of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* that:

> provided there was consideration for the promise, in some circumstances a promise to negotiate in good faith will be enforceable depending upon its precise terms. Likewise I agree with Pain J in *Donwin* [Productions Ltd v EMI Films Ltd *(unreported, 2 March 1984)*] that so long as the promise is clear and part of an undoubted agreement between the parties, the courts will not adopt a general principle that relief for the breach of such promise must be withheld.[13]

8 United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177 at [25].

9 United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177 at [25].

10 Hillas & Co Ltd v Arcos Ltd [1932] UKHL 2.

11 Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd [1975]1 WLR 297.

12 United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177 at [32]. The judgment in Courtney was generally followed and the English cases that did so are set out in the judgment of Allsop P at [36].

13 Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd 24 NSWLR 1 at 26.

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Genuine and good faith negotiations (continued)

It would appear that Kirby P was saying that, where such an obligation (to negotiate in good faith) occurs in an agreement where the terms of that agreement were agreed and where the good faith requirement related to the need for agreement on other matters that had not been agreed but which were necessary to be agreed upon to give full effect to the concluded agreement, then the enforcement of that obligation would more likely be required.

On the other hand, where the obligation so to negotiate was for the purpose of agreeing upon the terms of the main agreement, then there may not be consideration to enforce the obligation (in effect it amounts to an agreement to agree). Alternately, it would be seen as "illusory or unacceptably uncertain".[14] As Kirby P said in *Coal Cliff*, "courts should hold back from giving effect to arrangements which the parties have not concluded, at least in circumstances such as the present".[15]

Handley JA put it another way when he said "[i]n many cases the question of good faith arises in the context of an existing relationship which gives content and certainty to the issues which the court is called upon to decide".[16] Further, he pointed out that in the case before the court, there were no "identifiable criteria by which the content of the obligation to negotiate in good faith can be decided. This is left to the discretion of the parties".[17] He agreed with Kirby P that the "content of the promise was uncertain and the promise itself illusory".[18]

In *Con Kallergis Pty Ltd v Calshonie Pty Ltd*[19], Hayne J took the view that, where in a contract there is a clause requiring the parties to negotiate, eg the price for a variation, and there is no dispute resolution clause then the agreement to negotiate may be too uncertain to be enforceable. On the other hand, Hayne J pointed out:

> But unlike the kind of contract considered in *Walford v Miles*, a contract of the kind now under consideration (in which I assume (sic) there is a provision for resolution of disputes between the negotiators) does provide for an end to the negotiation other than the parties to it retreating to their offices to nurse their pride and their rejected bargaining position. If one party withdraws from the negotiations, whether in the hope that the opposite party will reopen them with an improved offer or for any other reason, the impasse between the parties can be resolved by one or other setting in train arbitration of the dispute or whatever other process of dispute resolution has been agreed. The matter will not stop with the breaking off of negotiations.[20]

Allsop P in *United* set out some "essential propositions founded on accepted authority and principle"[21], which included:

1) An agreement to agree is incomplete lacking essential terms.
2) The task of the court is to give effect to business contracts where there is a meaning capable of being ascribed to a word or phrase.

14 Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd 24 NSWLR 1 at 26-27 (Kirby P).

15 Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd 24 NSWLR 1 at 27.

16 Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd 24 NSWLR 1 at 41-42.

17 Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd 24 NSWLR 1 at 43.

18 Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd 24 NSWLR 1 at 43.

19 Con Kallergis Pty Ltd v Calshonie Pty Ltd (1998) 14 BCL 201.

20 Con Kallergis Pty Ltd v Calshonie Pty Ltd (1998) 14 BCL 201 at 212.

21 United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177 at [56]-[61].

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Genuine and good faith negotiations (continued)

3) Good faith is not a concept foreign to the common law, the law merchant or businesspeople. (2009) 25 BCL 368 at 371.

4) The law in Australia is not settled as to the place of good faith in the law of contracts. The court should work from the position that it has said on at least three occasions (not including Renard) that good faith, in some degree or to some extent, is part of the law of performance of contracts.

Allsop P said that, in his view (Ipp and Macfarlan JJA both concurring), the reasoning of Kirby P in *Coal Cliff* was more persuasive than the competing authority. After a further review of the competing authorities, he stated that the certainty and content of any contract will depend upon its specific terms and context:

> The concern in the present case is the express mutual promises of the parties to undertake genuine and good faith negotiations to resolve disputes arising from performance of a fixed body of contractual rights and obligations.[22]

As he had already pointed out in that paragraph, "It is also unnecessary to consider, in the abstract, a clause providing for good faith negotiations in bringing about a commercial agreement in the first instance".[23] The difference, he noted, is of great importance.

The obligation to negotiate in *United* was part of a dispute resolution clause and the obligation to act in good faith does not, as his Honour pointed out, do violence to the language used by the parties in the instant contract. Its strength lies in its closeness to the "contractual jurisprudence of the common law".

The court took the view that cl 35.11(c) was not uncertain and had identifiable content and should be enforced. Whilst subcl (d) was agreed by the parties to be void, nonetheless cl 2.14 was designed to save other terms of the contract and "is an apt use of language to maintain the continued enforceability of the arbitration clause".[24] Thus it was held that cl 35.12 (the reference to arbitration) was severable from the void terms of cl 35.11(d) and enforceable.

Conclusion

It is commercially agreeable to see that the court did, in the circumstances of *United*, give force to an obligation to negotiate genuinely in good faith.

The court reinforced the effect of the obligation to act in good faith and has made quite clear the distinction between an agreement to agree and an agreement to negotiate within an existing contract and, more particularly, within the terms of a resolution of disputes clause.

Any reliance upon the decided cases on this matter of negotiating in good faith should always be read and applied subject to the terms of this judgment and subject further again to any judgment of the High Court of Australia which may otherwise decide.

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This article previously appeared in the Building and Construction Law Journal Vol. 25 No. 6 2009, citation (2009) 25 BCL 368.

22 United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177 at [69].

23 United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177 at [69].

24 United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177 at [97].

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Dualcorp revisited

In our last newsletter we touched on the Court of Appeal's clear warning to claimants in the recent decision of *Dualcorp Pty Ltd v Remo Construction Pty Limited [2009] NSW CA 601* that claimant's get one shot only at submitting a payment claim under the Act for work carried out during a reference period.

In the recent Supreme Court decision in *Urban Traders v Paul Michael [2009] NSWSC 1072*, the Court considered the circumstances in which the re-agitation of payment claims will amount to an abuse of process under the Act, or be prohibited by issue estoppel.

In *Urban Traders* McDougall J noted that "it does not follow…that every repetition, in a subsequent payment claim, of a claim made in an earlier payment claim must amount to an abuse of process. That is so even if that earlier payment claim has been the subject of an adjudicator's determination".

This comment by His Honour appears on its face to be at odds with the view expressed by the Court of Appeal regarding the finality of matters determined in an adjudication.

Whilst in crude terms any conflict ought to be resolved in favour of the position expressed by the Court of Appeal, in practice these issues would first be considered in the Supreme Court which could potentially adopt a less stringent approach to repeat claims than adopted by the Court of Appeal.

Despite this uncertainty, claimants and respondents should continue to approach progress claims on the basis that claimants have only one shot at submitting a payment claim in respect of a reference period. The clearest and most effective means of then ensuring full recovery of amounts claimed is to submit a thorough progress claim which includes each and every aspect of work performed in the respective reference period.

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The important right to suspend the works under the Security of Payment Act

A claimant under the *Security of Payment Act 1999* (NSW) (**the Act**) is given a powerful weapon to extract payment that becomes due and payable under the Act — this is the power to suspend the performance of the works until payment is made. Coupled with the power to suspend is:

1) a claimant's right to loss and expense if the respondent removes from the contract any part of the works, and
2) a claimant's right to immunity from any loss or damage suffered by the respondent as a consequence of the suspension.

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The important right to suspend the works under the Security of Payment Act (The Act) (Continued)

Many claimants do not give sufficient consideration to this important entitlement.

The Court recently considered this issue in *Urban Traders v Paul Michael [2009] NSWSC 1072*.

Suspension under section 27(2A)

Section 27 of the Act allows a claimant to suspend work where a respondent has failed to issue a payment schedule pursuant to a payment claim, or failed to pay a scheduled amount pursuant to a payment schedule.

Where works are suspended, section 27(2A) of the Act then entitles a claimant to recover any loss and expense it incurs as a consequence of a respondent taking work out of the claimant's hands following a suspension by the claimant.

What is loss & expense?

A claim for loss and expense would usually be restricted to the amount the claimant would have earned under the contract for finishing the remaining work if the respondent hadn't taken that work out of the claimant's hands following their suspension.

The scope of section 27(2A) was tested in the case of *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd [2009] NSWSC 61*. In that case the court went a little way to defining the scope of loss and expense in determining that a contractor was entitled to an amount for 'loss of income' which the contractor would have earned but for the fact that the proprietor terminated the contract following suspension of the works.

In *Urban Traders* McDougall J has gone a step further and confirmed that loss of profit also falls within the scope of loss and expense incurred as a result of suspension and is recoverable where a proprietor has terminated a contract following suspension by the contractor and removed work from the contractor's hands.

In his reasoning McDougall J noted that "the right to suspend work would lose much of its efficacy if a proprietor could, with impunity and without cost, react to the suspension by withdrawing the work from the builder".

How do you recover your loss and expense following a suspension?

The relevant question for consideration is not whether your claim is for actual construction work carried out, but rather whether your claim is for loss or expense incurred as a result of the respondent's decision to remove work from your scope under the contract.

In *Parkview* the court made it clear that any assessment of an amount claimed under section 27(2A) for suspension of the works is at the discretion of the adjudicator based on the evidence placed before him or her.

The key points to note are:

1) Where you are considering suspending works under section 27: If you are the claimant, ensure that the suspension has been carried out strictly in accordance with the Act. If it has not, you do not have the protection of section 27.

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The important right to suspend the works under the Security of Payment Act (The Act) (Continued)

2) If the respondent takes work out of your scope following a suspension: A claimant in this situation will be entitled to make a claim for loss or expenses under section 27(2A). Where you have actually suffered a loss of profit, include in your claim an amount for expenses, overheads, loss of income and loss of profit together with detailed information in support of those claims to make it easy for the adjudicator to deem them reasonably incurred and therefore recoverable.

3) If you are a respondent faced with a notice of suspension: Give careful consideration to the situation before removing any aspect of the contractor's scope of work and issuing it to others as this is likely to expose you to a claim for loss of profit. Determine first whether the suspension was in accordance with section 27. In the event that such a claim for loss of profit under section 27(2A) is made against you thoroughly review and assess the accuracy and reasonableness of information provided in support of any claim for loss or expense under section 27(2A) and provide the adjudicator with detailed objections where you believe any part of the claim to be unsubstantiated.

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Home Building — changes to home warranty insurance

In November 2009 the NSW Government announced a major overhaul of the home warranty insurance scheme for home building work in New South Wales, which provides for compulsory home warranty insurance cover for home building work valued over $12,000.

Currently the home insurance scheme is privately underwritten and is a "last resort" scheme providing homeowners with insurance cover of up to $300,000 against the risk of loss resulting from non-completion of work or of being unable to recover compensation from the builder for breaches of statutory warranties under the *Home Building Act 1989 (Act)* or of having the builder rectify such breaches because of the builder's death, disappearance or insolvency. The insurers approved by the Minister for Fair Trading to provide cover are Lumley Insurance, CGU Insurance, Vero Insurance, QBE Insurance and Calliden Insurance.

Earlier this year Lumley Insurance and CGU Insurance announced that they would no longer issue new home warranty insurance policies or renew existing policies.

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Home Building — changes to home warranty insurance (Continued)

These announcements followed amendments to the Act and *Home Building Regulation 2004* in May 2009, including, but not limited to amendments, which resulted in:

- the introduction of a new trigger for homeowners to make claims on home warranty insurance policies, namely the suspension of a builder's licence for failure to comply with a monetary order made by a court or the Consumer, Trader & Tenancy Tribunal, and
- the removal of a requirement to notify the insurer of losses within six months of awareness (except for losses which become apparent during the last six months of the period of cover).

A number of builders were reportedly not able to retain or obtain home warranty insurance cover following the withdrawal of Lumley Insurance and CGU Insurance and the resulting contraction of the market. Although Vero Insurance, QBE and Calliden had not announced an intention to withdraw from the market prior to the Government's announcement of the new scheme, there was a general concern that the building industry would be at serious risk, with builders unable to obtain cover and premiums becoming more costly, unless the Government took steps quickly to stabilise the industry.

The new home warranty insurance scheme will commence on 1 July 2010 and will be underwritten by the NSW Government.

Details of the new scheme have not yet been released pending industry consultation and necessary amendments to the Act, but in general terms the new scheme will remain a scheme of "last resort", will be funded by insurance premiums, managed by NSW Treasury and operated by providers in the private sector who will issue certificates, collect premiums and handle claims. The new scheme will remain one of "last resort" and existing policies of insurance will remain in effect for the relevant periods of cover.

We will provide updates on the new scheme in a future newsletter when further details are announced.

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Home Building — changes to licensing

In September 2009 the *Home Building Act 1989* (NSW) (**the Act**) and *Home Building Regulation 2004* (Regulation) was amended to remove licensing requirements for four occupational categories in the residential building industry.

Section 12 of the Act prohibits an individual from doing:

- any residential building work where the reasonable market cost of that work (labour and materials) exceeds $1,000 inclusive of GST, or

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Home Building — changes to licensing (Continued)

- specialist trade work (including gasfitting work, electrical wiring work, work declared by the Regulation to be refrigeration work or air conditioning work and plumbing work other than roof plumbing work),

unless the individual:

- is a member of a partnership or officer of a corporation that is the holder of a contractor licence authorising its holder to contract to do that work
- holds an owner-builder permit authorising its holder to do that work, or
- is an employee of the holder of such a contractor licence or permit.

Any work carried out contrary to the licensing requirements of the Act is unlawful and subjects the person carrying out the work to possible fines. A person contracting to carry out that work in contravention of the licensing requirements is not entitled under the Act to enforce the contract but is still subject to liability for damages in respect of any breach of that contract.

The NSW Office of Fair Trading administers home building licensing in NSW, including the issue, renewal, suspension and cancellation of licences under the Act. Until 16 September 2009 the Office of Fair Trading administered the separate licensing of building consultancy work, flooring work, mechanical services work and kit home supply. With the assent to the *Occupational Licensing Legislation Amendment (Regulatory Reform) Bill 2009* (Amending Bill) on that date, the separate licensing for these four occupational categories was abolished.

The Government's decision to remove the licensing requirements for these occupational categories followed public consultation and review by the NSW Better Regulation Office. That office's assessment was that separate regulation for these types of work was unnecessarily costly for businesses in terms of administration, education and insurance and also of little added value or benefit to consumers.

In relation to building consultancy work, which for the purposes of the Act was restricted to pre-purchase visual inspections of all or part of a dwelling, the Government's rationale for removing licensing for that type of work was that:

- pre-purchase inspections, which do not include pest inspections, do not necessarily disclose the degree of any structural problems, and
- consumers are generally able to engage suitably qualified people to undertake inspections.

The removal of licensing for building consultants, in particular, was met with resistance during the consultation process because licensing was viewed by many in the building industry as an effective tool to keep incompetent and dishonest property inspectors in check.

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Home Building — changes to licensing (Continued)

For flooring work the Government's view was that:

- flooring work of a structural nature is appropriately included in either the general building or carpentry classes of licences, and
- the work of floor finishers and coverers is generally decorative in nature and generally of a low value. Further, there were said to be few consumer disputes about work of this nature which could, in any event, be dealt with separately under other consumer protection laws.

With the assent to the Amending Bill on 16 September 2009, clause 9 of the Regulation was amended to exclude from the definition of "residential building work" under the Act any work involved in installation of material forming an upper layer or wearing surface of a floor which does not include structural changes to the floor.

The consequence of that amendment is that persons carrying out this type of work are not required to hold a contractor licence. Flooring work of a structural nature, however, remains "residential building work" under the Act and must only be carried out under an appropriate class of contractor licence, such as under the general building or the carpentry classes of contractor licences.

For mechanical services work, the Government's view was that there was unnecessary duplication in the regulation of that work because:

- many activities relevant to mechanical services involve specialist trade work which can only be carried out by an appropriately licensed or certified tradesperson, and
- many mechanical services activities are separately subject to more comprehensive OH&S laws than the requirements of the mechanical services class of contractor licence.

It was in this context that clause 9 of the Regulation was amended in September 2009 to amend the definition of "residential building work" to exclude any work involving the installation or maintenance of lifts, escalators, inclinators and automatic garage doors. This redefinition, together with the removal of the mechanical services class of licencing, means that there is no longer any requirement for lift mechanics to hold a contractor licence.

Although mechanical services is no longer the subject of a separate licence class, ducting and mechanical ventilation work remains "residential building work" for the purposes of the Act and must only be carried out under an appropriate class of licence. The Office of Fair Trading has classed ducting and mechanical ventilation work as minor tradework for licencing purposes.

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Home Building — changes to licensing (Continued)

In relation to the supply of kit homes, the rationale of the Government in abolishing separate licencing was that licencing did not offer any greater protection to consumers than the protection offered by other requirements of the Act pertaining to kit homes (including information disclosure, contract and dispute resolution requirements under Part 2A of the Act) and that consumers' rights against kit home suppliers would continue to be protected through the Consumer Trader & Tenancy's Tribunal's Home Building Division.

Although the Government's aims in amending the licensing requirements to reduce unnecessary regulation in the home building industry and to preserve appropriate levels of protection for consumers appear to be well-intentioned, it remains to be seen whether those aims will in fact be realised.

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