

This month **Professor McInnis** takes a look at **New Zealand Construction Law** through the eyes of **Tómas Kennedy-Grant**, a Master of the High Court of New Zealand, well known international arbitrator and the author of a recently published book carrying the same title.<sup>1</sup>

### The Context

There is something special about the common law. It comes not simply from its evolution over time and the cumulative wisdom of judges in crafting solutions but their wisdom in crafting *common solutions* – solutions that draw upon the decisions of judges in other common law jurisdictions. It is true in the law in general, and in construction law. A cursory review of local and international caselaw will confirm that countries are looking for guidance in this way. Professor John Uff, QC brings out these borrowings in the foreword to *New Zealand Construction Law*, he has written: "The task of undertaking a complete new text on a major legal topic is, today, immense. No longer can an author limit his researches to his own library and experience. Modern communications and the now multi-headed common law, ensure that any major text written anywhere in the Commonwealth must now consider cases from all the jurisdictions, as well as the textbooks with which the new volume will be compared...(t)he work will be read with interest in many jurisdictions, not least the UK, following the bloody nose suffered by the House of Lords as a result of *Shire of Sutherland*,<sup>2</sup> and the increasing respect demonstrated by the Privy Council's decision in *Invercargill City Council v Hamlin*.<sup>3</sup>

Just as Hong Kong judges turn to New Zealand cases from time to time so too do New Zealand judges refer to those from Hong Kong. The text highlights many Hong Kong cases cited in the New Zealand courts that may be relied upon or illustrative of the law as it is or should be and include *Big Island Contracting*, *Jardine Engineering*, *Leon Engineering* and *Shui On Construction*.<sup>4</sup> Taking *Shui On Construction* as an example Kennedy-Grant writes: "The position

regarding the liability of a professional representative to a contractor in New Zealand must be regarded as uncertain. There are no New Zealand authorities on the point...the following are examples of cases in which overseas Courts have held that a professional representative owed a duty of care to the contractor...The High Court of Hong Kong held, [in *Shui On Construction*] on a strike out application, that it was arguable that a professional representative owed a duty of care to a contractor".<sup>5</sup> Someday a court in New Zealand might thus apply this Hong Kong rule.

### Background to the Text

Kennedy-Grant begins the preface to his text with: "had I been a contractor, I would have been put off the job a long time ago!" The reason, he goes on to note, is that he was originally commissioned in 1984, together with RP Smellie, QC to do a new edition of Smellie's text *Building Contracts and Practice in New Zealand*, which had been published in 1979. The project took 15 years to complete. It went through a few twists and turns with Smellie first being appointed to the bench, then dropping out and leaving Kennedy-Grant as the sole remaining author going forward. Work proceeded in fits and starts for the first few years and then languished until 1997 when the nettle was grasped and Kennedy-Grant set his own deadline beyond which no extensions of time would be granted. The happy result was the recent publication of the text by Butterworths. The preface makes clear that a wide range of practitioners and academics, as well as the Honourable Justice Smellie QC as he now is, usefully contributed comments during its writing and which have undoubtedly strengthened it as a reference work.

### Structure

The text is set out in seven parts along both traditional and atraditional lines, when compared to other standard texts. Thus, in following the mainstream, parts 1, 3, 4, 6 and 7 deal respectively with the general law, construction contracts, subcontracts, negligence and dispute resolution. In contrast, parts 2 and 5 bring out newer categorisations, which include contracts for professional services, and supply contracts respectively. In many areas the greater significance that the New Zealand statutory framework plays in dictating the form and content of construction law, compared to that in Hong Kong, comes through. In no area is this more evident than that concerning the making and enforcement of contracts generally and which are without true counterparts in Hong Kong.<sup>6</sup> Thus, contract law in New Zealand is subject to more formalities and protections than in Hong Kong, which reveals a greater willingness on the part of the legislature to intervene and address these issues as well. It is noteworthy that the passage of legislation in the United Kingdom recently to override certain aspects of the doctrine of privity of contract,<sup>7</sup> which has historically prevented third parties from suing to enforce rights under others' contracts comes 18 years after New Zealand took up the challenge with the Contracts (Privity) Act 1982. Perhaps the Law Reform Commission in Hong Kong too will now re-examine this area.

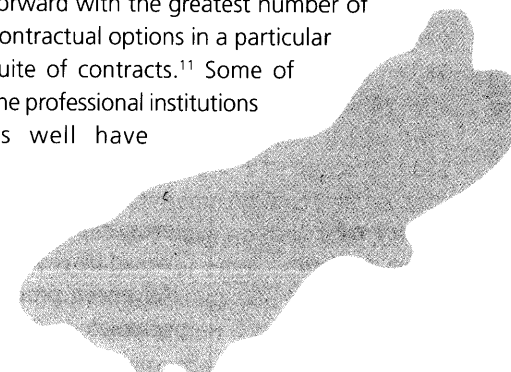
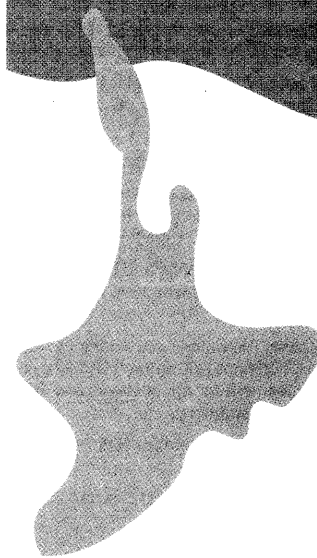
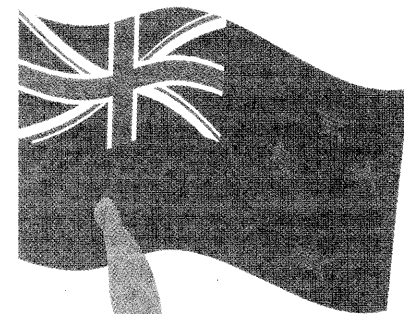
The text is exceedingly easy to use, in part because of the systematic way in which subjects are divided and in part because of how references are given. Uff, again writing in the foreword, says "the author's approach is to achieve a clear and relatively uncluttered text, with extensive footnotes, approaching the Halsbury style. The work is thus eminently

accessible to non-lawyer construction industry professionals, as well as to those who will need to follow up the copious authorities cited". The table of contents is given in two forms — in summary and in full. The full table sets forth headings in three levels and thus is capable of tremendous detail. The result is several chapters, for instance, approaching or exceeding 100 topics in description. This makes quickly researching a topic that much easier. Ease of use is enhanced by the page and decimal numbering throughout as well as by a full Index. The 600 plus pages are closed with several key appendices setting out the law not only as it is *but as it should be*. Hence, one Appendix, A, outlines recent "Proposals for Amendment of Resource Management Act"<sup>8</sup> — one of the principal statutes governing development.

### New Zealand Standard Forms

One interesting aspect of the text is the references to the New Zealand Standard forms of contract. They reveal the breadth of involvement of professional institutions<sup>9</sup> and industry organisations<sup>10</sup> in their formulation as well as the forms' diversity in their modes of procurement. The Electricity Corporation of New Zealand plays a prominent role in contracting and has driven best practice forward with the greatest number of contractual options in a particular suite of contracts.<sup>11</sup> Some of the professional institutions as well have

collaborated on common forms and model conditions of engagement, notably the Association of Consulting Engineers of New Zealand and the Institution of Professional Engineers of New Zealand<sup>12</sup> which may be of interest to Hong Kong. The Master Builders' Federation has released main and subcontract conditions and particular agreements for housing, which comprise a substantial part of total construction spending there.<sup>13</sup> New Zealand Standards round out some, though



# Construction Law In New Zealand

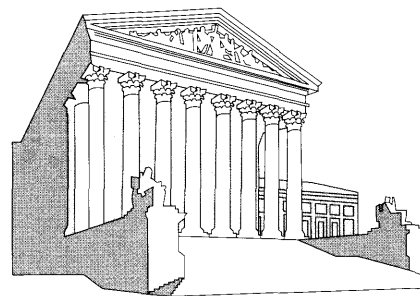
not all of the forms Kennedy-Grant has described, pertaining to building and civil engineering works as well as road construction and maintenance.<sup>14</sup>

## Summing Up

This brief tour of *Construction Law in New Zealand* cannot convey the full flavour of the law in that jurisdiction or the interest that it holds for Hong Kong. The similarities, and at times the differences, are striking. Noteworthy in this respect is the fact that New Zealand maintains, like Hong Kong did until June 30th 1997, appeals to the Privy Council. Thus our common legal heritage is clear. At the same time, with English law subsequent to this date no longer binding upon our courts, we must turn to other common law jurisdictions to fill the gap. In my view, Kennedy-Grant's impeccably articulated account of the law in one such leading jurisdiction is an excellent place to start. ■ AAC

- 1 Master Tomás Kennedy-Grant, *Construction Law in New Zealand*, Butterworths: Wellington, 1999.
- 2 *Shire of Sutherland v Heyman* [1985] 157 CLR 424. See generally Duncan Wallace, "The Shire of Sutherland Case in Australia," (1986) 3 ICLR 157.
- 3 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, 1 All ER 756 (PC).
- 4 *Big Island Contracting (HK) Ltd v Skink Ltd* (1990) 52 BLR 110, *Jardine Engineering Corporation Ltd v Shimizu Corporation* (1992) 63 BLR 96, *Leon Engineering & Construction Co Ltd (in Liq) v Ka Duk Investment Co Ltd* (1989) 47 BLR 139 and *Shui On Construction v Shui Kay Co Ltd* (1985) 1 Const LJ 305.
- 5 At p 527 of *Construction Law in New Zealand*.
- 6 Eg the Contracts Enforcement Act 1956, Contracts (Privy) Act 1982, Contractual Mistakes Act 1977 and Contractual Remedies Act 1979.
- 7 Contracts (Rights of Third Parties) Act 1998.
- 8 Other Appendices include extracts from the Resource Management Act 1991, the Building Act 1991, Building Regulations 1992 and Building Code.
- 9 Association of Consulting Engineers of NZ, Institution of Professional Engineers of NZ, NZ Institute of Architects, NZ Institute of Quantity Surveyors and NZ Institute of Surveyors.
- 10 NZ Contractors' Federation Inc and NZ Master Builders' Federation Inc.
- 11 Seven options are listed as follows: A Lump Sum, B Schedule of Quantities, C Target Lump Sum, D Target Schedule of Quantities, E Cost Reimbursable, F Management and W LumpSum/Reimbursable.
- 12 ACENZ/IPENZ, *The Briefing and Engagement of Consultants 1994*, *Model Conditions of Engagement 1996* and *Short Form Agreement for Consultant Engagement 1992*.
- 13 AA1 Housing Alterations and Additions Agreement June 1997, FG 1/1990 General Conditions of Contract, FH4 Housing Contract Agreement October 1997, MW 2 Agreement for Minor Works and SC 1/1991 Subcontract Agreement and Sub-contract Conditions.
- 14 Eg New Zealand Standards or NZS: 3901: 1974, 3902: 1974, 3910: 1987.

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**As a contractor, do we have a duty to warn about the suitability or safety of work that we anticipate the employer may ask other contractors to carry out and that could affect the safety of the work that we have carried out?**

As I have mentioned in a previous column last year, the English courts (and therefore potentially the Hong Kong courts) appear to be gradually widening the circumstances in which a contractor has a duty to warn of unsafe work. It is therefore sensible risk management to be considering your potential duties to warn others.

## A recent English case

The sort of situation that you mention has recently been considered by the English courts in *Aurum Investments Ltd v Avonforce Ltd* and *Knapp Hicks Partners and Advanced Underpinning Ltd*.

In that case the employer (Arum Investments Ltd) employed Avonforce on a design and build basis. The work included excavation close to an existing flank wall for a basement garage. Avonforce employed a separate specialist contractor, Advanced, to underpin the existing flank wall to protect it during the excavation. Advanced knew about the proposed excavation but did not know the excavation was going to be carried or whether any temporary support would be provided for the under-pinned sections of the flank wall. Advanced provided no advice or design. The underpinning was completed without defects.

Avonforce did not know that some form of temporary support