



## CONSTRUCTION LAW UPDATE – No. 609

### Demolish and rebuild?

#### Introduction

The recent Queensland Court of Appeal decision in *Kirkby v Coote & Titmus* is an interesting reminder of the potential consequences of negligent design and construction.

#### The facts

In 1993, the Kirkbys decided to build their retirement home on a steep ridge of land near Mapleton. The house was to be positioned on the low side of the road, overlooking a forest. They obtained a report from Mr Murdoch, a geotechnical engineer, before they purchased the land. Murdoch alerted them to the potential risks of land slip and advised that a pole frame house could be placed on the site but would need to be piered to the underlying basalt rock strata using 450mm diameter piers. He recommended inspection of pier holes by a geologist before pouring of any piers. Murdoch dug backhoe pits to confirm his preliminary report. For reasons that are unclear, the Kirkbys engaged Mr Titmus to design the house foundations, presenting him with the preliminary reports obtained from Murdoch.

Titmus designed a more economical footing system and produced a final report. The Titmus report did not require inspection of the pier holes before pouring and provided for founding of piers at a depth of 2 metres, rather than a requirement that the home was founded on basalt. Mr Coote constructed the home. Titmus and his employer provided a certificate stating that the footings had been designed in accordance with principles of structural mechanics and in reference to the Murdoch reports. A subsequent inspection certificate was also provided, asserting that the piers had been constructed in accordance with the design requirements of the Titmus report.

In February 1999, Mapleton experienced a week of very high rainfall, in total 1,180mm. On 9 February, the Kirkbys were alerted by a loud cracking sound. On examination, it was found that the lower section of the house had dropped by approximately 90mm, causing cracking and distress to doors and windows.

#### The claims

The Kirkbys claimed against the builder Coote and Titmus and his employer. Investigations of the site (excavating around 5 of the 45 piers) revealed that the builder had not properly complied with the Titmus report. The piers were not founded at the specified depth and had not been cased in lean mix concrete. Titmus argued that the real cause of the failure of the footings was the builder's non compliance with his report.

The Kirkbys claimed that, even if the builder had complied with the Titmus report, the substantial difference in the design requirements between Murdoch and Titmus would have resulted in the same failure. Four engineers gave evidence on this issue with a majority view that supported the Kirkbys' claim. The judge agreed with the Kirkbys and said that the evidence led to the conclusion that the foundations designed by Titmus would have failed. In any event, Titmus and his employer had certified the foundations as in compliance with his design.

The Court was then asked to determine whether the house should be repaired or rebuilt.

#### Compensation for damage

The general principle is that a negligent party must compensate the injured party for the amount of the loss that has flowed from the negligence. In this instance, the parties differed about the quantum.

Titmus said that the home could be rectified by underpinning the defective piers only – at a cost of approximately \$193,200. The Kirkbys sought the cost of demolishing and rebuilding the home, a cost of \$581,200.

In the 1954 case of *Bellgrove v Eldridge*, the High Court considered a similar claim by an owner in relation to the construction of a house with defective footings where the method of rectification was at issue.

The High Court was asked to determine whether the rectification should proceed by partial underpinning or demolition and rebuilding. The case has long

stood for the general principle that, when determining the quantum of damages for defective workmanship:

*"The measure of the damages recoverable by the building owner for the breach of a building contract is ... the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract"*,

subject to the following qualification:

*"The qualification ... to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt."*

In *Kirkby v Coote & Titmus*, the Queensland Court of Appeal considered that the demolition of the Kirkbys' house was a reasonable course. It noted that the engineer representing Titmus and putting forward the partial underpinning theory was unwilling to offer a guarantee that the house was not at risk of further deterioration in the future. Given the failure by the builder to comply with the Titmus report, and the apparent inadequacies of the Titmus design, the engineer's reluctance was hardly surprising. The Court was then faced with determining whether it was acceptable to require the Kirkbys to live in a house that had an element of ongoing risk associated with its foundations.

The appellants referred to the English authority of *Ruxley Electronics v Forsyth*, where a builder constructed a swimming pool with a diving end 6 feet deep instead of the specified 7 feet 6 inches. In that case, the Court had relieved the builder of the obligation to demolish and rebuild on the basis that the loss sustained did not extend to the need to reinstate. The builder was required to make compensation by the payment of damages assessed in an amount to compensate for the loss and not to provide a "gratuitous benefit".

The Court said that, only by the expenditure of demolition and reconstruction, could the Kirkbys be freed of a real risk of catastrophic failure, and made orders awarding the Kirkbys the claimed amount of \$581,200.

It is noted that the builder, Mr Coote, was not a participant in the proceedings as he was never formally served with the claim.

### Conclusion

The cost of careless design and negligent construction can take many years to emerge. In these circumstances, entities have often ceased trading or individuals have moved on. It is the

remaining players who are sought out by claimants. Appropriate insurance cover should be carried by contractors and professionals.

Even where liability is clearly established, the issues of quantum can be difficult to resolve. The general principles set down in *Bellgrove v Eldridge* remain unchallenged and apply today. In *Kirkby*, the Court of Appeal has extended those principles to apply to claims in negligence, as well as breach of contract.

In brief – damages are to be assessed by the cost of bringing the project up to the original design or specification with the finished product but always provided that cost of reinstatement is reasonable in relation to the defect.

Defects in foundations are always likely to give rise to significant rectification costs. However, the Court of Appeal noted that no case had been cited where defective work impacting on the stability of a house had not resulted in orders for demolition and reconstruction.

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