



CONSTRUCTION LAW UPDATE – No. 610

Direct Engineering Services Pty Ltd v A Goninan & Co Ltd [2006] WASC 105

Not the oxy torch!

Introduction

The Western Australian Supreme Court recently published its decision as to liability for a fire that caused extensive damage to Hamersley Iron's railway and rollingstock maintenance facility at Dampier.

Direct Engineering had contracted to upgrade the airconditioning plant at Hamersley's premises. Part of the works required the installation of a new steel staircase and safety railing to the roof of the office block. A number of subcontractors submitted quotes to Direct. Goninan's price of \$8,000 for installation only of the stairs and safety rail was accepted. Direct was to supply all the materials; Goninan was to supply labour only.

The faxed order

Direct's employee faxed a purchase order to Goninan. The order form was two sided. The terms and conditions were printed on the back in small font and were extremely difficult to read. The front side of the purchase order did not mention the terms and conditions on the back. When the purchase order was faxed to Goninan, only the front side was transmitted. The original was then sent by post but did not arrive until after the fire. As a result, Goninan first saw the terms of the indemnity it was required to give, set out on the reverse side, after the fire occurred.

Risk assessment

In accordance with Hamersley's requirements, Direct had carried out a risk assessment of the works. On the day of the fire, Goninan had obtained a hot work permit as it proposed to carry out some oxy cutting, grinding and welding when installing the stairs.

Goninan starts work

One of Goninan's first tasks was to remove a section of the old airconditioning ducting from the office roof. When Goninan's employees arrived on site they were told by Direct's supervisor that the airconditioning plant was operating and that the section of ducting was to

be "unbolted". One employee was performing the work while the other was designated as fire watch. When they started to unbolt the ducting, they found that the bolts were corroded and could not easily be removed. Although they had been given the mobile phone number of Direct's supervisor, they did not call him to discuss their problem. They decided to use an oxy-acetylene torch to cut the bolts. Shortly afterwards, the oxy torch operator noticed a small pin prick hole in the ducting. As he looked into the hole, the fire watch saw a heat haze from the duct, heard a roar of flames and saw the duct begin to buckle. The fire rapidly escalated due to the forced airflow inside the ducting, causing over \$400,000 damage.

The contracts

Direct's contract with Hamersley required it to indemnify Hamersley for any damage caused during the works. Direct then sought to recover the \$400,000 from Goninan under their \$8,000 subcontract.

Not surprisingly, the court found that there was a contract between Direct and Goninan but that its terms did not include the words on the reverse side of the faxed purchase order. The omission to fax both sides of the document was significant; the reverse side of the fax contained an indemnity requiring Goninan to indemnify Direct in the event that Goninan caused any loss or damage while performing the works. The court noted that, if both sides of the fax had been sent, even though the indemnity was an onerous one, the indemnity clause would have bound Goninan. The court referred to *Toll v Alphapharm* where the High Court recently stated that even an onerous exclusion clause, if part of the contract, does not need to be highlighted to be binding.

The implied term to take care

The court then turned to examine the allegations by Direct that Goninan had breached its contract and had been negligent in the performance of its work.

The parties agreed that it was an implied term of the contract that Goninan would exercise reasonable skill, diligence and care in performing the work. Given this implied term, the court did not deal with the allegation of negligence.

Goninan denied that it had failed to exercise skill, diligence and care in performing the work. It said that its employees had no reason to suspect that the inside surface of the ducting was lined with polystyrene foam insulation - Direct was an expert in airconditioning and should have told it to take care not to cut through the ducting with the oxy torch.

The court's findings

The court found that the direction given was to "unbolt" the duct. In these circumstances, it was incumbent on Direct's employees to inquire whether it was permissible to use the oxy torch. The employee said that he had used the torch in a careful way to avoid causing damage to the duct, indicating that he was aware of the danger but had proceeded with the method regardless. The court quoted an earlier similar decision (*Preston Erections v Rheem*) in which Justice Gibbs said:

"It is immaterial that they might not have been able to see that materials of a kind likely to be inflammable were in fact close ... when they commenced their operations. ... If they did not know whether or not inflammable materials were within that range, they should have made inquiries, so that reasonable steps could have been taken to ensure [their] removal..."

Goninan argued that there was an implied term in the contract to the effect that Direct was obliged to tell it about the flammability of the ducting. The court refused to imply this term, saying that it did not meet the legal test for a term to be implied into a contract; that it must be necessary to give the contract "business efficacy". The court said the contract did not need a term to the effect that Direct would protect its own interests.

Goninan also said that, even if it had breached the contract by cutting through the duct, the real cause of the fire was Direct's failure to provide information about the flammability of the ducting. The court disagreed, finding that Goninan's actions were the commonsense cause of the fire. Goninan was found liable for the entire loss and damage suffered by Hamersley.

Conclusion

When faxing a purchase order with terms and conditions on the reverse side, it is essential to fax both sides of the document. Otherwise, the terms and conditions are unlikely to form part of the supply contract – potentially with significant consequences. In this case, Goninan was found liable under an implied term so the omission to send the purchase order terms was not fatal to Direct's case.

When performing works that pose a risk to property or persons, a contractor should ask for directions rather than proceed on an assumption.

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