



CONSTRUCTION LAW UPDATE – No. 611

When one bore hole is not enough

Introduction

A recent decision of the Victorian Supreme Court in *Barton v Stiff* has examined the liability of a designer and builder of a home in relation to significant defects in the home that arose from inadequate design and inappropriate choice of materials. The principle discussed has general application to designers and architects.

Background

Barton agreed in 2000 to design and construct a new house on land owned by the Stiffs. Under the contract, Barton was required to give the Stiffs a soil test report and engineer's design of the structural aspects of the house, including the footings. However, the only soil test report that existed at the time of construction of the house was one prepared eight years earlier, in 1992. This report was given to Barton by the Stiffs, who had obtained it from the vendor of the land.

The report was headed "Classification of Foundation Soil Conditions" and recorded that a single bore hole had been excavated to a depth of 1.5 metres. The report stated that no groundwater had been encountered when the hole had been drilled and that the site was well drained.

The home was built on brick build up. In view of the absence of groundwater, Barton specified and used general purpose clay bricks in the build up below the damp course level. When the home was completed, the Stiffs complained of a number of defects, including "fairly severe salt efflorescence and spalling" of the brick build up. The evidence established that the bricks had been damaged by salty groundwater which had emerged from the site – notwithstanding the fact that it had not been anticipated by the original soil report.

The Stiffs made a claim in the Victorian Civil and Administrative Tribunal. The Tribunal ordered that Barton pay compensation to the Stiffs on account of the use of the general purpose bricks, finding that Barton should have designed the home to withstand the attack of the salty groundwater. This finding was made notwithstanding evidence that the occurrence of the salty groundwater was "highly unusual" and that no groundwater had been encountered during the process

of construction, including excavation of the site. The Tribunal found that the house was not fit for its intended purpose and that Barton had breached his warranty. Barton appealed to the Supreme Court.

Latent conditions

The presence of unexpected groundwater on a construction site is an example of a latent condition; a condition not known to the parties at the time that they entered into the contract. Latent conditions most often arise in the context of geotechnical conditions or environmental issues such as contamination and are a frequent source of disputes during construction projects. Construction contracts usually contain clauses that allocate the risk of extra costs that arise from latent conditions that become apparent during construction. Exhaustive preliminary site investigations reduce the likelihood of latent conditions but the initial cost is a deterrent.

There is a clear tension between saving cost on the preliminary investigation work and assuming more risk by proceeding without extensive site investigation. In this case, proceeding with evidence from a single bore hole may have prevented the parties from learning of the presence of the groundwater until the building was completed.

The extent of the designer's warranty

In the *Barton* case, it was necessary for the court to consider the extent of the warranty provided by Barton under the contract to provide a home that was "fit for its intended purpose".

The lower Tribunal had found that the obligation of a designer/builder under such a warranty is absolute and Barton's claim that he was only required to "perform reasonably" was not correct. The Tribunal had based this finding on the builder's obligation (as a designer) to investigate the site and prepare a competent design.

The parties agreed that the designer's obligation is to provide a design that is fit for purpose.

However, Barton submitted that the intended purpose of the house should be considered by reference to the particular location of the land.

In relation to groundwater, Barton said that there was no evidence available to it that groundwater would be encountered. It was "highly unusual" and the evidence of the various contractors who had carried out earthworks on the site was to the effect that no groundwater had been sighted. There was evidence that groundwater was unknown in the locality in which the house was constructed. For this reason, Barton said, the purpose of the house was not to withstand the attack of the groundwater and it had complied with its obligation to provide a house that was fit for purpose.

The court asked counsel for Barton to identify legal authority that supported this proposition. Counsel was unable to identify any previous case that had relied on the principle. Fortunately for Barton, Justice Hargrave identified an English decision of the Court of Appeal, in relation to the design and construction of a television mast that failed; *Independent Broadcasting v EMI and BICC*. There, the lower court had expressed the obligation of a designer and constructor as an obligation to design, supply and erect a mast that would stand up, subject to proper maintenance, and remain standing up for a reasonable life.

The Court of Appeal had disagreed, saying that the obligation was too broad, and would include an obligation to design and construct a mast that would:

"for example, withstand being struck by a meteorite or perhaps by some trespassing aircraft.

...We have come to the conclusion that the contractual obligation upon EMI and BICC was to provide a mast which would be proof against any meteorological conditions likely to be encountered in that area."

Justice Hargrave in the Victorian Supreme Court applied this reasoning to the *Barton* case. He said that the absolute warranty of fitness for purpose relates to the purpose as properly identified. In the *Barton* case, the purpose had been defined by the site investigations and the observations during construction, leading to a factual finding that the salty groundwater was "highly unusual". It was this finding that led the court to constrain the purpose and to overturn the earlier finding against the designer.

Conclusion

The obligation of a designer/builder is to provide a finished project with materials and workmanship that are fit for the intended purpose. In the typical case, the designer/builder provides an absolute warranty to this effect.

However, where the purpose of the project is defined in such a way as to exclude the cause of the defect that is complained of, the designer/builder is not to be held liable.

The case is a reminder of the ever present risk of latent conditions and the need for parties to be clear at the outset as to how this risk will be allocated under the contract. The party who undertakes the risk then needs to make a commercial decision about bearing the cost of getting extensive geotechnical reports to reduce the risk.

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November 2006

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