



CONSTRUCTION LAW UPDATE No. 705

Car park or roof?

A recent decision of the NSW Supreme Court discusses whether an engineer is contracted to produce a result or to provide services (*Roluke Pty Ltd v Lamaro Consultants Pty Ltd* [2007] NSWSC 349).

The design brief

Roluke purchased land next door to Hornsby Honda to construct a new building to lease to Hornsby. The new building was to have 3 levels; level 1 - a car washing and detailing area, level 2 - a 12 bay motor service centre and level 3 - a car park with no roof.

Mr Ezzy, the architect, suggested the level 3 slab be constructed in two stages. The lower portion of the slab was to be structural. A waterproof membrane was then to be placed over the completed structural slab, before a 100mm thick concrete topping slab was to be placed over the entire car park. The slab was to be constructed with appropriate falls so that rain would drain into a 20 cubic metre onsite detention basin to be constructed on level 3.

The cheaper and better option

Lamaro was engaged as engineer to advise on and provide design services for the project and suggested an alternative design for the level 3 slab. He said that if the slab was constructed in the way envisaged by Mr Ezzy, the waterproof membrane would possibly suffer damage during hot weather when cars drove over the topping slab. Instead of using a waterproof membrane, he proposed to increase the level 3 slab thickness, a solution he said would be more durable, equally effective and less costly. Lamaro's suggestion was accepted and the design proceeded accordingly.

The problems start

Construction took place during 1999 and the building was completed in January 2000. By May 2000, cracks appeared in the level 2 and level 3 slabs. The cracks were extensive and permitted rainwater to penetrate. Water accumulated on level 2, resulting in slippery floors and a risk of injury and danger when using electric power tools. Vehicles on level 1 suffered damage to paintwork from water that had collected lime particles as it passed through the level 2 and level 3 slabs.

The first repairs

In May 2001, Roluke installed a waterproof membrane on level 3 at a cost of \$52,152. It failed and water continued to penetrate the slab. In October 2003, Roluke repaired the cracks and installed a more durable membrane on level 3 at a cost of \$103,943.40. Shortly after, that membrane also failed and water again penetrated the slab, entering the service area below.

A lack of reinforcing admitted

The parties entered into litigation. Lamaro conceded that his designs for the level 2 and level 3 slabs were defective and that the reinforcing detailed in the drawings was less than that required under AS3600. However, the parties could not agree as to what compensation Lamaro should pay to Roluke.

A permanently waterproof slab or a 10 year slab

Experts for both parties agreed that a slab could be designed to be waterproof without a membrane and topping slab. However, it would need to include adequate reinforcing, be subject to minimal restraint by walls and columns, be post stressed and contain an appropriate waterproofing additive. Their view was that Lamaro's designs were defective for their omissions to include these features.

Evidence was presented that, had the slab been constructed with the waterproof membrane as suggested by Ezzy, it would have probably remained waterproof for 10 years and then required replacement of the membrane.

Roluke claimed that following Lamaro's suggestions, agreement had been reached that the waterproof membrane would be deleted and as a term of that agreement Lamaro would design a waterproof slab that did not require maintenance after 10 years.

Disagreement as to the remedy

Accordingly, Roluke said that Lamaro should provide them with a building that did not require regular maintenance on the slab. To that end, they said that Lamaro should pay for the construction of a roof over the car park, and pay compensation for

business interruption and the previous repairs, totalling about \$2.3 million. Given the repeated failures of the membranes that had been installed after the initial problems, it would seem likely that Roluke had come to the conclusion that the membrane solution originally proposed by Ezzy was not suitable in the long term.

Lamaro said that the contract was to provide professional services requiring the design of slabs that were waterproof. While he conceded that he had made an error in the design, he said that the true measure of damages was to be calculated by what it would cost to put Roluke into the position that it would have been in if the slab had been waterproof. On this basis, Lamaro said that Roluke was only entitled to the cost of installation of a membrane over the level 3 slab plus compensation for previous repairs and business interruption, totalling about \$539,000.

Is it a contract to produce a result

The competing positions can be summarised thus; was the contract between Roluke and Lamaro a contract to produce a result (a permanently waterproof slab) or a contract to exercise due skill and diligence in the performance of work (a slab with a membrane that might need occasional replacement)? Lamaro conceded that he had failed to deliver the second of these two options, but said that he was never obliged to deliver the first.

In order to answer this question, the court examined the terms of the retainer, which set out the terms of the contract. The retainer required design, liaison with the plaintiffs and the architect during the design and construction stage, and the provision of structural information. As is usual in contracts of this kind, it included a term that the defendants would provide advice from time to time in relation to the suitability of the engineering design and specification.

The court's decision

The court rejected the argument put by Roluke. It said that Lamaro was not required to produce a result of a permanently waterproof slab. There was no express term that required Lamaro to achieve the result contended for by Roluke.

Lamaro produced expert evidence that the repair of the cracks and application of a single layer torch - on "Emerclad" sheet membrane with an overlaid asphalt screed would waterproof the building for about 5 years.

The court said that in this case it was not possible to award damages that would provide a remedy which would give Roluke a building that was exactly equivalent to what was originally contemplated.

The court made an assessment based on what the evidence indicated was reasonable and necessary.

It awarded compensation for past expenditure on repairs, cost of installation of membrane and asphalt screed, damages for one future replacement of the membrane in 5 years time, compensation for business interruption and interest. The matter was adjourned for further submissions on some of these costs, but it appears likely that Roluke will be awarded approximately \$1 million.

Conclusion

Generally, professionals such as engineers are retained to provide services with due care, not to produce a successful outcome, but the terms of the retainer will be determinative in each case.

The general principle remains that a party is entitled to be placed in the position that it would have been in, had the terms of the contract been fulfilled.

If the terms of the contract express an obligation to perform services, rather than an obligation to produce a result, then the quantum of damages following a failure to perform may be greatly reduced.

Contributor: Tom Grace

Tom is a former engineer who ran his own construction company for 20 years before becoming a construction lawyer. He has wide experience in the engineering and construction fields and specialises in the resolution of commercial disputes.

Contact Details

Tom Grace – Partner
Direct: (08) 8110 8004
tom.grace@feg.com.au

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Fenwick Elliott Grace is a law firm that specialises in providing legal services to the construction and engineering industries.

Office: Level 10, Optus Centre
431 King William Street
ADELAIDE SA 5000

Ph: (08) 8110 8000
Fax: (08) 8231 2922
Web: feg.com.au

If you would like to receive our legal publications by email, please contact Amanda Atkins on (08) 8110 8000 or by email to amanda.atkins@feg.com.au.