LIABILITY OF ENGINEERS TO CONTRACTORS

Pacific Associates Incorporated and Anor v Baxter and Ors, Court of Appeal [1989] 3 WLR 1150 and (1989) 2 All E.R. 159.

Although this case has been covered by Philip Davenport in 1989 Australian Construction Law Reporter Issue #8 at page13 in an article entitled "Liability of Professionals", this case report by Philip Greenham has been included as it provides a different treatment of the case.

This matter involved an action by a contractor and sub-contractor ("the contractor") and an engineering firm ("the engineer").

The contractor entered into an agreement for the carrying out of dredging and reclamation work in Dubai Creek Lagoon in the Persian Gulf. The contractor submitted a tender for the work after examining bore hole reports and other geological information provided by the engineer. Those reports and information described the existence of a certain amount of "hard material". The amount of this material was greater than expected and accordingly the works to be carried out by the contractor were more expensive than anticipated.

The contractor advised the engineer of the existence of the material and of its intention to make a claim in respect of the additional costs incurred. A claim was prepared and submitted in accordance with the terms of the contract. The engineer dealt with the claim in accordance with the terms of the contract and rejected the claim.

The contractor then referred the matter to arbitration in accordance with the contract. The dispute referred to arbitration was a dispute between the contractor and the employer. The engineer was not a party to this arbitration.

Points of claim and points of defence were delivered in the arbitration proceedings. Those proceedings were then settled. The proceedings were settled on the basis of a payment being made by the employer to the contractor. The payment was made in full and final settlement of all of the contractor's claims against the employer.

The contractor then commenced court proceedings against the engineer. In these proceedings the contractor claimed the balance of the hard material claim together with interest and the costs of the arbitration. The engineer brought an application seeking to have the contractor's claim struck out for not disclosing a cause of action and being an abuse of process. This application was granted by the Judge at first instance. The contractor appealed against the decision.

Duty of Care

The central issue in the appeal was whether or not an engineer, in these circumstances, owed a duty of care to a contractor. The court of appeal commenced a consideration of this question by referring to *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. The Court of Appeal considered that the question was whether ".... an appropriate degree of proximity between the engineer and the contractor beyond the terms of the contract is established .... in order to give rise to a liability in tort". The court noted that in argument it had been referred to a large number of authorities. Purchas LJ stated, at page 1165, that:

> "It is clear from these authorities that there is no one touchstone with which to determine the existence or otherwise duty of a duty of care in any particular circumstance. Various criteria emerge which are capable of adaption to the particular circumstances of the case under review. As a generalisation before a duty can be found to exist the circumstances in which the parties find themselves must establish a proximity of some kind that would demonstrate that the lack of care of the one will foreseeably cause pecuniary loss to the other in the context where the first has accepted responsibility for such loss, if occasioned by his negligence, and the second has, in the same context relied on the exercise of due care and skill by the first so as to give rise to a direct duty to be responsible for that loss. The matter does not end there, however, because superimposed on the foregoing criteria is what has been called a policy aspect, namely, before a duty of care will be held to exist the court should find it just and reasonable to impose such a duty."

His Lordship then referred to *Greater Nottingham Co-operative Society Limited v Cementation Piling & Foundations Ltd* [1989] QB 71 and noted that in that case the court considered, at page 100, that ".... it would be difficult to construct a special obligation ... in tort to which liabilities created by a collateral contract did not extend ....".

His Lordship, at pages 1165 and 1166, went on to state as follows:

> ".... Where the parties have come together against a contractual structure which provides for compensation in the event of a failure of one of the parties involved the court will be slow to superimpose an added duty of care beyond that which was in the contemplation of the parties at the time they came together. .... I believe that in order to determine whether a duty arises in tort it is necessary to consider the circumstances in which the parties came together in the initial stages at which time it should be considered what obligations, if any, were assumed by the one in favour of the other and what reliance was replaced by the other on the first."

His Lordship then went on to consider the contractual structure against which the engineer and the contractor came into contact. His Lordship noted that the contract provided for many detailed clauses dealing with the relationship between the contractor and the engineer. These clauses included the power in the engineer to vary the programming of the work, determine measurement of the work and numerous certifying obligations.

His Lordship then considered cases commencing with *Ranger v Great Western Railway Co.* (1854) 5 HL Cas 72

and concluding with *Michael Salliss & Co Ltd v Calilona* (unreported) 3 July 1987 Judge Fox-Andrews. His Lordship then made the following comments, at page 1175, as to whether the engineer was liable to the contractor in tort:

> "One must start with the proposition that if the contractor had required an indemnity for extra-contractual protection in respect of default by the engineer or insolvency on the part of the employer then it was open to the contractor to have stipulated for such protection. On the contrary, by accepting the invitation to tender on the terms disclosed in the document "Instructions to Tenderers" and the contractual document submitted therewith the contractor must be taken to accept the role to be played by the engineer as defined in the contract."

Included in the contract was an "exclusion clause" which purported to exempt the employer and the engineer from being liable for any acts or obligations performed under the contract or from any default or omission in the performance of such acts.

Having regard to the contractual framework, and after taking into account the "exclusion clause" (although His Lordship stated that his decision would have been the same even if the "exclusion clause" did not exist), His Lordship concluded, at page 1176, that it was ".... impossible either to support the contention that the engineer was holding himself out to accept the duty of care with the consequential liability for pecuniary loss outside the provisions afforded to the contractor under the contract, or to support the contention that the contractor relied in any way on such an assumption of responsibility on the part of the engineer in any way to bolster or extend its rights."

His Lordship did not consider that there was any difficulty in allowing a clause in a contract between two parties to operate to limit liability by one of those parties to a third party. His Lordship stated, at page 1177, as follows:

> "The presence of such an exclusion clause whilst not being directly binding between the parties, cannot be excluded from a general consideration of the contractual structure against the contractor demonstrates reliance on, and the engineer accepts responsibility for a duty in tort, if any, arising out of the proximity established between them by the existence of that very contract."

Ralph Gibson and Russell LJ reached the same conclusion regarding the existence of a duty owed by the engineer to the contractor. However their Lordships' reasoning was somewhat different.

Estoppel

The second submission made on behalf of the engineer was that the proceedings should be dismissed as a result of the exercise of the court of its inherent jurisdiction to prevent vexatious or oppressive litigation. This submission was based upon the earlier arbitration proceedings between the contractor and the employer and the settlement of those proceedings.

His Lordship considered this submission in the light of principles of estoppel. His Lordship accepted that historically privity between parties was necessary to establish estoppel. However His Lordship also accepted that in one sense the court proceedings between the contractor and the engineer amounted to a bear re-agitation of the same issues which were dealt with in the arbitration between the contractor and the employer. His Lordship did not express any firm view on this issue as it was unnecessary to do so given that he had already held that there was no duty owed by the engineer to the contractor. However His Lordship did state, at page 1179, as follows:

> "Had I been obliged in order to determine this appeal to reach a firm conclusion in the circumstances I would have been minded to sustain what would be a small extension of the principle already established ....".

Having regard to the above comment His Lordship would appear to be amenable to an argument that the resolution of the arbitration between the contractor and the employer did operate as an estoppel between the contractor and the engineer.

Causation

The final submission put to the court was that any damages which might have been suffered by the contractor did not flow from any breach of duty which may have been owed by the engineer. In effect there had been an intervening act, that is the arbitration and its settlement, which had broken the causal nexus between any beach of duty and the suffering of any loss.

His Lordship accepted these submissions.

Ralph Gibson LJ also accepted this argument.

- Phillip Greenham

UNSIGNED BUILDING CONTRACT HELD ENFORCEABLE

Empirnall Holdings v Machon Paull Partners Pty Limited, New South Wales Court of Appeal, 11 November 1988.

A dispute which raised fundamental questions of contract law relevant to the construction industry has recently been decided by the New South Wales Court of Appeal.

The decision, concerning the acceptance "by silence" of a building contract is one of practical importance in a general contractual sense and is of particular interest as it arose in the context of a dispute between a firm of architects, Machon Paull Partners Pty Limited ("the architects") and a property developer, Empirnall Holdings Pty Limited ("the developer").

The facts

Following upon the preparation of a feasibility report, the architects were appointed architects of a development at Crows Nest.