CONSTRUCTION PROFESSIONALS AND THE PEER PROFESSIONAL OPINION DEFENCES

By Maxine Tills

Peer professional opinion defence - no 'get out of jail free' card for construction professionals

Since the recommendations made by the Review of the Law of Negligence Final Report (Ipp Report) in 2002, each Australian state has enacted legislation that provides for a defence of peer professional opinion. In Western Australia, the defence applies only to health professionals and, despite a wider application in the other states, the majority of cases dealing with the defence are medical negligence cases. The defence has been argued in a number of cases regarding claims against engineers, notably in New South Wales, most with little success.

The relevant provision in New South Wales is Section 50 of the Civil Liability Act 2002 (New South Wales) (CLA). The effect of the section is as discussed in Dobler v Havlerson: [1]

If the conduct complained of accorded with professional practice regarded as widely accepted by peer professional practice as competent, then the professional escapes liability, subject to any irrationality of the practice.

The case confirmed the section provides a defence to claims of professional negligence and that (with the exception of WA) the professional has the onus of proving the existence of a professional practice widely accepted by peer professional opinion as competent professional practice.

The defence applies only to breach of a duty to exercise reasonable care whether under a contract or in negligence. It applies to damage whether it be property damage, economic loss or personal injury. The defence does not apply to a claim for breach of an express term of a contract which imposes an obligation on a construction professional other than to exercise reasonable care or under consumer legislation for misleading and deceptive conduct.

Given that a large number of claims against construction professionals involve not only allegations of breach of duty of care but breach of contract and misleading and deceptive conduct arising from design drawings or the certification of the design, the defence's application is necessarily limited in defending claims.

The defendant should plead sufficient material facts to establish the defence. Reference to the section is desirable.[2] The material facts pleaded should include:

- the specific manner in which the defendant acted being a practice at the time;
- the fact of its wide acceptance by peer professionals as competent practice; and
- that the defendant acted in accordance with the practice.[3]

The defendant does not need to plead the names or number of professionals who accept the practice as competent professional practice.

Expert evidence is required to support the manner in which the defendant acted and to

establish evidence of acceptable professional practice. It is not sufficient for a professional to give abstract evidence that professional persons have responded in a similar way as the defendant in similar circumstances. Evidence should be adduced to prove the specific matters pleaded.[4]

The limitations of the defence under Section 50 CLA to allegations of professional negligence in complex engineering claims are evident in UGL Rail Pty Ltd v Wilkinson Murray Pty Ltd (**UGL Rail Case**)5 and Thiess Pty Ltd and John Holland Pty Ltd v Parson Brinckerhoff Australia Pty Ltd (**TJH Case**)[6]

The UGL Rail Case concerned the provision of advice by Wilkinson Murray, acoustic engineers, about what UGL Rail was required to do to comply with contractual specifications regarding reverberation control in the Epping to Chatswood Rail Link. In 2003, Wilkinson Murray under a consultancy agreement, provided advice in a report about the type and quantity of sound absorbent panels necessary to meet the reverberation times specified. In 2007, Wilkinson Murray provided further advice when its reverberation testing indicated that the tunnels did not meet the reverberation specification and more acoustic panels would be required. The claim relates to both pieces of advice.

The claim by UGL Rail against Wilkinson Murray was for both negligence and misleading and deceptive conduct in contravention of what was then Section 52 of the Trade Practices Act 1974 (Cth). The New South Wales Supreme Court found that, in relation to the 2003 report and recommendations, Wilkinson Murray was negligent and engaged in misleading and deceptive conduct because without undertaking any computer modelling, building a scale model or adopting a trial and error approach to determine the amount of acoustic panelling required to meet the reverberation specification, it was not in a position to make the recommendations it did and an engineer exercising reasonable care and skill would not have made the recommendations made by Wilkinson Murray.

Wilkinson Murray submitted that it was not negligent and relied on evidence from its expert that it was unusual at the time for acoustic engineers in Australia to build scale models or perform computer modelling. Wilkinson Murray relied on Section 50 of the CLA in its defence. The Court rejected the peer professional opinion defence.

The Court found that while computer and scale modelling were not common in Australia at the time Wilkinson Murray provided its advice, a number of firms of acoustic engineers had the capacity to undertake computer modelling. The Court found that Wilkinson Murray's negligence was not that it had not undertaken computer modelling but that it had made recommendations about the acoustic panels required to meet the reverberation specification which in the absence of any modelling, it had no rational basis for making. The Section 50 CLA defence did not apply.

The peer professional opinion defence was more recently considered in the TJH Case, another complex engineering claim which involved litigation arising from the roof collapse of a section of the Lane Cove Road Tunnel at Artarmon in New South Wales resulting in significant loss of property and property damage. The designers of the works and the geotechnical engineers responsible for monitoring the ground conditions, formerly Pell Sullivan Meynink Ltd (in liq) (**PSM**) were among the professional consultants sued. As to be expected with a project of this size, there was a complex suite of contracts governing the project and the litigation was complex.

The Court found that PSM breached its obligations to TJH based on its conclusion that PSM's contract with TJH required it to continue to monitor and report on the adequacy of the design in response to the observed rock conditions and that there was no evidence that PSM undertook any assessment of the relevant support systems. The Court said the whole of

the design approach and of PSM's obligations was to require continual reassessment of the adequacy of the design in the conditions actually encountered.

PSM relied on the peer professional opinion defence. TJH argued that the expert evidence relied on by PSM did not provide any evidence of widely accepted peer professional opinion. The Court said in relation to section 50:

> In my view, the question raised by section 50 cannot be considered in a vacuum. It can only be considered, and the widely accepted peer professional opinion can only be assessed, by reference to the specific obligations that the professional undertakes pursuant to the contract of retainer.
> ...
> It is easy to see how section 50 operates where the professional undertakes no more than the usual and proper obligation to exercise due care and skill in the performance of duties of design, inspection, supervision, or whatever else is a subject of the particular retainer. In the present case, the obligations that PSM undertook were very carefully designed to reflect the particular demands of this complex project. It may be that peer professional opinion could be relevant in the context with which I am concerned. It is not necessary to decide that point...[7]

Conclusion

The peer professional opinion defence is routinely pleaded. However, while there may be some cases where a construction professional may be able to rely successfully on the peer professional opinion defence as the two cases briefly discussed demonstrate, in complex construction projects in which the obligations of a construction professional under its retainer are invariably specific and go beyond the usual obligation to exercise due care and skill in performing the duties under the retainer, the defence is unlikely to succeed.

End Notes

[1] [2007] *NSWCA 335 at 59-62 per Giles, JA.*
[2] Sydney Southwest Area Health Services v MD (2009) 260 ALR 702.
[3] *Douglas QC, R. 'CLA Professional Liability exemption – beware the calculus!'* (2014) 11(9) Civil Liability 114 page 115.
[4] *Vella v Permanent Mortages Pty Ltd* [2008] NSWSC 505.
[5] [2014] NSWSC 1959.
[6] [2016] NSW 173.
[7] [2016] NSW 173.

About the Author

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