The Architect's Administration Role Under a Spotlight: *Robinson v Kenny*

Written by Nick Lux, Partner and, Christy Mellifont, Solicitor

Introduction

In a decision handed down last month, the Federal Court of Australia has found that an architect engaged in misleading or deceptive conduct during a tendering process by providing inaccurate cost estimates to his client.

Background

The applicant owned land in Tweed Heads, New South Wales. In 2005, he obtained development consent to demolish the house which stood there, and build a larger residence as his family home. The applicant retained the first respondent, an architect, to design the new house. The architect, Mr Kenny, was the sole director and controller of ABK Australia Pty Ltd (**ABK**).

The design process was completed in November 2006 and the architect then oversaw the tender process. Mr Simpson, of Simcorp Developments and Constructions Pty Ltd (**Simcorp**), tendered for the job and was eventually chosen to conduct the works.

In May 2007, the builder and the owner entered into a contract to build the house. The building contract was a 'cost-plus' contract without a cap, which contained a 'Risk Reward Chart' devised by the owner, under which the builder's margin fell if the total contract price increased. The owner's evidence at trial was that he was led by the architect to believe that the work would cost up to $1.35 million or marginally more.

The existing house was demolished and building commenced in July 2007. The building work ceased in December 2009 before the house was complete, and the building contract was terminated. The owner spent $2.47 million on building the house during that time. The evidence was that that it would cost a further $300,000 to complete the work.

The Claim

The owner commenced proceedings against the architect, the builder and Simcorp in the Federal Court. Simcorp was subsequently placed into liquidation, and it and the builder were removed as respondents.

The owner sought compensation for misleading or deceptive conduct by the architect pursuant to ss 42(1) and 68 of the **Fair Trading Act 1987 (NSW)**, and by ABK under ss 52(1) and 82 of the T**rade Practices Act 1974 (Cth)**.

The owner alleged that the architect misled him as to the nature of the tender process which resulted in the quote, as well as the likely costs of the works the subject of the building contract. The owner submitted that, had he known the work was going to cost in excess of $1.4 million, he would have not undertaken the project at that time.

The architect's defence was that he was an "*innocent conduit*" between the builder and the owner, and it was the builder who stipulated the inaccurate pricing.

Tender Process Representations

At the time of the tender process, the builder provided an estimate of $1.3 million on a 'cost-plus contract (20%)' basis, or a quotation of $1.4 million on a 'fixed time/fixed price contract' basis (**the quote**).

The expert evidence was that, at the time the quote was given, the true fixed price contract sum was approximately $1.7 million and the cost plus sum was approximately $1.9 million.

After detailed consideration of the evidence, her Honour found that the tender process was unorthodox because the architect was instrumental in the production of the quote. The architect:

+ asked the builder if he could build for $1.4 million, thereby suggesting the fixed quote to the builder;
+ consulted with the builder on the morning the quote was produced;
+ created the document which became the quote on his computer;
+ did not relay to the owner that, during their conversations on the morning the quote was produced, the builder qualified the quote by saying that he could not complete the work for a total cost of $1.4 million "*without specification and design change*".

Her Honour found that any material way in which the tender was not orthodox (including the fact that the quote was not wholly the product of the builder's work and that it was attended by a qualification not apparent on the face of the quote) was important information which the owner would reasonably expect to receive from a professional architect conducting a tender on his behalf.

Her Honour was therefore satisfied that the architect's conduct was misleading or deceptive, or was likely to mislead or deceive, the owner. The Court also accepted that, if the owner had learned of the qualification to the quote or that the tender had been unorthodox, he would have had no further dealings with either the architect or the builder.

Building Cost Representations

In April 2007, the architect sent draft building contracts to the owner on 'fixed price' and 'cost-plus' bases as follows:

+ the 'fixed price' draft contract had a price of $1.35 million, with a builder's margin of 20%; and
+ the 'cost-plus' draft contract did not contain a cap and stipulated that the builder's fee was "20% of the cost of the building works ... if total contract price results in less than $1.2m".

The Court found that:

+ it was the architect who inserted the figure of $1.35 million into the draft 'fixed price' contract, not the builder;
+ the architect thereby gave credibility to $1.35 million as being an achievable construction cost within the builder's scope; and
+ the architect also encouraged the owner to adopt the 'cost-plus' contract in circumstances where:

    - the builder had not provided a new estimate;
    - the architect had not notified the owner of the builder's qualification that he could not complete the work for a total cost of $1.4 million without variations;
    - the variations following the fixed price estimate of $1.4 million did not result in a significant reduction in the re-design and re-specification process; and
    - the architect did not have firm advice from the builder that he would or might be willing to enter a fixed price contract at $1.35 million.

Her Honour was satisfied that this conduct, viewed as a whole, had a tendency to lead the owner into the erroneous view that if the builder built the works on a cost-plus basis with a builder's margin, the likely cost of the works within the builder's scope would (without variation) be less than $1.35 million, or marginally more than that amount.

The Court was persuaded that the architect genuinely believed that the work could be built for $1.35 million, but found that he had no reasonable basis for that view.

Liability of the builder

The architect claimed that the owner and the builder were concurrent wrongdoers because:

+ the builder provided the quote without the necessary qualification;
+ the owner knew the builder had refused to enter a fixed price contract for $1.35 million, and accordingly should have known that it was not feasible to complete the work for that amount; and
+ the range of cost values in the 'Risk Reward Chart' attached to the final building contract amounted to a representation by the builder that the building cost would fall in that range.

The Court dismissed the architect's claim for proportionate liability.

Her Honour found that it was the architect who acted for the owner, and it was the architect through whom all communication passed. The builder had no reason to suspect the architect did not pass on the qualification to the quote, nor did the builder have an advisory relationship with the owner in relation to the building contract.

Conclusion

Ultimately, the finding in this case rests upon the particular factual circumstances.

The architect assumed an unusually prominent role in devising estimates for the building work in the lead up to the execution of the building contract. The Court seemed at pains to carefully detail the evidentiary findings which gave rise to its decision.

Nevertheless, the case does highlight the importance of accurate representations to clients when an architect assumes a contract administration role. ▪

Nick Lux, Partner
e: nick.lux@wottonkearney.com.au
p: +61 3 9604 7902

Christy Mellifont, Solicitor
e: christy.mellifont@wottonkearney.com.au
p: +61 3 9604 7946