Sharing the Blame, Sharing the Damages

By Doug Jones, Construction Partner, Clayton Utz, Sydney

Even the most superficial review of negligence law will quickly reveal some arcane legal thinking and bizarre and frightening results for builders and construction industry professionals.

This unfortunate situation is well illustrated by looking at how liabilities for damages are shared between different parties when things go wrong, both under contract law and under the judge-made law of negligence. The results under these two branches of the law are often far from consistent!

The starting point was the March 1999 High Court decision in *Astley* v. *Austrust Ltd*.

In this important case, the High Court confirmed that in many situations, especially those involving professional services, both contractual and negligence claims can be made for defective work.

This long-standing potential for concurrent liability under both branches of the law was confirmed even though:

- there are differences in the periods during which plaintiffs may sue, with the potential for negligence claims often outliving the possibility of contractual legal action; and
- the damages awarded may be very different, mainly because Australian courts use different *remoteness of damage* tests. Typically, negligence liabilities extend more widely than contractual damages.

The High Court confirmed that

The existence of a duty of care under the law of negligence does not displace the unwritten contractual duty – long implied by the courts as a matter of law rather than choice by the contracting parties – to perform professional services with reasonable care and skill.

If a plaintiff's own negligence contributes to the damage suffered, this *contributory negligence* will reduce the damages awarded for *negligence*, even if the very purpose of the contract was for the defendant to protect the plaintiff completely against this damage.

The most important and difficult question before the High Court, however, was whether the same contributory negligence will also reduce the damages awarded for a *breach of contract* arising from the same factual situation.

Overruling a series of earlier Australian and English court decisions, the High Court decided that in Australia a plaintiff's own negligence will *not* reduce the damages it is entitled to be awarded for a breach of contract by the defendant, no matter how much the plaintiff is to blame for the defendant's breach.

This will now apply even when the contractual obligations that have been breached are *implied* by the courts, rather than written into the contracts by the parties themselves, and even when the performance standards imposed by the courts in this way under the law of contract are identical to those imposed by the courts under the law of negligence.

The result is that while negligence damages will often be reduced because of a plaintiff's contributory negligence, this can never occur for damages for a breach of contract arising from exactly the same circumstances, unless the contract itself expressly caters for this type of situation.

The majority of the High Court judges made this decision partly by analysing the wording and history of the legislation that apportions negligence damages to take account of contributory negligence.

But they also made the distinction between contract and negligence apportionment by arguing that contractual obligations are voluntarily assumed by the parties, whereas negligence liabilities are imposed on the parties by the law.

Curiously, the fact that the only contractual obligation being considered by the High Court in Astley was itself also imposed by the courts, rather than voluntarily assumed by the parties, was not addressed as part of this argument!

The dissenting judge, Justice Callinan, rejected these niceties, observing that it is anomalous for the legal outcome of a set of facts to differ depending on the way a plaintiff's case is pleaded. As he noted, such anomalous results *do not accord with the modern tendency to eschew form and prefer substance*.

In the face of *Astley* v. *Austrust*, it may now become necessary for construction industry contracts to start incorporating clauses providing explicitly for contractual damages to be apportioned in a way similar to the apportionment of negligence damages.

Indeed, the majority of judges suggested precisely this course, adding that this might reduce professional fees. Again, the fact that these fees would otherwise have to be increased in the first place to cater for the new exposure created by the High Court was apparently overlooked!

It needs to be remembered, however, that even if contracts start to incorporate these types of apportionment provisions, negligence damages often will still be much higher than contractual damages, and/or available much later, so significant anomalies are still likely to arise.

The dangers of quick fixes

What is more, unless greater care is taken, the cure may be ineffective or may produce its own problems. This has already occurred with legislation in several States and the Northern Territory designed to protect building industry professionals from the impacts of *joint and several liability*.

In many situations, the protection afforded by this legislation is an illusion.

Suppose, in a defective building case, for example, a court finds that the responsibilities for the defect are shared between the architect, the engineer, the builder, one of the builder's subcontractors and the local council inspector.

Under the common law, each of these will be liable for a proportion of the damages, as determined by the court, but if only the architect (for example) can afford to pay, the owner may recover *all* the damages from the architect.

Insurance companies and councils often end up paying the lot.

So, in New South Wales, Victoria, South Australia and the Northern Territory, legislation has sought to replace this *joint and several liability* and limit each party's liabilities to their own responsibility for the loss or damage.

This legislation, in the NSW *Environmental Planning and Assessment Act*, the Victorian and NT *Building Acts* and the SA *Development Act*, does not expressly distinguish between contract and negligence liabilities.

But, as one construction industry commentator argued in a recent article, it is far from clear whether *responsibility* (or an equivalent phrase in some of the Acts) refers to legal responsibility or casual responsibility. The two may be quite different.

Similarly, the legislation directs the courts to apportion damages in a way that is just and equitable, having regard to the assessed responsibilities of the parties – but arguably it would *not* be *just and equitable* to override an express contract provision making each party potentially liable for all the damage.

Again, it is not clear whether the legislation applies to arbitrations, or only to litigation in the courts. Despite the references only to *courts*, it is possible, in the light of a 1981 High Court decision, that some arbitration clauses will now allow arbitrators to sever joint and several liability in arbitration hearings as well.

Importantly, in Victoria and New South Wales, the intent of the legislation might be overcome very simply by a plaintiff's choosing to sue only one defendant and, because of insurance, that is usually the one with the deepest pockets. Even if this defendant joins other parties, the statutory limitation on its liability will not arise. In South Australia and the Northern Territory, the legislation uses different words and this avoidance technique is probably not available.

And finally, the State and Territory legislation almost certainly provides no protection in the case of actions brought under the Commonwealth *Trade Practices Act* – and most claims against building industry professionals and councils can easily be made this way, along with claims under contract and negligence law.

The need for tight and careful drafting of construction industry contracts, addressing all these sorts of issues, has never been more important! *(Reprinted from the Clayton Utz newsletter,* Construction Issues, *June 1999. Further details can be obtained from the author on (02) 9353 4000.)*

Principal's Power to Value Variations at its Sole Discretion – Decision Reversed

By Stephen Boyle, Construction Partner, Clayton Utz, Perth

The decision by a single judge of the West Australian Supreme Court in *WMC Resources Ltd* v. *Leighton Contractors Pty Ltd* has been overturned on appeal to the Full Court.

The appeal concerned the principal's valuation of work executed by the contractor which constituted variations under a mining contract.

Essentially, there were two principal issues in the appeal. First, on what grounds could the arbitrator appointed under the contract interfere with the principal's valuation of the variations? Second, could the arbitrator – and, if so, on what grounds – substitute his own determination for that made by the principal?

The trial judge held, in effect, that merely upon the contractor disputing the principal's valuation, the arbitrator had the power to set it aside and determine the value of the variations himself.

The contract empowered the appellant to determine the value of a variation, in certain circumstances, *in its sole discretion*.

Much of the argument at first instance and on appeal revolved around this phrase. However, in the appeal court's view, the critical feature of the principal's valuation was that it involved, or had many of the characteristics of, a discretionary judgment. The trial judge regarded the valuation in a different light and considered that it did not involve a discretionary process. The Full Court said that this difference substantially explained the different conclusions it had reached.

Background circumstances and the formal questions

Under the contract, the contractor undertook to carry out open cut mining work for the principal. The relevant clause of the contract provided that, subject to certain conditions, the value of variations would be determined by the principal *in its sole discretion*.

The conditions were fulfilled and the principal began valuing the variations. The contractor disputed the principal's valuation methods and the valuations it completed.

The contract contained an arbitration clause under which the contractor commenced arbitration proceedings. It contended that the appellant had *failed to exercise its discretion in a way which is authorised by the contract*, and requested the arbitrator to determine the value of the