14. LATENT SITE CONDITIONS AND THE TRADE PRACTICES ACT

In Westham Dredging Company Pty Limited v. Woodside Petroleum Development Pty Ltd (1983) 5 BCLRS 135, in relation to an action under Section 52 of the Trade Practices Act on the basis that site information in the form of a geological and geophysical report provided to tenderers for a dredging and reclamation contract at Dampier, Western Australia was alledgedly misleading or deceptive within the meaning of Section 52 of the Act, it was held that Section 52 of the Act was applicable to "consumers" and that corporations such as Westham capable of negotiating and executing contracts for $5.5M did not constitute "consumers".

In Bevanere Pty Ltd v Lubidineuse (1985) 6 BCLRS 226, Lubidineuse, purchasers of a beauty clinic business from Bevanere, alleged that Bevanere had made a statement that one of its employees would remain with the clinic after it had been sold, knowing that the employee in question intended to set up her own clinic. A single judge of the Federal Court held that this statement constituted misleading or deceptive conduct in breach of Section 52 of the Act.

On Appeal, Bevanere submitted that the conduct complained of had not occurred in "trade or commerce", but during the sale of an asset and further that Section 52 of the Trade Practices Act was only relevant in a consumer protection context. It was held that Section 52 should not be given a confined meaning as a result of the heading "Consumer Protection" in Part V of the Act and that it was not confined to statements directed to the public or some identifiable section of the public. In reaching this decision, the Federal Court declined to follow Westham Dredging Pty Limited v. Woodside Petroleum Developments Pty Ltd.

It would appear that this decision opens the way for the future use of the Trade Practices Act in relation to misleading tender information, e.g. with respect to latent site conditions. It should be carefully considered that facts would have to be there to support such an action. It should also be noted that the Trade Practices Act does not bind the Crown in the right of the States and, accordingly, no such action would currently lie against a State Government Construction Authority (it is understood that there is some consideration at present by the NSW Government to extend the operation of the Act to NSW Government Departments engaged in commercial undertakings). There would also seem to be some potential for State Fair Trading Acts to be used, as an alternative to the Trade Practices Act in relation to misleading site information or advice. Such legislation currently exists in Victoria, New South Wales and South Australia, is proposed for Queensland and Tasmania and is currently in Bill form in Western Australia.

15. NEGLIGENT ADVICE, INACCURATE ESTIMATES AND THE TRADE PRACTICES ACT

The potential for liability in tort for negligence in relation to estimates of construction costs has certainly caused architects some heartburn in recent years; see Balnaves v McLeay (1982) 5 BCLRS 284, Nemer v Whitford (1983) 33 SASR 208 and Bennetto v Kostromin (1983) 5 BCLRS 377; also see Abrams v Ancliffe (1978) 2 NZLR 420 re the potential liability of builders for estimates.

The novel case of Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd and Ove Arup Pty Ltd (1987) 6 BCLRS 406 and 9 ATPR 40-771 involved an action under the Trade Practices Act in relation to estimates and will do nothing to alleviate concerns. If anything, it will extend the paranoia over the potential consequences of estimates.

Bond Corporation had engaged Ove Arup Pty Ltd to act as consulting engineers for earth, road and drainage works associated with a residential subdivision. Thiess Contractors were engaged to carry out the construction. Bond Corporation brought an action in the Federal Court alleging that Ove Arup had misrepresented its experience and expertise in the design and supervision of land subdivisions and its ability to provide competent estimates of the costs of the works. Bond alleged that these representations were made in trade or commerce and were misleading or deceptive contrary to Section 52 of the Trade Practices Act and had caused Bond Corporation to suffer damage. Bond Corporation claimed that in reliance on and upon Ove Arup's advice, it would have to pay some $5.4m in excess of the estimated costs of the subdivision. Bond Corporation also alleged that Ove Arup Pty Ltd was in breach of its contract and was negligent in the performance of its duties under the contract and in relation to the provision of estimates.

Ove Arup contended that the provision of services by a member of a profession is not capable of being conduct in trade or commerce for the purposes of Section 52 of the Trade Practices Act. Ove Arup also contended that Bond Corporation's particulars of claim failed to establish a relationship between the alleged misleading or deceptive conduct and the loss or damage allegedly suffered by Bond Corporation.

It was held:

1. Section 4 of the Trade Practices Act defines the term "services" to include "work of a professional nature" and the use of the term "services" in Section 53 of the Act to qualify the application of "trade or commerce" suggests strongly that the words "trade or commerce" as used in the Trade Practices Act were intended to apply to the provision of professional services.
2. Where the conduct of a profession involves the provision of services for reward then, even allowing for widely different approaches to definition, there is no conceivable attribute of professional activity which takes it outside the class of conduct falling within the description "trade or commerce". It follows that the provisions of Section 52 are applicable to the giving of professional advice by a consulting engineer and nothing flowing from the characterisation of that occupation as a profession prevents their application.
3. Bond Corporation's statement of claim failed to plead the necessary material facts to establish the causal relationship between breach of Section 52 and the consequent damages necessary to establish the cause of action. Bond corporation was allowed time to amend its pleading.
4. No concluded view was reached on whether the Federal Court would have jurisdiction to entertain the common law claims for breach of contract and for negligence in view of the possibility of Bond Corporation amending its pleadings; the Federal Court had a discretion to decline the exercise of such jurisdiction.

This case and the Westham case mentioned above in relation to latent site conditions both illustrate the potential for creative use of the Trade Practices Act. This case also establishes that professionals are not exempt from actions under Section 52 for misleading or deceptive conduct. The Trade Practices Act has the potential for use as a vehicle for recovery of damages, in the event that loss is suffered as a result of a negligently prepared estimate. Previously, actions in relation to defective estimates had been brought only for breach of contract or in tort for negligence. Of course, the problem with estimates is that economic decisions are based upon them and experience indicates the notorious difficulty of ensuring that they are prepared with a sufficient

degree of accuracy. Architects, engineers, design and construct companies, project managers and others faced with the daunting task of preparing estimates on which the client will base decisions should consider: whether they are best placed to carry out the estimate or whether it is feasible to have the client engage others to do so; ensuring that the client understands the limitations of estimates and the potential for cost blow outs through problems encountered; and that it might be advisable to limit or exclude liability for the estimate and for damages incurred as a result of reliance upon it.

It must also be understood that the Bond Corporation case also clearly indicates the potential for the Trade Practices Act to be used as an alternative to an action in tort in relation to negligent advice generally, not just in relation to estimates of cost.

Finally, there would also seem to be the potential for State Fair Trading Acts to be used, as an alternative to the Trade Practices Act in relation to negligent advice. Such legislation currently exists in Victoria, New South Wales and South Australia, is proposed for Queensland and Tasmania and is currently in Bill form in Western Australia.

16. LATENT DEFECTS AND LIMITATION PERIODS - HIGH COURT DEVELOPMENT

Pirelli General Cable Works Limited ("Pirelli") was a building owner, which decided to build a 50 metre high chimney in England. The chimney was completed in mid-1969. Cracks must have appeared in the top of the chimney by April 1970. Even with reasonable diligence, the cracking of the chimney could not have been discovered by October 1972. In fact Pirelli discovered it in November, 1977.

In October, 1978 Pirelli instituted proceedings against the engineers responsible for the design of the chimney, claiming the cracks had occurred because the chimney had been designed by the engineers in a negligent manner.

Judgment was entered against the engineers, who appealed to the Court of Appeal. The appeal was rejected. That decision was appealed and so the case came before five Law Lords, sitting as the House of Lords, the final appellate court in England.

The House of Lords unanimously found in favour of the engineers. Judgment was accordingly entered against the owner, who recovered nothing in the end and no doubt incurred very substantial legal fees in the process.

While the judgment in Pirelli is to be applauded from the point of view of contractor, sub-contractor, architect, engineer, insurer or the like, from an owner's point of view it is obviously a disaster.

The Limitation Period

The engineers were successful because they raised a Limitation Act (UK) defence. That Act limits the period in which the various forms of action (proceedings) can be instituted. As a general rule, it provides that actions will not, as a matter of law, be permitted to succeed if not commenced within the relevant period.

In Pirelli, the action was brought in tort. More particularly the action was an action for negligence.

At the time Pirelli was heard, the Limitation Act (UK) provided that, as a general rule, such actions must be commenced within six years of the date upon which the right to sue arose. Similar provisions exist throughout Australia.

The House of Lords Judgment

The Law Lords held that the right to sue in tort arose when damage came into existence and not when it was discovered or should with reasonable diligence have been discovered.

They indicated there may be an exception to that rule. That was where "the defect is so gross that the building is doomed from the start". In such cases they held the owner's right to sue in tort might arise as soon as the building was built and before any damage had come into existence.

In Pirelli, they merely had to apply the general rule. It was not necessary to consider the application of the exception. In doing so, they found that the six year period commenced when the cracks first appeared. Therefore, the owner had not commenced the action within the six year period. Accordingly, they upheld the engineer's defence that the owner's action, as a matter of law, should not be permitted to succeed.

The Law Lords acknowledged that the application of that rule may lead to injustice. However, they stated that it was for the Parliament and not judges to correct any such injustice. It has since done so by enacting the Latent Damage Act 1986.

Australia: Post Pirelli To April 1988

The issue raised in Pirelli was not the subject of a judgment by the High Court of Australia, directly on the point, until Hawkins v Clayton, a judgement handed down on 8 April, 1988, (1988) 62 ALJR 240.

Pending that judgment, all courts in Australia were bound either not to disregard Pirelli lightly or possibly even to follow it, unless they could find something in a judgment of the High Court of Australia which permitted them to reach the conclusion that the High Court had rejected the line of reasoning adopted in Pirelli.

Prior to the High Court's judgment in Hawkins v Clayton, as far as the writer is aware only a small number of Australian decisions after Pirelli involved consideration of the issues raised by Pirelli. Of those, the two leading decisions are judgments of the Court of Appeal of New South Wales.

In San Sebastian's case, of the three members of the Court only two Justices (Hutley and Glass JJA) addressed the Pirelli issue. Both noted that they were obliged to follow Pirelli. Both did so with approval.

The second judgment was in Hawkins v Clayton. There two of the three judges (Justices Kirby and Glass) followed Pirelli with approval. The third, Mr Justice McHugh, held that Pirelli was not relevant to the case before him. He also stated that on the basis of two of the judgments of members of the High Court in Sutherland Shire Council v Heyman (1985), it was by no means probable that the High Court would follow the approach in Pirelli.

As to the remaining Australian cases, each involved a judge sitting at first instance. In each case, the judge followed Pirelli either with approval or without protest. The judgments were of judges in New South Wales, Queensland and South Australia. For example, in the New South Wales Supreme Court decision in Burgchard v Holroyd Municipal Council (1984) 5 BCLRS 360, which involved cracking and damage to a building, Roden J. noted that, according to the decision in Pirelli, the date of the accrual of the cause of action was the date that the damage came into existence and not the date when the damage was discovered, or ought with reasonable diligence to have been discovered, as was previously regarded to be the position. In deciding Burgchard, Roden J. followed and applied the decision in Pirelli.

The High Court of Australia: Hawkins v Clayton

The Judgment of the Court of Appeal of New South Wales in Hawkins v Clayton was the subject of an appeal to the High Court of Australia. The High Court upheld the appeal. In doing so it declined to follow, as predicted by the dissenting Justice in the Court of Appeal, the approach adopted in Pirelli.

In essence the facts in Hawkins v Clayton concerned a claim in negligence by an executor of a deceased's estate against a firm