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Architects (and their clients) should take care as to the terms on which sub consultants are retained -

Surfstone Pty Ltd & Anor v Morgan Consulting Engineers Pty Ltd [2016] QCA 213

Key Points

- A structural engineering firm incorporated terms limiting liability in its retainer with the architect by reference to usual Associate of Consulting Engineers of Australia (**ACEA**) terms by reference to them in the engineer's proposal.
- Therefore the owners of the building could not pursue the structural engineer for damages due to movement in a concrete floor in their distribution centre which occurred six years later.

Background

The appellants were owners of a distribution centre. The owners commissioned an architect to design their distribution centre.

The architect retained a civil and structural engineer to provide design services, and to inspect and certify aspects of the work.

Some six years after the engineer had been retained, the distribution centre had issues with the concrete floor caused by deflection and rotation following settlement of compressible clay beneath the floor.

The engineer defended the owners' claim on the basis that liability was excluded by a term of the agreement which provided:

> "The consulting engineer shall be deemed to have been discharged from all liability in respect to the services…on the expiration of 1 year for the completion of the services, and the [owners] shall not be entitled to commence any action or claim whatsoever against the consulting engineer in respect of the services after that date."

The question for the Court was whether the exclusion of liability clause had been incorporated into the contract between the owner's architect and the engineer.

The engineer's retainer consisted of a letter providing the scope of works and the fee structure and stating "the commission would be generally in accordance with the ACEA Guideline Terms of Agreement".

The Law

The Queensland Court of Appeal confirmed the usual test is that the contract is to be constructed using an objective assessment of the terms of the contract and the context in which the contract was formed, as well as taking commercial approach to resolve any uncertainties in the language, and to give meaning to words where possible, without being unduly pedantic.

The Court of Appeal agreed with the Court at first instance that a reasonable person would read the engineer's proposal as meaning that it was an offer to perform their works on the basis that the contract would be governed by the usual ACEA terms.

This conclusion was inescapable given that the architect admitted in evidence that he was aware that the ACEA terms were a standard set of contractual terms for engaging engineers and that he knew they would form part of the contract.

The next ground of appeal was that whether the engineer was obliged to bring the exclusion clause to the attention of the architect.

The Court of Appeal agreed with the Court at first instance which found that the evidence of the expert architects provided ample evidence that such a clause might be expected in such a contract. This is because the ACEA had been in existence for many years and civil engineering firms commonly put them in their proposals. It was also common practice for the ACEA terms simply to be referred to in a fee proposal without being quoted.

Therefore the Court found that the clause was not unusual or onerous.

Conclusion

- Parties retaining professional service providers should carefully consider acceptance of the professional's standard terms to ensure reasonably foreseeable losses are not excluded.
- This may result in the professional charging more to cover their insurance premium, but that additional cost would be easily justified given the substantial losses which may otherwise result.

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