

Negligence - Subcontractor's Indemnity - Contractor Not Vicariously Liable

NRMA Insurance Ltd v FR Coyle Pty Ltd, unreported, NSW Supreme Court, Cole J, 10 May 1994.

The decision of Giles J in *RW Miller & Co v Krupp (Aust) Pty Ltd*, unreported, NSW Supreme Court, 9 June 1992 considered the possible concurrence of duties in contract and in tort and was adopted in the decision of *NRMA Insurance Ltd v FR Coyle Pty Ltd*.

The fact that a contractor may have received from a subcontractor an indemnity from any liability for the subcontractor's negligence does not mean that the contractor is vicariously liable for the subcontractor's negligence. The general position is that a contractor is not liable for the acts or omissions of another, including a subcontractor, unless that other is a servant acting in the course of his employment.

NRMA had entered into an Edition 5(b) contract with AW Edwards Pty Ltd (the Builder). The works that were the subject of the contract included plumbing performed by FR Coyle Pty Ltd as subcontractor to the builder. NRMA, either directly or through its architects, engaged hydraulic consultants. The consultants got the architects' approval to call tenders for plumbing work, called the tenders and recommended to the architects that the plumbers' tender for the hydraulic services be accepted. After the builder entered a subcontract with the plumber, the plumber sought the builder's permission to use a different joint than that specified. The builder sought the architects' approval and the architects referred the matter to the hydraulic consultants. They approved the use under certain conditions.

The joint burst, causing damage to NRMA's building and its contents. NRMA sued the plumber, builder, hydraulic consultants and architects. By cross-claim, the hydraulic consultants claimed contribution or indemnity against the builder pursuant to section 5(1) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). The builder sought that NRMA's proceedings against it be dismissed and that the hydraulic consultant's claim for contribution against it also be dismissed. NRMA sued the builder in contract, tort and for alleged breach of section 52 of the *Trade Practices Act 1974* (Cth).

In dealing with NRMA's claim against the builder in tort, there was an allegation of a duty of care relating to "the manner" in which it performed its "tasks" under the contract. Those "tasks" were to perform the contract works in accordance with the plans, specifications and conditions of contract. As pleaded, the tortious allegation was entirely coincident with the contractual obligation. No circumstances were pleaded that were said to give rise to a relationship of proximity to ground a duty in tort other than the contract.

NRMA tried to establish a tortious duty owed by the subcontractor plumber to NRMA not to act negligently so

as to cause damage in the future to NRMA's property. Accordingly, it was alleged that the builder had a vicarious liability for the negligent tortious acts of its subcontractor. NRMA relied on clauses in the contract between itself and the builder that imposed on the builder a responsibility for "the superintendence of the works". NRMA also relied on provisions relating to nominated subcontractors, which required any nominated subcontractor to indemnify the builder "against like liabilities in respect of the subcontract works as those for which the builder is liable to indemnify the proprietor under this contract". NRMA finally also relied on the clause that provided that "any nominated subcontractor shall indemnify the builder against claims in respect of any negligence of such subcontractor, his servants, or agents ..."

Cole J noted that the fact that a contractor may have received from a subcontractor an indemnity from any liability for the subcontractor's negligence does not mean that the contractor is vicariously liable for the subcontractor's negligence.

He noted that the general position is that a contractor is not liable for the acts or omissions of another, including a subcontractor, unless that other is a servant acting in the course of his employment. The terms of the contract retained the builder's obligation to NRMA for performance of the contract works even if a portion of those works were subcontracted. He held that the terms did not make the builder vicariously liable for any tortious obligation for the subcontractor to the proprietor.

Cole J then set out a major part of the the judgment of Giles J in the *RW Miller* case, where the judge analysed in some detail the authorities dealing with the possible concurrence of duties in contract and in tort.

He held that where, as in this case, the only aspect pleaded as giving rise to the relationship said to ground a tortious duty was the contract, and as the alleged breaches of any tortious duty were entirely concurrent with the contractual obligations between NRMA and the builder, there could, in his view, be no basis for holding that there existed concurrently with the contractual obligation a tortious duty in coincident terms.

Cole J also held that where the contract is a detailed recitation of the agreed rights, obligations and responsibilities of the builder to the proprietor, as it was here, there is no basis for erecting a tortious duty different to the agreed contractual responsibility.

For these reasons, Cole J held that the claim in tort should be struck out.

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