Design certification crisis in NSW - Another developer casualty after the bank steps in

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A developer failed in an attempt to bring a unique case in the Supreme Court of New South Wales to pursue the structural engineer responsible for a non-compliant structural design certificate which led to catastrophic losses[1].

The developer's novel argument was that it had lost an opportunity when the bank stepped in to sell off the secured property consequent upon the misleading design certificate.

The facts

The developer (Mistrina) borrowed approximately $7m from Bankwest under a Facility Letter for the development of a ten-storey mixed development in Brighton Le Sands, Sydney. The developer retained a builder (Jabbcorp) to build the development. The developer gave security to Bankwest over the development land and a separate property which they owned in Brighton Le Sands (secured property).

The design of the building incorporated a raft slab rather than traditional piled foundations. The builder, as one might expect, required a structural engineering certificate that the design complied with the Building Code of Australia and relevant Australian Standards.

The structural engineer (Australian Consulting Engineers) designed the slab and was retained by the builder, and subsequently gave the structural design certificate.

The builder relied on the design certificate in deciding to commence construction incorporating the raft slab and would not have commenced construction without it. Had it been disclosed that the slab was non-compliant, the builder would have sought an alternative design which did comply. In the event, the raft slab did not meet the stated requirements.

When construction was well advanced, it emerged that the raft slab was non-compliant and, indeed, that it posed a risk to the integrity of a neighbour's structure by laterally transferring load to it. The defendant ordered that work be stopped. The project was subsequently delayed for a redesign.

Bankwest undertook an audit of the design and remediation works were then undertaken and ultimately demanded immediate repayment of the entirety of the loan then outstanding from the developer. The demand was not met and Bankwest's receivers sold the secured property.

The developer's novel loss of opportunity claim

The developer claim against the engineer was based on a unique argument that the developer had lost an opportunity to make a profit due to the circumstances under which the misleading design certificate had triggered the bank's realisation of the secured property.

[1] *Mistrina Pty Ltd v Australian Consulting Engineer Pty Ltd* [2020] NSWSC 130, 26 February 2020.

The engineer argued that the loss allegedly suffered by the developer was too remote because it was not reasonably foreseeable that the provision of a defective design would ultimately cause the development to be taken from the developer by the bank. The engineer' obligations were to provide a professional service to the developer, not a commercial opportunity.

The Court acknowledged that the High Court has long accepted that the common law does permit a party to establish that they suffered loss or damage by the conduct complained of in a practical or common-sense manner[2].

However, the Court found that the developer in this case failed to establish that the engineer caused them to lose their commercial opportunity and they have not established that it caused them to lose the secured property.

The Court reasoned that the evidence did not provide a reasonable foundation to conclude that Bankwest would not have triggered the default for other reasons. The state of the evidence made it extremely difficult to approach the value of the opportunity in a sensible and rational fashion. There was, for example, no evidence about the bank's view of the project as a whole, its lending policies, or its consideration from time to time of its prospects. The Court stated that justice does not dictate that a figure be plucked out of thin air.[3]

Design certification reforms cannot come too quickly

It is well settled that an engineer does not owe the developer a duty of care in respect of its certification[4] and, in this case, the developer attempted a different approach to recover the catastrophic losses that it had incurred from the non-compliant structural design certificate.

To fix the certification crisis in NSW, the State government has been focused on the proposed reforms set out in the *Design and Building Practitioners Bill 2019* (NSW). Those reforms include the imposition of a duty of care by certifiers to developer and owners. See https://www.parliament.nsw.gov.au/bills/Pages/Profiles/design-and-building-practitioners-bill-2019.aspx

Those reforms have been welcomed by industry. In particular, the engineering industry body, Engineer Australia has stated its keenness for the reforms to include a very wide definition of 'building element' to ensure that any design under the Building Code of Australia requires sign-off by a registered engineer[5]. https://www.engineeraustralia.org.au/News/media-release-following-introduction-design-and-building-practitioners-bill-2019-nsw

In the meantime, unfortunately *Mistrina* has become another casualty of the design certification crisis in New South Wales and this case underscores the urgent need for rebuilding confidence in that part of the engineering and construction industries.

If you have any concerns in relation to the compliance of your development or any related queries please contact a member of the Addisons Construction Team.

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[2] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514
[3] *Troulis v Vamvoukakis* [1998] NSWCA 237 at 14
[4] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36
[5] Engineer Australia has suggested that such building elements would include civil, structural, hydraulic, mechanical, geotechnical, fire safety and fire protection system.