

Contract Administrators - Liable to Contractors?

R W Miller & Co v Krupp (Australia) Pty Limited, unreported, Supreme Court of NSW, Giles J, 9 June 1992.

A single judge in a notable recent New South Wales Supreme Court decision has developed the law in Australia on a contract administrator's potential liability to the contractor in an engineering contract (*R. W. Miller & Co v Krupp (Australia) Pty Limited*). Mr Justice Giles' decision is in line with the latest English authority and stifles what many have advocated as a burgeoning area of the law of negligence as it relates to construction and engineering projects.

The facts are briefly as follows. Miller, the proprietor of a coal-handling and preparation plant servicing an open-cut mine at Mount Thorley, New South Wales engaged Krupp to design, construct and commission a rail-mounted bucket wheel reclaimer to load stockpiled coal for rail shipment. The counterweight boom of the reclaimer collapsed in July 1986.

Miller also engaged Minenco Pty Limited to provide, among other things, "a total construction management service for all on-site activities". Minenco, as part of its contract with Miller, had to determine whether work performed and goods supplied were in accordance with the contract and to examine and approve drawings and calculations submitted to it by Krupp. In accordance with usual practice, there was no contract between Minenco and Krupp.

Miller claimed from Krupp the cost of repairs to the reclaimer, the cost of leading coal by alternative means while the reclaimer was being repaired, other costs flowing from the damage to the reclaimer and an indemnity against any liability it might have for injury to the operator of the reclaimer at the time of the collapse. Miller's action against Krupp was based on alleged breaches of contract only.

Krupp cross-claimed against Minenco alleging negligence and sought damages equivalent to any amount for which Krupp might be liable to Miller or, alternatively, contribution. Krupp submitted that Minenco owned to it a duty to avoid economic loss through failure to take reasonable care in supervising Krupp's work.

It is established law that tortious liability for economic loss only exists if the person suffering the loss is able to demonstrate a sufficiently "proximate" relationship between themselves and the person being sued, usually by demonstrating that the person suffering the loss "relied" on the other party. In deciding whether a sufficiently proximate relationship existed between Krupp and Minenco, Mr Justice Giles had particular regard to the contractual relationship between Krupp and Miller. His Honour found that although Minenco had agreed with Miller that it, Minenco, would determine whether work performed and goods supplied by Krupp were in accordance with the contract, this did not relieve Krupp of its responsibilities under its contract with Miller. His Honour said:

"... Krupp entered into the contract on the basis that except in relation to the final certificate (in respect of which it had the benefit of condition 48.2 as a matter of contract) it had to fully comply with its obligations thereunder whether or not Minenco properly carried out its supervisory function. It is difficult to see how any relevant reliance on the part of Krupp could be justified, or any relevant assumption of responsibility on the part of Minenco ... In my view there was not the requisite proximity ..."

Although His Honour emphasised that the determination of a duty of care involves a consideration of the circumstances of each case, the judgment is particularly significant because His Honour considered that the provisions of the contract between the principal and the contractor were relevant to his determination that the contract administrator did not owe a duty of care to the contractor.

From a practical point of view, the judgment is likely to have considerable impact. Where a contract administrator is engaged to administer a detailed construction contract that comprehensively details the rights and obligations of the parties, such as the standard form contracts NPWC3, AS2124-1986 or JCC-1985, it will be very difficult for a contractor to maintain a successful action in negligence against the contract administrator.

The decision in *Miller v Krupp* is subject to appeal. Depending on what matters are actually considered on appeal, it will be interesting to see whether the appellate court confirms the reasoning adopted by Mr Justice Giles.

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