PRODEMNITY

RISK EDUCATION

Approved But Unproven

In this claim story, an architect's design uses an approved but unproven material, resulting in a "system" failure. Product liability is involved, along with the disappearance of several hockey pucks.

PARTIES

Plaintiff

Driftwood Inc., Retirement Home (Owners)

Third Parties

Structural Engineer, General Contractor and Crispyblock Inc., Manufacturer.

Defendant

Gerald Mills, Architects

CONTEXT

The architects had designed a two-storey retirement home utilizing a construction system that was fully approved by authorities having jurisdiction. It consisted of very lightweight blocks made from what looked like Rice Krispie squares, but were actually a plastic mixture. The walls made from these blocks were held together by a buttering of an acrylic stucco containing a nylon mesh on both the interior and exterior faces, with no “mortar” between them. This wall system was held to be load bearing and, by utilizing spreaders, could take the point loads of beams and trusses. Also, it was cheap.

The Pro-Demnity Claims Manager visited the building to see things for himself. He was, therefore, under no illusion as to the need for remedial work.

THE OWNER’S PLEAS

The Owners stated that the building was only a year old and rapidly descending into decrepitude, having assumed the appearance of a ruin. Stepped through-wall cracking was evident inside and out. Water stains were disfiguring all surfaces and the stucco had the uneven look of crude adobe, which, when whitewashed, would have been an attractive wall in Santa Fe, but looked tacky in Cornwall.

In addition, local boys had discovered that they could slapshot stones and hockey pucks from an adjacent playground into the walls of the building wherein those most energetically whacked would penetrate to the point where less than half a puck would be left protruding. Some of the retirees were incensed at this vandalism and vigorously removed the objects by attacking them (the objects, not the boys) with canes which left rather ugly additional damage.

The Owners’ concern for their safety and investment demanded remedies.

THE ARCHITECT’S DEFENCE

The Architect maintained that the problems stemmed from workmanship, or alternatively, product failure.

The workmanship was obviously lacking. The wall surface undulated, some blocks clearly protruding, others recessed. The acrylic stucco varied from transparent to half an inch thick. The stepped cracking was caused by failure to reinforce joints to act as spreaders for point loads.

The product had all the official approvals, so problems could not have derived from the Architects’ professional service. Either workmanship or product failure was to blame.

The Architects told Pro-Demnity that they had realized early on that the materials were not good. They regretted being persuaded by the salesman, and would never use this product again.

If this honest opinion were to emerge as the result of a straightforward question in cross-examination, it would be awkward for the defense. We would be reduced to reliance on Cross- and Third-Party Claims, in other words: sharing the guilt.

THIRD-PARTY DEFENCES

The Structural Engineer had accepted the system and designed his structure relying upon it. He had placed joists bearing directly on the Crispyblocks but failed to ensure that the loads were properly carried. He had visited the site, and had “signed off” on the structure.

The Engineer’s insurer was concerned, and agreed to follow Pro-Demnity’s* lead, accepting shared liability if any existed.

The General Contractor: At a meeting held with the various potential defendants, their insurers, and lawyers, the contractor explained the problems he had encountered. He was a straightforward, “honest workman” type, who had done his best.

The blocks were supposed to be 12” thick, but their width varied ½’ plus or minus. This random width was a serious problem as the mason had to try to keep both exterior and interior faces flat, clearly impossible. The mason has therefore averaged the wall out, creating two uneven surfaces. The acrylic stucco and mesh was supposed to be 1/8” thick. He had tried to hide the unevenness but had, admittedly, failed.

The stepped cracking was, in this view, caused by shrinking of the blocks in the drying out process. The spreaders were in place as designed, but were only a few horizontal strips of nylon mesh in the joints. Maybe the design was inadequate. How could he know?

The Contractor did not want a lawsuit. He would contribute a modest sum, or undertake remedial work if he knew what to do, and if the others pitched in.

The Manufacturer was not in good shape. He was living abroad and his operations appeared to have petered out. He was represented by his lawyer, who was uncertain as to whether there was any point in his attendance. He was willing to cooperate as far as he could, but since his duty was to defend his client, he did not admit to any shortcomings in the product.

It was rather clear that little comfort could be expected from the manufacturer’s direction.

SETTLEMENT NEGOTIATIONS

The Owner’s lawyer was mercifully patient. He was surprisingly content to play a mediation role rather than the more usual pose of virtuous avenger.

The Defendants agreed to hire a third-party consulting engineer to report on the situation and suggest remedies. The Owner agreed to wait.

The engineer’s report served its purpose well. The structural problem was serious but not catastrophic. Structure could be inserted. Provided the owners were not looking for perfection and prepared to accept something less than flatness, the walls could be repaired.

Various payment formulas were proposed, each Defendant seeking to minimize their own involvement, and claiming that, as they were entirely blameless, their contribution should be token. There also had to be alternative formulas: one if the manufacturer was insolvent, another if there proved to be a viable entity to claim against.

The Architects prepared the contract documents for the remedial work. The Contractor agreed to do it at cost. The third-party consultant was accepted by the Owner as the certifier of the work and accepting authority.

In the final analysis, all parties contributed. The Manufacturer revived a little and contributed a modest sum. The Owners reduced their claim to the cost of the work, forgetting consequential losses which were quite legitimate in the circumstances – loss of revenue, for example, for suites that could not be occupied.

The remedial work was completed and the Architects fully released from any further claims.

CLAIM CONTROL ANALYSIS

We were lucky to have an owner with a “problem solver” for a lawyer, rather than a sabre tooth tiger. It benefitted all parties and a refreshing quality of reasonableness pervaded the controversy.

This was also a victory for “repair theory,” i.e., the work-it-out method, as opposed to the

confrontational vigorous defense that is more normal. The avoidance of the litigation process saved all the litigants money.

POSTSCRIPT

The portico fiasco and the whole case was farce There is no intent to disparage adobe construction. It is a marvelous construction method for the arid southwest. It requires constant renewal and some of the buildings in New Mexico, the pueblo in Taos for example, are the oldest surviving structures in North America that are still inhabited. It is not recommended for projects in Canada however.

Product liability is an area of law which is receiving much attention. Liability is meaningless if not backed by resources. Had the Manufacturer in this case had a viable business, Pro-Demnity would have approached this case differently.

LESSONS TO BE LEARNED

Lesson 1: The risks associated with "new and improved" materials are burdensome. We cannot discourage experiment, however, penalties can be severe. Think twice before believing the promises of product literature and sales personnel, even if they are supported by governing authorities.

The approvals of various government authorities – CMHC, Underwriters Labels, Fire Marshal, etc. – are necessary and comforting, but *you* are still the architect. Quoting the authorities may be a defense, but it may not exonerate you.

Lesson 2: The use of building materials that resemble – or inexpensively imitate – those used in other climates, should be carefully considered for suitability to our climate.

Lesson 3: By seeking remedies rather than pointing fingers, much litigation time and money can be saved.

Names and places have been changed to protect the innocent, and partially innocent, also the guilty. Situations are slightly modified and fictionalized from Pro-Demnity's actual claims files and imbued with our real experience in protecting and defending Ontario architectural practices over three decades.

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