

PROXEMNITY

RISK EDUCATION



FROZEN ASSETS

In this claim story, an Architect engages Engineers to provide design services for a building containing complex industrial processes. Problems start when the owner fails to properly brief the consultants, and continues when the consultants fail to recognize obvious issues.

PARTIES

Plaintiff

Alimgel SA (Owner)

Third Parties

Structural Engineer, General Contractor and Mechanical & Electrical Engineers, Mechanical Contractor, Engineering Consultant (Mechanical Engineer No. 2)

Defendant

Herbert Lansing, Lansing Architects
Kerwood General Contractor

CONTEXT

The Owner, a large worldwide food processor, headquartered in Europe, had decided to introduce a new line of dietary frozen meals and needed a plant expansion. The existing plant, close to Ontario's richest agricultural belt, and sitting adjacent to the US border, was ideally situated.

The Architect was hired to provide full services and to coordinate the construction program, in order to get the plant in operation and take advantage of the seasonal vegetable market, i.e., summer and early fall.

THE OWNER'S CLAIM

Alimgel had contracted with the Architect to deliver the expanded building, complete with equipment, to start processing in late June. The plant, however, had not been able to operate at any level until the following spring. The delay had cost them two million dollars in lost business and had enabled others to establish themselves in the market, thus requiring Alimgel to battle for market share as a latecomer. This entailed huge costs for advertising and market incentives.

Once the expected occupancy day had passed, the Owners put a lot of pressure on the Architect to get the work completed in minimum time, but to no avail.

The General Contractor had liened for additional funds to cover the costs of the correction of work and the delay.

The Owner-Architect contract was ironclad. The Architect had warranted and guaranteed his and the engineer's performance, and indemnified the owner from all additional costs and consequential losses – even those due to unknown problems in the existing structure, which the architect had not inspected. The Owner's head office was extremely angry; jobs were on the line.

Looking at their contract with the Architect, they fully anticipated a large cheque to make it all right.

AN INTERVIEW WITH THE ARCHITECT

The Architect told Pro-Demnity that he had no knowledge of freezer processing. That is why he hired engineers. As it turned out, the engineers were equally ignorant of the special requirements, but he had no reason to suspect this. The delay had been caused by nothing going as planned, and he had planned very carefully. The equipment kept on blowing up. Pipes full of refrigerant alongside pipes of superheated steam caused unexpected ruptures. Various bureaucratic officials had ordered work redone.

The Architect had had no idea how dangerous this process actually was.

The Engineers had neglected to call the appropriate authorities. Either they had not realized that the local building inspector was not the governing authority for high-pressure containers and dangerous industrial fluids, or alternatively, they had relied on the contractor to get the permits and approvals. The Architect, a very intense and conscientious professional, thought the whole matter terribly unfair. He had done his best, worked very hard for a modest fee, and had been let down by his Engineers.

AN INTERVIEW WITH THE ENGINEERS

The Mechanical and Electrical Engineers were interviewed by Pro-Demnity, the Architect's legal counsel appointed by Pro-Demnity, and the Engineers' insurance counsel.

It appeared to the Claims Manager that both Engineers, who were quite mature, had practiced almost exclusively in the small building (apartment and housing) end of the business, and lacked experience in process or production engineering.

They probably hadn't done any high-pressure, or expansion calculations since their university days, decades before. They seemed not to believe that the fiasco caused by their failure to perform as engineers had anything to do with them personally. It was their belief that the Mechanical Contractor should have known. Their drawings were, after all, diagrammatic, not to be followed literally.

One remark did give us a lead for a defence, however. They said that the Owner's staff had told them what to do during construction, and that they, the Engineers, had taken instruction on many matters directly from them.

The Mechanical Contractor had the usual we-were-following-orders defences, well papered in their files, but most of the documentation was *post facto*¹. They had a gobbledygook explanation as to why the proper permits had not been obtained, which covered the spectrum from "they were not required" through "the engineer should have got them" to "we got them as soon as we could; no delay was caused."

The Engineering Consultant (Mechanical Engineer No. 2) was the messenger who was being shot. He was a real factory process Engineer who had been called in by the first Engineer to sort out the mess. He did so and, for his troubles, was blamed for causing delay and expense. To add insult to injury the Engineers denied hiring him, as did the Architect, despite having signed his letter of engagement.

But it was this Engineer who had recognized the kinetic nature of the huge temperature differentials, done the calculations and enabled the plant to eventually pass official muster and start operations. Pro-Demnity found it hard to accept that he was a villain. He had saved the situation, but had never received any payment.

The General Contractor was an innocent party. He appeared to have done everything asked of him, several times over. The Structural Engineer played a very minor role, and could only be blamed for not asking questions which may have minimized the errors, but only insofar as they affected structure, and this was negligible.

THE ARCHITECT'S POSITION

For a start, the Architect had signed an RAIC Doc.6 Standard Agreement, to which had been added additional clauses. These clauses were more than a little unfair, making the Architect, in return for the opportunity of earning a modest fee (which included engineering), responsible for business loss and other economic damages. These, he subsequently learned amounted to tens of thousands of dollars a day.

Furthermore, the Architect claimed that he initialled the contract pages without reading them, being aware that the lawyer was in a hurry to catch a plane home. But he had been assured that these were just the standard boilerplate clauses the industry giant always had in contracts.

Pro-Demnity's position was that any claim that relied upon these clauses was clearly excluded by the insurance policy, and would be denied coverage. The Architect had agreed to these clauses without benefit of legal counsel, because another (the Owner's) had characterized them as harmless boilerplate. In fact, they were clearly inequitable, and would have been rejected by legal counsel if any advice had been sought.

The Architect had virtually no assets other than the insurance funds – and he was happy to be audited. This took a lot of the wind out of the Plaintiff's lawyer's sails, further deflated by the lack of excess insurance, and the low limit available. At several stormy settlement meetings, held in the absence of the Architect for tactical reasons – we wished to suggest by his absence that he was not a factor, it being all strictly engineering – we put our arguments forward.

THE ARCHITECT'S DEFENCE

To begin with, the Architect knew nothing about the frozen food process. The Owner was aware of this and, in truth, did not rely upon the architect as they were now claiming. It was an unstated but implied term of the contract that the Owner's staff would inform and properly advise during the contract performance. They were the experts, and indeed hovered over the work on a daily basis, even, on occasion giving instructions directly to workers.

Therefore, at the very least, the Owners had a large degree of contributory negligence. In fact, we took the view that the Owner's managers and plant engineer were totally responsible.

Further to this, the Architect had relied on his Engineers, and had been largely ignored during the construction phase. The job was so "engineering" in nature that large changes were made without anyone informing him. The Change Orders were chaotic and mostly *post-facto*.

Finally, the damages sought – business losses due to the lateness of coming into production – should have been anticipated in some fashion by the Owners, and alternate provisions made. It was patently unreasonable to imagine that the consultants, hired to do a minor extension to a decrepit industrial shed could be liable for worldwide losses of an industrial giant. We were reasonably confident that common law judges are, for the most part, reasonable persons.

SETTLEMENT

Once the vision of a cornucopia of insurance funds had faded, and a vigorous defence of the architect had been established – not the slam-dunk the lawyer for the Plaintiff had expected – the Plaintiff decided to climb down to reality. No guilt was admitted by any party, of course, but in order to avoid expensive litigation with an uncertain outcome where even a victory would be largely pyrrhic, the Plaintiff was ready to talk turkey.

Pro-Demnity counsel successfully argued that the Architect's contribution should not be equal to that of the other parties. We ended up paying out much less than half of the limit, while others contributed much more. The Owner reduced his demands, in effect, reflecting the Pro-Demnity view that contributory negligence was a factor.

CLAIM CONTROL ANALYSIS

Architects by training and nature are generalists. Most feel capable of designing any building, whether it be summer cottage or opera house. The larger buildings merely need a larger

orchestra.

There will always be a wide variety of talent at the design end of the business, just as there is a huge variation in the organizational and management skills of architects. Where claims occur, the design talent of the architect counts for little. The most gifted are famous for the mistakes they make.

Projects requiring unusually large measures of organizational talent, coordination of engineers, compatibility with existing services, and crucial scheduling need real effort to be put into management. The normal “periodic” reviews may not suffice. Inspections are needed. Perhaps full-time site attendance is called for.

The architect’s contract needs to be tailored to fit the circumstances. Contracts that punish errors or extract outrageous penalties should give no one comfort. It is disturbing that so many lawyers produce them.

POSTSCRIPT

The Architect allowed a situation to develop in oblivion. He frequently visited the site and spoke to those in charge but obtained no feeling as to what was going on.

The Architect woke up too late.

LESSONS TO BE LEARNED

Lesson 1: Don't undertake projects, the scope of which you cannot appreciate, without safeguards, such as guidance by your client, client approvals and acceptance stage by stage.

Lesson 2: Do not assume all engineers are equal. Do your research and find an appropriately knowledgeable firm.

Lesson 3: Get legal advice whenever "standard clauses" in the Client-Architect Agreement are modified, or additional clauses added. Never fail to read what you sign.

Lesson 4: "Delivery dates" are very dangerous. Buildings are nearly always delivered late. Where time really is of the essence, the construction process must go "like clockwork," which is not a normal construction environment.

NOTES:

1. Post facto: done, made, or formulated after the fact; retroactive.

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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