Acer Forester Pty Ltd v Complete Crane Hire (NT) Pty Ltd & Ors [2013] NTSC 41

PARTIES:	Acer Forester Pty Ltd (ACN 081 108 868) Plaintiff v Complete Crane Hire (NT) Pty Ltd (ACN 086 562 674) Third Defendant Sutherland, Bart Kenneth Fourth Defendant A & K (NT) Pty Ltd (ACN 109 540 150) Fifth Defendant
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	109 of 2009 (20923730)
DELIVERED:	30 JULY 2013
HEARING DATES:	11 & 12 JUNE 2013
JUDGMENT OF:	KELLY J

CATCHWORDS:

DAMAGES—Negligence—Business disruption—Calculation of loss—Assessment of lost commercial opportunity—Evidence needed to establish claim—Crane collapsed and damaged roof—Plaintiff claimed this caused delay in completion of contract and lost opportunity to

perform other work—No evidence that damage to roof caused other than minor delay in completion of contract—Therefore no evidence that damage to roof caused loss of opportunity to perform other work.

Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, followed

La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd (2011) 190 FCR 299, distinguished

REPRESENTATION:

Counsel:

Plaintiff:	Prof L McCrimmon
Defendants:	A Young

Solicitors:

Plaintiff:	David Francis & Associates
Defendants:	Minter Ellison

Judgment category classification:	B
Judgment ID Number:	KEL13009
Number of pages:	27

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Acer Forester Pty Ltd v Complete Crane Hire (NT) Pty Ltd & Ors [2013] NTSC 41
No. 109 of 2009 (20923730)

BETWEEN:

ACER FORESTER PTY LTD
(ACN 081 108 868)
Plaintiff

AND:

COMPLETE CRANE HIRE (NT) PTY LTD (ACN 086 562 674)
Third Defendant

and

BART KENNETH SUTHERLAND
Fourth Defendant

and

A & K (NT) PTY LTD
(ACN 109 540 150)
Fifth Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 30 July 2013)

[1] In July 2006 the plaintiff, Acer Forester Pty Ltd, carried on a business as consulting engineers, building certifiers and project managers from

premises at 3 Whitfield Street, Darwin and had done so since June 1995. 3 Whitfield Street, Darwin was owned by another of Mr Forester's companies. The sole director and shareholder of Acer Forester was Brian Forester.

[2] On 17 July 2006 the fifth defendant, A & K (NT) Pty Ltd, was performing building works on the block behind 3 Whitfield Street, in 3 Lindsay Street. They were using a crane owned by the third defendant, Complete Crane Hire (NT) Pty Ltd. The fourth defendant, Mr Sutherland, was operating the crane that day. He tried to move a pallet of tiling glue with the crane, but the load was too heavy and the crane collapsed onto the roof of the plaintiff's premises at 3 Whitfield Street.

[3] Fortunately, no-one was injured, but the collapsing crane caused significant damage to the roof, ceilings and fascia of the plaintiff's business premises. That damage was repaired and the repairs paid for under an arrangement with insurers. In this proceeding, the plaintiff claims damages in negligence against the third, fourth and fifth defendants said to have been caused by the interruption to the plaintiff's business while the damage to the building was being repaired.

[4] Liability was admitted shortly before the case was due to be tried and the hearing before me proceeded as an assessment of damages.

[5] The plaintiff performs two broad general categories of work in its engineering business, identified in its accounts as "B" jobs and "D" jobs.

"B" jobs are certification work, issuing permits, inspecting and certifying building works. They involve work done away from the office on building sites and paper work done in the plaintiff's office. "D" jobs consist of project work either as a contractor or sub-contractor. All or almost all of the work on "D" jobs is done in the plaintiff's office.

[6] When the crane collapsed, the plaintiff was working on a major government project, a "D" job, which was taking up about 75% of the plaintiff's resources. It was providing engineering services as a sub-contractor to Peddle Thorp Architects for the purposes of residential developments for the Defence Housing Authority at Larrakeyah and at the RAAF base in Darwin ("the DHA project"). Work on the DHA project had not long begun, starting on 11 July 2006, when the crane collapsed onto the plaintiff's roof on 17 July.

[7] The plaintiff's work on the DHA project was due to be completed by 11 September 2006. In fact it was not complete until 15 November 2006, and the plaintiff's final invoice was rendered on 23 November 2006. The plaintiff claims that this delay was due to disruption to the business as a result of the crane collapsing onto the roof and the subsequent repair work during the period from 17 July to the end of October 2006.

[8] The plaintiff claims the following heads of damage:

(a) re-imbursement of an amount spent by the plaintiff in providing psychological counselling to staff members following the accident;

(b) re-imbursement of a payment made to a sub-contractor on account of time lost during repairs;

(c) damages for delay in receiving payment for the DHA project;

(d) damages for loss of opportunity to perform other work during the period when the work on the DHA project ran overtime; and

(e) interest at a commercial rate on the above amounts.

[9] The defendants concede (a) and (b). They also concede that an amount would be payable in respect of (c), if it was shown that the DHA project was delayed as a result of the crane collapse (although the period of the delay is contested), and they concede that if any damages were shown to be payable, interest should be allowed at a commercial rate for the applicable period. Everything else is in issue.

Establishing the period of disruption to the plaintiff's business and its effect on the DHA project

(a) The nature and extent of the disruption

[10] As indicated above, the plaintiff claims that its business was disrupted by the effects of the collapse of the crane onto its roof for the period from 17 July to the end of October 2006. The plaintiff relies on evidence by Mr Forester. In his affidavit, Mr Forester detailed the damage to the building and said, in summary, that on the same day the crane collapsed, he received a report from an engineer engaged by the insurance brokers that once the crane and its load had been removed, it would be safe to occupy both levels

of the building, subject to electrical checks. Those checks were performed and the plaintiff's staff reoccupied the plaintiff's offices on 21 July. They were therefore completely prevented from working on the DHA project for three days.[1]

[11] That, however, was not the full extent of the disruption to the plaintiff's business. Mr Forester considered relocating to other premises while repairs were being carried out but rejected the idea because it would take a week to pack up the plaintiff's office for the move and a further three days to unpack, and the whole thing would have to be done over when the repairs were done. Further he thought there would be at least three weeks reduced productivity after the move. Taking these matters into account, he decided to continue to conduct the plaintiff's business from 3 Whitfield Street while repairs were being carried out.[2]

[12] Mr Forester said that the ability of the plaintiff's staff to satisfactorily perform their duties was severely impeded during the first two weeks after the crane collapse while the extent of the building repairs required and the logistics of how such repair works could be completed so as to cause minimal disruption, were determined. However, he gave no details as to what staff (if any) were involved in such assessment, and for how long, or how this affected the ability of other staff to perform their duties, if at all.

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1 Two of these, it appears were on the weekend.

2 This is an indication that, at that time Mr Forester expected that the period of disruption caused to the business if the plaintiff remained at 3 Whitfield Street would be less than 20 lost days and 3 weeks reduced productivity. He did not state in evidence that this initial assessment had been grossly inaccurate.

The plaintiff did not call evidence about the steps being taken to advance the DHA project during this period, what staff were doing the work, what work they were doing, whether they fell behind in that work, and (if so) why.

[13] The repair work involved roof repairs, replacement of structural steel work and other repairs to the external fascia, and repairs to the air conditioning. The plan was complete by mid-August and the repairs were progressively undertaken during August, September and October 2006. Mr Forester said that this work resulted in "significant disruption" to the ability of the plaintiff's employees to carry out their duties, which disruption gradually lessened over the duration of this period. However, no details were given as to how the repair work significantly disrupted the employees' ability to do their work. In cross examination, Mr Forester said that when the ceiling was being repaired, desks and equipment had to be moved into other areas of the office, and employees were obliged to work in those other areas for a time. Again no details were given as to how long this took, how many employees were affected and how this affected work on the DHA project.

[14] In answer to a question from the bench, Mr Forester agreed that once the employees were back in the office after the three day interruption, there was no task that any employee was unable to perform that the employee could have performed but for the crane collapse. However, he said that staff were not working to their full effectiveness. He said that conditions

were not ideal as some employees had had to move into alternative spaces and the air conditioning was not working for a time.

[15] In his affidavit, Mr Forester explained that while the plaintiff's employees all made their best effort to satisfactorily and efficiently fulfil their duties, it was not possible for them to be focused and working to full efficiency with the extent of the disruption that was occurring while construction work was proceeding. He said morale and motivation[3] were also adversely affected. He said that "the ratio of fee earnings to time expended was reduced" during the period of the construction work. However, no concrete evidence of this was produced and no figures given. The expert called by the plaintiff did not analyse the average ratio of fee earnings to time expended in the business and compare it to the period of the alleged disruption. Moreover, the evidence in relation to the way the business operated was that most of the "D" jobs were charged on a fixed fee basis, so one would expect the ratio of fees charged to time expended to vary according to the price tendered for the job (some projects being more profitable than others) and how smoothly each job progressed.

[16] In cross examination, Mr Forester conceded that the plaintiff had been paid by the insurer to project manage the repairs to the building and that the plaintiff had kept a file [No D0007273] on which was recorded time spent on those repairs. That file was put into evidence as an annexure to the

[3] The comment about motivation at least seems to be inconsistent with their all making their best effort to satisfactorily and efficiently perform their duties.

report prepared by Mr Holmes, the accountant engaged by the defendants.[4] Mr Forester said there was another file on which was recorded time lost as a result of the crane collapse, but the plaintiff did not put any material from that file in evidence to demonstrate the time actually lost to the business. Mr Sawers, the accountant engaged by the plaintiff, said he assumed that the statement by Mr Forester that there was a second file was not accurate because the printout from File No D0007273 annexed to Mr Holmes' report contained a number of entries described as "Lost time". However, those entries (which record a total of only 20 hours "lost time") all refer to Ms Laressa Moody, the office administrator, and appear to be related to the roof repairs. I therefore see no reason to doubt Mr Forester's evidence that the plaintiff kept an additional file recording time lost. This was not put into evidence by the plaintiff, its absence was unexplained, and it is apparent from Mr Sawers' evidence referred to above, that the file was not shown to the plaintiff's expert.

[17] There was some objective evidence about the nature and extent of the disruption. Mr Forester annexed to his first affidavit a tax invoice from a sub-contractor, Mr Darren Noyce-Brown, who was engaged by the plaintiff to do work on the DHA project. The invoice is headed "CLAIM FOR LOST TIME DUE TO DAMAGE BY CRANE AT OFFICE AT 3/3 WHITFIELD STREET DARWIN" and is the basis for the head of damages

4 Expert Report of Peter Holmes dated 13 November 2012 Annexure 5

set out at (b) in paragraph [8] above. The invoice contains the following claims.

- Lost Time on 17th July 2006 when crane fell on building and subsequently on 18th July when office was closed:[5]

  15 hours at $65/hr $ 975.00

- Lost productivity due to failed air conditioning for 3 weeks between 19 July to 2 August 2006:

  18 days x 1 hour per day x $65/hr $1,170.00

- Lost time due to having to vacate the building whilst roof repairs were taking place and unable to work out of hours because of repairs taking place after hours and on weekends, unable to park under building due to scaffolding, shifting car spaces to avoid fines, during week commencing 6 October 2006:

  6 hrs x $65/hr $ 390.00

- Lost time due to air conditioning being turned off during repairs, during week commencing 23 October 2006:

  3 hours x $65/hr $ 195.00

  TOTAL $2,730.00

[18] It seems from this invoice that the disruption to Mr Noyce-Brown's work for the plaintiff was limited to some lost time on the day the crane fell and a whole day the following day (15 hrs); an hour a day for the following three weeks during which the air conditioning was out (18 hrs); 6 hours while repairs were being carried out during one week in early October and 3 hours due to air conditioning repairs during one week in late October (a

[5] Mr Forester gave evidence that the plaintiff did not reoccupy the building until 21 July 2006. It seems that 20 and 21 July fell on a weekend.

total of 42 hours). I infer that the level of disruption to other employees of the plaintiff is likely to have been of a similar nature, duration and extent.[6] The objective evidence, therefore, supports lost productive time to the business due to the crane collapse of about 42 hours. Based on a working day of 7.5 hours, this works out at 5.6 (or near enough to 6) days. If one assumes in the plaintiff's favour that there was some disruption to the plaintiff's business as a result of being unable to reoccupy the office over the weekend of 19 and 20 July 2006, the total period of disruption for which there is objective evidence is 8 days.

(b) Effect of the disruption on the DHA project

[19] In his affidavit of 22 March 2013,[7] Mr Forester said that the plaintiff was required to fulfil all of the services under the DHA project by the end of August 2006 and that, at the time the crane collapsed, it was "on schedule to provide the services by the end of August 2006". No details of the work already done, or the scheduling of the work which would have been done by the end of August were given. In his later affidavit, sworn on 7 June 2013, Mr Forester said that the requirement for the plaintiff to complete the work by the end of August had been contingent upon receiving instructions to commence the work by 1 July and that, as they had not received such instructions until 11 July, the due date for completion had been extended to

6 In cross examination Mr Forester agreed that the disruption to other employees would have been similar, although he later said he thought Mr Noyce-Brown's office may have been on a separate air conditioner.

7 Affidavit of Brian Wayne Forester sworn on 22 March 2013 paragraph [52]

11 September 2006 and that "the references contained in paragraph 52 of my affidavit to the completion of the *[DHA project]* by the end of August 2006 are incorrect and should read 'by on or about 11 September 2006'."[8] The correction causes me to have serious doubts about the basis upon which Mr Forester made the assertion in paragraph 52 of the first affidavit. It seems to be a simple assertion that the plaintiff would have finished the job "on time", rather than being based on any careful consideration of the work performed, the work to be performed, and the resources available to perform that work.

[20] At paragraph 53 of his first affidavit, Mr Forester makes the following assertion:

> "As a result of the crane collapse, the plaintiff was unable to comply with the timetable specified in the program contained in the sub-contract for the completion of the DHA project whereby the works required to be performed by it pursuant to such sub-contract … could not be completed until November 2006, thereby depriving the plaintiff of the cash flow it would otherwise have received during the months of July, August and September 2006."[9]

[21] This is a broad assertion that the whole of the delay in completion of the DHA project was due to the disruption to the plaintiff's office caused by the crane falling on the roof. In cross examination, Mr Forester's attention was drawn to a printout of time recorded by various of the plaintiff's

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8 Affidavit of Brian Wayne Forester sworn on 7 June 2013 paragraph [6]

9 Affidavit of Brian Wayne Forester sworn on 22 March 2013 paragraph [53]. No explanation is given for choosing the months of July, August and September for lost cash flow since in the immediately preceding paragraph Mr Forester said the DHA would have been finished at the end of August (not July)and was in fact not finished until November (not September).

employees on the DHA project for the period from 1 September 2006 to the end of the project which showed some 120 hours recorded as "V2: Revised Master Plan Additional Work". He conceded that there had been a change to the project which required a plan or plans to be redrawn which meant that additional time was spent on the project as a result.

[22] The plaintiff submitted two progress claims on the DHA project. The first was submitted on 7 September 2006, for work done between 30 June 2006[10] and 1 September 2006. It claimed:

RAAF: Project Briefing				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$3,680.00	100.00%	$0.00	$3,680.00	$3,680.00
RAAF: Survey				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$72,800.00	65.00%	$0.00	$47,320.00	$47,320.00
RAAF: Geotechnical				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$19,200.00	55.00%	$0.00	$10,560.00	$10,560.00
RAAF: Environmental and Heritage				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$32,250.00	60.00%	$0.00	$19,350.00	$19,350.00
RAAF: Civil Infrastructure Ass't				

[10] The evidence of Mr Forester was that the work began on 11 July 2006.

Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$56,950.00	45.00%	$0.00	$25,627.50	$25,627.50
RAAF: Public Works Committee				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$11,320.00	0.00%	$0.00	$0.00	$0.00
			Total	$106,537.50
			Total Tax	$10,653.75
			Total incl Tax	$117,191.25

Total	106,537.50
GST	10,653.75
Total Amount Payable	**$117,191.25**

LARR: Survey				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$20,800.00	60.00%	$0.00	$12,480.00	$12,480.00
LARR: Geotechnical				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$12,800.00	55.00%	$0.00	$7,040.00	$7,040.00
LARR: Environmental and Heritage				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$10,500.00	60.00%	$0.00	$6,300.00	$6,300.00
LARR: Civil Infrastructure Ass't				

Agreed Fee	Complete to Date	Previous Claims	This Claim		Total
$23,350.00	45.00%	$0.00	$10,507.50		$10,507.50
LARR: Public Work Committee					
Agreed Fee	Complete to Date	Previous Claims	This Claim		Total
$6,120.00	0.00%	$0.00	$0.00		$0.00
				Total	$36,327.50
				Total Tax	$3,362.75
				Total incl Tax	$39,960.25

Total	36,327.50
GST	3,632.75
Total Amount Payable	**$39,960.25**

[27] The second progress claim was submitted on 23 November for work done between 1 September 2006 and 15 November 2006, when work on the project was complete. It claimed:

RAAF: Project Briefing (R1)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$3,680.00	100%	$3,680.00	$0.00	$0.00
RAAF: Survey (R2)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$72,800.00	100%	$47,320.00	$72,800.00	$25,480.00
RAAF: Geotechnical (R3)				

Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$19,200.00	100%	$10,560.00	$19,200.00	$8,640.00
RAAF: Environmental and Heritage (R4)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$32,250.00	100%	$19,350.00	$32,250.00	$12,900.00
RAAF: Civil Infrastructure Ass't (R5)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$56,950.00	100%	$25,627.50	$56,950.00	$31,322.50
RAAF: Public Works Committee (R6)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$11,320.00	100%	$0.00	$11,320.00	$11,320.00
			Total	**$89,662.50**
			GST	**$8,966.25**
			Total Amount Payable	**$98,628.75**

LARR: Survey (L2)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$20,800.00	100%	$12,480.00	$20,800.00	$8,320.00
LARR: Geotechnical (L3)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total

$12,800.00	100%	$7,040.00	$12,800.00	$5,760.00
LARR: Environmental and Heritage (L4)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$10,500.00	100%	$6,300.00	$10,500.00	$4,200.00
LARR: Civil Infrastructure Ass't (L5)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$23,350.00	100%	$10,507.50	$23,350.00	$12,842.50
LARR: Public Work Committee (L6)				
Agreed Fee	Complete to Date	Previous Claims	This Claim	Total
$6,120.00	100%	0.00	$6,120.00	$6,120.00
			Total	**$37,242.50**
			GST	**$3,724.25**
			Total Amount Payable	**$40,966.75**

[28] It can be seen both from the percentages specified on the invoices and the dollar amounts claimed that work on the DHA project was more than 50% complete by 1 September 2006. Mr Forester said in evidence that the percentages of work completed claimed on the invoice for the first progress claim "were not necessarily accurate", but he gave no alternative figures. Mr Forester also said in cross examination that if everything had gone

according to plan, the first progress claim would have been submitted by about 11 August 2006 and the second by 11 September 2006.[11]

[29] Based on the only available evidence, it seems that the project was running 21 days behind schedule to the date of the first progress claim (when it seems that more than half of the work was complete) and 66 days behind schedule by the time of the second progress claim. This is despite the fact that on Mr Forester's evidence, the level of disruption gradually lessened over the period from 17 July to the end of October and was gone by the beginning of November. That leads to the inevitable conclusion that there was another factor or factors at work causing the delay. One such factor is obviously the additional work which was required in the second half of the project.[12] Counsel for the plaintiff pointed out that 120 hours was only around 5% of the time spent on the entire project.[13] However, no explanation was given why the work was falling further behind when the disruption was abating, consistent with the disruption being the sole, or even the major, cause of the delay. I conclude that the plaintiff has not satisfied the onus of proving that the delay to the DHA project was caused by disruption to the business as a result of the crane collapsing on the roof.

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[11] The invoices were submitted some days after the end of the period to which the claim relates so I assume that since the project was due to be completed by 11 September 2006 and 11 August was the half way mark, the actual invoices would, in an ideal world have been submitted some days later for work done in those periods.

[12] I do not know whether there was additional work required in the first half of the project. The plaintiff did not put the time sheets for the work done in relation to the first progress claim into evidence.

[13] This means it was more than 10% of the time spent on the work for the second progress claim, as the work was more than half complete when the first progress claim was submitted.

[30] Nevertheless, because the plaintiff has demonstrated that the crane collapse caused approximately 8 days loss of productive time to the business, one can infer that 8 days of the delay to the DHA project was attributable to the crane collapse. It may be that adverse working conditions due to such things as the air conditioning being off for a time[14] and having to work in unfamiliar rooms while the ceiling was repaired caused work to go a little more slowly from time to time, but the plaintiff has not shown what effect, if any, this had on the progress of the DHA project. The plaintiff is therefore entitled to damages for 8 days delay in receiving payment for that project.

The expert evidence

[31] The expert engaged by the plaintiff, Mr Sawers, calculated the plaintiff's loss as follows:

(a) The damages claimed for loss of opportunity to perform other work during the period when the work on the DHA project ran overtime was calculated by Mr Sawers as "loss of revenue during the period of the disruption to the business". He calculated the alleged loss by comparing "the projected revenue had the Incident not occurred" with

[14] Allowance is in fact made for lost productivity due to the air conditioning being off in the calculation of 6 days lost time based on the Noyce-Brown invoice. In cross examination Mr Forester at first said that the disruption to Mr Noyce-Brown's work would have been the same as the disruption to any other employee, but when the number of hours lost due to failure of the air conditioning was pointed out to him he said he thought Mr Noyce-Brown's office may have had its own air conditioner. However, he was unable to give any figures about what additional lost productive hours would have been suffered by other employees.

"actual revenue derived during the period affected by the Incident".[15] The "projected revenue had the Incident not occurred" is said to have been based on "an Average monthly revenue".[16] The average was calculated by averaging the revenue from November 2006 and February to June 2007.[17] An adjustment was made to take into account increased revenue received in November 2006 as a result of delayed payment for the DHA project. The period affected was taken to be July 2006 to October 2006 (a total of 4 months)[18]. The loss of revenue calculated by this method was $246,621.[19]

(b) The next head of damage claimed was loss of use of money as a result of delayed completion and invoicing of the DHA project and one other project, the GEMCO project, said to have been affected (though less so than the DHA project).[20] This was calculated to be:

DHA project	$2,645
GEMCO project	$ 240
	$2,885

15 Sawers Report paragraph 10.1

16 Sawers Report paragraph 10.3

17 Sawers Report paragraph 10.7

18 Sawers Report paragraphs 10.18 and 10.19

19 Sawers Report paragraphs 10.18 and 10.19

20 Sawers Report paragraph 15.1

In making this calculation, Mr Sawers assumed that the invoicing for the DHA project which occurred on 7 September and 23 November would have occurred on 30 July and 30 August but for the collapse of the crane.[21] Similar assumptions were made in relation to the smaller amount claimed for the GEMCO project.[22]

(c) He therefore valued the total loss of earnings as a result of the incident at $203,710.[23] The plaintiff claims interest at a commercial rate on the whole of this amount to the date of judgment. No figures for this claim were provided in the expert report of Mr Sawers.

[32] Mr Sawers' report was based on a number of assumptions. First, he assumed that the disruption to the plaintiff's business lasted from the beginning of July to the end of October. The expert engaged by the defendants, Mr Holmes, pointed out, correctly, that the crane did not collapse until 17 July. Mr Holmes expressed the view that that would have caused the plaintiff's losses to be overstated by between $53,000 and $71,000 (approximately)[24] assuming the methodology adopted by Mr Sawers was otherwise appropriate. Mr Sawers agreed that it would be appropriate to deduct a small amount for amounts actually invoiced in the

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[21] Sawers Report paragraph 15.2 (However, the calculation of the number of days delay set out in paragraph 15.3 adopts the dates 31 July and 31 August. Nothing turns on this.)

[22] Sawers Report paragraph 15.8

[23] Sawers Report paragraph 1.5

[24] Holmes report paragraphs 5.3.13 to 5.3.19

period from 1 July to 17 July, but otherwise stood by the methodology used.

[33] In my view, Mr Holmes' criticism of this aspect of Mr Sawers' report is well founded. The method used by Mr Sawers to assess the plaintiff's loss was (essentially) to calculate the average monthly earnings of the business, multiply that by 4 to arrive at a figure that would have been earned during the assumed period of lost productivity (1 July to 31 October) and deduct the amount that was actually earned in that period.[25] However, the assumed period of lost productivity was only 3½ months.

[34] More fundamentally, Mr Sawers was not given any information about the actual productive time lost due to the crane collapsing. He assumed (on the basis of his instructions from Mr Forester) that the entire delay to the DHA project was due to disruptions to the office caused by the collapse of the crane. As set out above, this important basis for the opinions expressed by Mr Sawers has not been made out on the evidence; in my view, the plaintiff has not established that any more than 8 days productive time was lost.

[35] While he relied on instructions from Mr Forester for the assumption that the whole of the delay to the DHA project was caused by the crane collapse, Mr Sawers also produced figures from the plaintiff's accounts

[25] Sawers Report paragraphs 10.18 and 10.19; Mr Sawers performed the calculation on a month by month basis and added the figures for each of the four months rather than multiplying by four, but that is the effect of what he did.

showing markedly reduced billable hours recorded and markedly reduced revenue for July and August 2006 to show that there had in fact been some disruption to the business as a result of the crane collapsing on the roof, although not to quantify the loss. These low figures turned out to be largely attributable to other factors. In cross examination, Mr Forester said that in early July 2006 the bulk of the company's assets were tied up in preparation work for the DHA project. He also said that he (the company principal) billed no hours during July because he was working on getting ready for the DHA project and also on overseeing the transition from one accounting system to another. Mr Forester's evidence in cross examination was that the first progress claim on the DHA project would have been invoiced on about 11 August so that both the low figures for both time recording and revenue for July at least were attributable to the existence of the DHA project (and the changeover of accounting systems) not disruptions due to the collapse of the crane.

[36] It follows that the factual basis for Mr Sawers' calculation of the plaintiff's loss has not been made out. The lost revenue/lost opportunity claim is based on this reasoning: the disruption to the office caused a delay in the completion of the work on the DHA project (from 31 August – later amended to 11 September – to 23 November); as a result of the delay in completion of the DHA project, the plaintiff lost the opportunity to perform other work during that period. Mr Forester gave evidence that the plaintiff did not tender for other work in the period to the end of November

2006 because staff were fully engaged on the DHA project. However, since the plaintiff has not established on the facts that the delay to the DHA project was caused by the collapse of the crane (except for 8 days), the basis for claiming damages for any such lost opportunity has not been established. There is no evidence to suggest that a loss of 8 days productive time caused the plaintiff to refrain from tendering for additional work for 4 months.

[37] Mr Sawers' report contained information about some tenders that it would have been possible for the plaintiff to tender for during that period. However, the loss was not estimated on the basis of the profit that could have been earned from any one or more of those tenders had the plaintiff been successful in obtaining the work. Rather, Mr Sawers adopted the method described above of attempting to calculate the plaintiff's average monthly earnings and compare that to actual earnings during the period of the delay due to the disruption.

[38] Mr Holmes criticised this method as being inappropriate, at least for a business in the nature of the plaintiff's. I accept the evidence of Mr Holmes that this method was inappropriate in the circumstances. Because a large part of the plaintiff's business was project work for which the plaintiff was paid in a lump sum at the end of the work (or large lump sum progress payments at the end of certain stages of the work), the amount earned by the plaintiff from month to month varied enormously, depending upon whether such a payment had been received in that particular month.

Mr Holmes demonstrated, by selecting different months as the basis for such a calculation, that such a method of assessing loss is susceptible to chance variation which may suggest losses where there were none (or vice versa).

[39] Counsel for the defendants, Mr Young, also questioned the legal basis for assessing damages for lost opportunity in this way. He relied on *Sellars v Adelaide Petroleum NL*[26] for the proposition that where the plaintiff is claiming damages for loss of a commercial opportunity, the plaintiff must show that some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value); the court then assesses the value of that lost opportunity by reference to the degree of probabilities of the commercial opportunity being realised.[27] That, it was contended, would have required the plaintiff to adduce evidence about the projects it would have tendered for, its historical success rate in tendering for projects of that nature, and its historical profit levels on such projects. The plaintiff adduced evidence of tender opportunities only.

[40] Prof McCrimmon in response relied on *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd*[28] for the proposition that it was only necessary for the plaintiff to establish on the balance of

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[26] (1994) 179 CLR 332

[27] *Sellars v Adelaide Petroleum NL* per Mason CJ, Dawson, Toohey and Gaudron JJ at [38] to [40]

[28] 190 FCR 299

probabilities that there was another commercial opportunity or opportunities of some value available; it was not necessary to establish the loss of a particular opportunity.

[41] In *La Trobe*, the defendant valuer negligently advised La Trobe that a property offered as security for a loan was worth more than its actual value. La Trobe advanced money to a borrower on the faith of that valuation; the borrower defaulted; and La Trobe recovered less than the full amount of its entitlements of principal and interest under the loan agreement. If it had been advised that the property was worth less than the value advised by the defendant, La Trobe would not have lent to the defaulting borrower. La Trobe recovered from the defendant damages for its lost opportunity to advance the funds loaned to the defaulting borrower to some other performing borrower. The court held that it was not necessary for La Trobe to identify a particular borrower to whom it would have advanced the relevant funds. It was sufficient for it to show that there were lending opportunities available to it. La Trobe had led evidence that demand by potential borrowers for loans was greater than the money available to La Trobe to lend, and that it was rejecting up to five loan applications per day. La Trobe was in the business of lending money on a regular and recurrent basis so it could be assumed that if it had not entered into the agreement with the defaulting borrower it would have loaned the money to another borrower at a similar rate of return.

[42] It seems to me that there is much to be said for the defendants' contentions. On the evidence, a large part of the plaintiff's work consisted of "D" jobs which, it was explained, were projects on which the plaintiff performed engineering consulting services either as head contractor or sub-contractor. If the plaintiff was relying on the lost opportunity to obtain project work either as successful tenderer or as sub-contractor to the successful tenderer on one or more of the tenders described by Mr Sawers in his report, then it seems to me that the damages for loss of such an opportunity would have to be assessed by reference to the likely profit if the plaintiff had obtained one of the project jobs and the probability of its successfully obtaining such a job.

[43] To bring itself into the *La Trobe* type of loss assessment, the plaintiff would have been obliged to adduce evidence that (for example) there was at least as much work readily available as the plaintiff had capacity to perform so that (for example) its staff were always 100% engaged with no down time. It could then have asked the court to assume that if it had not been delayed in performing the DHA project, it would have picked up work of some kind at its usual charge out rates as it had always done in the past. The plaintiff did not adduce such evidence, only evidence that there were tenders available for work that the plaintiff would have been interested in, and evidence of the amount of pre-mixed concrete produced on a year by year basis, from which the Court was asked to infer that there was a stable

economic environment in the building industry at the relevant time.[29] This, it seems to me, falls far short of what would have been necessary.

[44] However, it is not necessary for me to make any determination about this because (as explained above) the plaintiff simply has not established on the facts that the collapse of the crane did cause the plaintiff to lose the opportunity to earn additional revenue during the relevant period.

[45] That means that the claim for interest on the asserted loss also fails.

[46] There will be judgment for the plaintiff on the claim for:

(a) re-imbursement of an amount spent by the plaintiff in providing psychological counselling to staff members following the accident;

(b) re-imbursement of the payment made to Mr Noyce-Brown on account of time lost during repairs;

(c) damages for a delay of 8 days in receiving payment for the DHA project; and

(d) interest at a commercial rate on the above amounts.

[47] I will hear the parties as to the appropriate form of the order.

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[29] In fact the evidence of sales of pre-mixed concrete in the Territory showed that 4,000 m^3 less concrete was sold in the year of the incident than either the year before or the year after – a reduction of about 5%. Nothing turns on this.