Acer Forester Pty Ltd v Complete Crane Hire & Ors [2013] NTCA 11

PARTIES:	**ACER FORESTER PTY LTD (ACN 079 017 020)** v **COMPLETE CRANE HIRE (NT) PTY LTD (ACN 003 191 135)** **BART KENNETH SUTHERLAND** **A & K PTY LTD (ACN 109 540 150)**
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 8 of 2013
DELIVERED:	19 November 2013
HEARING DATES:	8 November 2013
JUDGMENT OF:	RILEY CJ, SOUTHWOOD AND BLOKLAND JJ
APPEALED FROM:	KELLY J in proceeding No 109 of 2009 (209237730)

CATCHWORDS:

NEGLIGENCE — Causation — Loss — Evidence — Onus of proof — Delayed project and low revenue insufficient to prove loss caused by negligent act.

DAMAGES — Negligence — Business interruption — Delay in completing project — Loss of opportunity — Calculation of loss — Evidence — Onus of proof — Damages awarded for loss of productive time.

REPRESENTATION:

Counsel:

Appellant:	P Heywood-Smith QC with D Riggall
Respondent:	A Young

Solicitors:

Appellant:	David Francis & Associates
Respondent:	Minter Ellison Lawyers

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

Acer Forester Pty Ltd v Complete Crane Hire (NT) Pty Ltd & Ors
[2013] NTCA 11
No AP 8 of 2013

BETWEEN:

ACER FORESTER PTY LTD (ACN 079 017 020)
Appellant

AND:

COMPLETE CRANE HIRE (NT) PTY LTD (ACN 003 191 135)
First Respondent

AND:

BART KENNETH SUTHERLAND
Second Respondent

AND:

A & K PTY LTD (ACN 109 540 150)
Third Respondent

CORAM: RILEY CJ, SOUTHWOOD AND BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 19 November 2013)

The Court:

Introduction

[1] On 17 July 2006 a crane collapsed onto the appellant's business premises causing significant damage. The appellant sued the respondents claiming

damages in negligence caused, inter alia, by the interruption to the appellant's business while the building was repaired.

[2] The proceedings came before the Supreme Court. Liability was admitted and the matter proceeded as an assessment of damages. On 30 July 2013 judgment was granted in favour of the appellant in relation to some of its claims. The appellant appeals against that part of the judgment in which the trial judge assessed damages for financial loss arising out of interruption to the appellant's business as a consequence of the damage to the building.

The history

[3] The trial judge found that the crane, which had been operated by the respondents on an adjacent lot, collapsed onto the roof of the appellant's premises causing significant damage to the roof, ceilings and fascia of the building. The damage was repaired and the repairs paid for under an arrangement with insurers.

[4] The appellant carried on business as engineers, building certifiers and project managers. At the time of the collapse the appellant was contracted to provide engineering services as a subcontractor to architects for the purposes of residential developments for the Defence Housing Authority ('DHA'). The DHA project was governed by a fixed-price contract and was the appellant's major undertaking for the period from July to 11 September 2006. The balance of the works undertaken by the appellant in the period

was supervisory work and was largely unaffected by the collapse of the crane.

[5] Work on the DHA project commenced on 11 July 2006 and the collapse occurred on 17 July 2006. The employees of the appellant were not permitted to return to the office for three full days. They reoccupied the business premises on 21 July 2006. Work continued from those premises from that date while the repairs were being carried out. The ability of the staff to satisfactorily perform their duties was said to have been impeded during the repair period. The evidence of Mr Forester, the sole director and shareholder of the appellant, was that the repairs were carried out in a way that minimised disruption and, so far as possible, occurred outside normal hours. When the building was reoccupied all staff members were present and the computers were functioning. There were no specific tasks that could not be undertaken, but things 'took longer' and were 'more difficult'.

[6] The trial judge noted that no evidence was led concerning: the actual work performed by staff during that period; the nature of any disruption to the work generally or in relation to specific employees; or whether any employees fell behind in work and, if so, why. There was no detailed evidence of how many employees were affected or how the work on the DHA project was affected. It was simply asserted that employees were not working to their full effectiveness and that delays occurred.

[7] The appellant's work on the DHA project was due to be completed by 11 September 2006 but it was not completed until 15 November 2006. The appellant's final invoice was rendered on 23 November 2006. It was claimed that the delay was wholly due to disruption to the business as a result of the crane collapsing and the consequent repair work that took place from 17 July 2006 through to the end of October 2006.

[8] In determining the extent of the disruption, her Honour referred to the claim of a subcontractor, Mr Noyce-Brown, who the appellant engaged to work on the DHA project and who operated from the appellant's premises. His invoice included supportive detail identifying the nature of his loss in terms of either time or productivity and the hours claimed as 'lost time' as a consequence. The claim included such items as 18 hours of 'lost productivity' due to failed air-conditioning. The invoice revealed he suffered disruption for a total of 42 hours or, as her Honour observed, 'near enough to 6 days'.

[9] Mr Forester observed that the disruption experienced by Mr Noyce-Brown would have been 'similar' to that of other employees in the office but went on to say that the appellant had 'significant additional costs' without identifying those costs. Her Honour observed:

> If one assumes in the [appellant's] favour that there was some disruption to the [appellant'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 eight days.[1]

[10] The evidence of Mr Forester revealed that loss of time and revenue in July and August was 'not 100% due to the crane collapse' but was affected by a 'whole range of factors'. Those factors were identified by Mr Forester in his evidence.

[11] The DHA project constituted approximately 75% to 80% of the appellant's workload. In the lead-up to the commencement of the project the work of the business was being deliberately wound down in anticipation of, and preparation for, that project. The appellant had scaled down its acceptance of other works and devoted 'the major portion of its activities to the performance of its obligations' under the DHA project. This resulted in 'reduced billables'. Mr Forester said that he personally was not doing billable work as he prepared for the DHA project.

[12] Other causes of lost time and lost revenue in the period, as identified by Mr Forester, included that there was a changeover in computer systems. Further, it was acknowledged that some time was also lost by the staff of the appellant undertaking work attributable to the repair of the business premises, for which the business was paid. There had also been a change in the scope of the DHA project after 1 September 2006 which required plans to be redrawn and additional time spent on the project as a result. In addition it was acknowledged that monthly time recordings made by the

[1] *Acer Forester Pty Ltd v Complete Crane Hire Pty Ltd* [2013] NTSC 41 at [18].

business, and relied upon by the expert witness called on behalf of the appellant to demonstrate lost time and therefore lost revenue, were of doubtful assistance for that purpose.

[13] When asked about the first half of July 2006 Mr Forester said:

> I was trying to configure our office and get ourselves organised and finalised in negotiations for the DHA project, predominantly, and manage a changeover from Solution 6 to Total Synergy, our time costing system; because we did have issues and difficulties with our timesheet records and to get better control of the business we implemented a new time costing system. So that is what I was predominantly doing.

[14] This evidence and the information revealed in the progress claims for work done by the appellant on the project led her Honour to conclude:

> 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. Counsel for the [appellant] pointed out that 120 hours was only around 5% of the time spent on the entire project. 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 [appellant] 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.[2]

[2] Ibid at [29].

[15] The trial judge accepted that the crane collapse caused approximately eight days loss of productive time to the business and inferred that eight days of delay to the DHA project was to be attributed to the crane collapse. Her Honour concluded:

> Nevertheless, because the [appellant] has demonstrated that the crane collapse caused approximately eight days loss of productive time to the business, one can infer that eight 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 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 [appellant] has not shown what effect, if any, this had on the progress of the DHA project. The [appellant] is therefore entitled to damages for eight days delay in receiving payment for that project.[3]

[16] As to the remaining claims for damages the respondents conceded liability for an amount spent by the appellant in providing psychological counselling to staff members following the accident and for reimbursement of a payment made to the subcontractor, Mr Noyce-Brown, on account of time lost during repairs.

[17] The respondents resisted the appellant's claim for damages for loss of opportunity to perform other work during the period when the DHA project ran over time. The trial judge considered this claim for damages in some detail and concluded that, for the appellant to have succeeded on this basis, it would have been necessary to adduce evidence of the work which it could have completed as a successful tenderer or as a subcontractor to a successful

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[3] Ibid at [30].

tenderer and the likely profit to flow therefrom. Evidence that such work was readily available to the appellant was necessary. If such evidence were available then the appellant could have asked the court to assume that, if it had not been delayed in performing the DHA project, the appellant would have picked up work of some kind at its usual charge rates as it had done in the past. Her Honour noted that the evidence was not produced.

[18] The trial judge concluded that, in any event, the appellant had not established that the collapse of the crane caused the appellant to lose the opportunity to earn additional revenue during the relevant period. The productive time lost was no more than eight days.

The appeal

[19] The issues on the appeal, as identified by the appellant, were:

(a) whether, and to what extent, the proven structural damage to the building caused a delay in the completion of a substantial consultancy project;

(b) the extent to which the burden of proof is placed upon a defendant who attempts to negate or challenge the plaintiff's claim by alleging alternate causes of loss; and

(c) whether the claim should have been characterised as no more than a business interruption claim assessed by reference to proven earnings on either side of the interruption.

[20] The appellant argued that the only significant physical event which occurred in July 2006 was the partial destruction of the appellant's premises, which occurred in the context of an engineering business that had operated since 1986. It was said that the respondent led no evidence to contradict the claimed causation and advanced no relevant alternative cause for the delay in the completion of the works. The reduced financial performance of the business over the period between 17 July 2006 and the end of October 2006 was attributable to 'the obvious cause', being the collapse of the crane, in the absence of some other identifiable cause. It was submitted that the onus to lead evidence of other causes rested upon the respondents.

[21] It was argued that her Honour's approach was erroneous because it imposed a burden on 'the innocent party' (the appellant) to lead evidence as to what projects it would have sought and how likely it was to obtain those projects. The correct approach was to consider the evidence of ongoing economic activity of the appellant and the industry to enable the court to determine the economic loss occasioned by reason of the business interruption. It was for the court to determine an average of income and then apply that to the period of time lost. It was further submitted that the onus rested upon the respondent to 'untangle the loss'.

[22] The appellant asserted that this was a business interruption case. The case for the appellant was that it did not tender for or otherwise seek work during the period of interruption because it was contractually committed to complete the DHA project within a specified time. The Court therefore had

to resolve what would happen if the appellant had finished the project on time and gone looking for work. It was argued that it was sufficient for the appellant to prove its case by evidence of actual earnings both before and after the crane collapse. There was evidence of the operations of the business over a period of years and of tenders being available in the building industry during the period of delay. The court had the opportunity to compare the revenue generated by the business over long and comparable periods with that of the period of interruption. It was submitted that, whilst it may be difficult to establish why time was lost as a result of the difficult working environment, it was incumbent upon the court to do the best it could[4] even where damages could be no more than an approximation.[5] It was contended that the correct approach for the court to adopt was to determine an average of income derived from the past and subsequent operations of the business and then apply that average to the period of time lost.

Consideration

[23] The appellant bears the ultimate onus of proving its loss.[6] However, the appellant, having proved damage which prima facie flowed from the collapse of the crane, 'will, if no more appears, recover for it'.[7] In *Middleton v Melbourne Tramway and Omnibus Co Ltd*[8] Isaacs J said:

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4 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 125 per Deane J.
5 *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625 at 636 per Barwick CJ.
6 *Savini v Australian Terrazzo and Concrete Co Pty Ltd* [1959] VR 811 at 820 per Sholl J.
7 Ibid at 821.
8 (1913) 16 CLR 572 at 590.

> But, where the evidence for the plaintiff, if believed, is sufficient not only to establish liability, but also to enable a jury with reasonable certainty, if they so conclude, to attribute to the defendant's wrongful conduct as an effective and proximate cause the injuries complained of, the plaintiff has so far discharged his burden of proof; otherwise he might be left without redress against an admitted wrongdoer. The onus then is on the defendant – unless he can succeed in satisfying the jury upon the plaintiff's evidence – to negative the inference of his total responsibility, or to distribute the damage arising by showing, if he can, that the damage accrued, or must in any case have accrued, wholly or partly from some other cause.

[24] It may be accepted that the DHA project had been expected to be completed by 11 September 2006 but was not completed until 15 November 2006, a delay of some two months. It may also be accepted that a contributing factor to some of that delay was the collapse of the crane onto the business premises of the appellant on 17 July 2006. However, in our opinion, the appellant's submission that the delay for the whole of the claimed period was 'solely attributable' to the 'obvious cause' being the collapse of the crane has not been established.

[25] The appellant submitted that the respondent led no evidence to contradict the claimed causation but that submission cannot be sustained. The evidence of other contributing causes was to be found in the affidavit of Mr Forester and his oral testimony. Her Honour examined that material in detail and determined that it had not been established that the collapse of the crane was the sole, or even the major, cause of the delay for the whole of the period.

[26] The appellant established that some damage resulting from delay followed the collapse of the crane. The appellant did not establish that the collapse

was the 'effective and proximate'[9] cause of the delay through to the end of the contract. Rather, as her Honour found, the collapse of the crane was the 'effective and proximate' cause of delay that lasted for a period of eight days only. By reference to Mr Forester's evidence, the trial judge accepted that the respondent had established that there were other causes contributing to the delay in addition to the collapse of the crane.

[27] The delay most clearly attributable to the collapse of the crane occurred in the period immediately following the collapse. Her Honour observed that, notwithstanding the unchallenged evidence of Mr Forester that the level of disruption gradually lessened as time went on, the delay in the works increased. Her Honour concluded that 'there was another factor or factors at work causing the delay'.[10] There was a sound evidentiary basis for her Honour's conclusions in this regard.

[28] Her Honour accepted that the recording of time lost reflected in the invoice of Mr Noyce-Brown provided some assistance in determining the extent of the loss. It gave guidance as to the impact that the repair work to the premises had on the work of those within the premises. There was a strong inference that those working in the same building and under the same conditions as Mr Noyce-Brown would have experienced similar difficulties.

[29] Unfortunately, because of the state of the appellant's records, there was no complete record of the times worked by each employee during the relevant

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[9] Ibid.
[10] *Acer Forester Pty Ltd v Complete Crane Hire Pty Ltd* [2013] NTSC 41 at [29].

period. There were ‘significant issues’ with the completeness of the monthly time recordings. It was not possible accurately to determine work time lost during this period.

[30] Factors that contributed to loss of revenue to the appellant and/or the delay in the DHA project over and above that caused by the collapsed crane included the following:

(a) Mr Forester was not doing billable work as he prepared for the project, some of his time was spent configuring the office for the project;
(b) the work of the business was being deliberately wound down in preparation for the project;
(c) the business was not looking for other work during that period because it would not have been able to service the DHA project;
(d) the additional work required in the second half of the project which amounted to 120 hours and constituted more than 10% of the time spent on the work covered by the second progress claim;
(e) those involved in the business managing the changeover of management systems and dealing with the ‘difficulties with our timesheet records’; and
(f) employees of the business carrying out remunerated work related to the repair of the damaged building.

[31] The trial judge’s conclusion that the collapse of the crane caused approximately eight days loss of productive time to the business has not been demonstrated to be in error. The evidence did not show that the

disruption caused a loss of revenue over the period of four months as claimed or, indeed, any period beyond the eight days.

The loss of productive time

[32] Although the trial judge concluded that the collapse of the crane caused approximately eight days loss of productive time from the business, no award of damages for this loss was made. This was because the appellant expressed its claim in the court below as being for damages for loss of opportunity to perform other work during the period when the work on the DHA project ran over time. Although expressed in that way much of the evidence was directed to a claim for business interruption, for which a specific claim for damages was made in the 4th amended statement of claim. The formulation of the claim by the appellant and its presentation in the court below was confusing. However, an interruption claim was sufficiently identified below, and contrary to the respondents' submissions, no truly new ground was argued on appeal.[11] In any event the only award arising out of the loss of time was for delay in the appellant receiving payment for the DHA project.

[33] In our opinion the appellant was also entitled to damages for the loss of productive time during that period. The measure of this loss, which was eight productive days, should be measured by the averaging process referred to by the appellant. Although that averaging process was criticised by the

[11] Cf *Coulton v Holcombe* (1986) 162 CLR 1 at 8 per Gibbs CJ, Wilson, Brennan and Dawson JJ; *Water Board v Moustakas* (1988) 180 CLR 491.

respondents because choosing different months for determining an average produces quite different results, it is, nevertheless, the most reliable indicator available. It provides an approximation whilst not being the result of clear mathematics. As Barwick CJ observed in *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd*:[12]

> It is perhaps not a very satisfying answer to say that damages are not in every case a perfect compensation but in many cases no more than an approximation lacking in mathematical or economic accuracy or sufficiency. But, however unsatisfying, that answer, in my opinion, must be accepted.

[34] The figure calculated by the expert called on behalf of the appellant was a monthly average of $106,821 for work excluding the building inspection work which had not been affected. The loss would therefore be a little over $38,800.[13]

[35] The appeal is allowed to the extent of increasing the award of damages by the sum of $38,800.

[36] We will hear the parties as to appropriate orders including orders as to costs.

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[12] (1981) 145 CLR 625 at 636.
[13] $106,821 divided by 22 (being the working days in an average month) and then multiplied by 8 (being the lost productive days).