Liability for Materials Specified in Bills of Quantities

By John B Molloy, LLB (Hons), BSc (Hons), FHKIS, FRICS, ACIArb Managing Director, James R Knowles (Hong Kong) Limited

Quantity Surveyors often include specification of materials in the Bills of Quantities. The specification may be advised by the Architect of the Engineer or may simply be a standard clause adopted by the particular quantity surveying firm. But who is liable in the event that the specified materials prove to be unsuitable for the works in question?

This is the interesting question that arose in the case of Rotherham Metropolitan Borough Council v Frank Haslam Milan & Co Ltd and Another (1996) 78 BLR 1.

The plaintiffs (Rotherham) were employers, who employed the defendants (Haslam and Gleeson), as contractors for the erection of a new 5-storey office building, known as Norfolk House, to be used as the new civic office of Rotherham in Northern England. The contracts were on JCT 1963 (1977 Revision) terms with quantities, which is almost identical to the RICS/RIBA Contract used for the vast majority of private developments in Hong Kong.

The bills of quantities referred to granular hardcore to be placed beneath the ground floor slab, and further provided:

"*Granular hardcore shall be graded or uncrushed gravel, stone, rock fill, crushed concrete or slag or natural sand or a combination of any of these. It shall not contain organic material, material susceptible to spontaneous combustion, material in a frozen condition, clays or more than 0.2% of sulphate ions as determined by BS 1377.*"

The granular hardcore used by the contractor contained steel slag which expanded and caused cracking of the ground floor slab.

The experts who gave evidence all agreed that it was generally known by organisations such as the Building Research Establishment and slag production companies, that steel slag (as opposed to other forms of slag) is not an inert material, and was prone to expansion.

Rotherham claimed that the contractors were liable for the damage caused to the concrete slabs. They argued terms should be implied into the contract at common law by analogy with reason of the Sale of Goods Act as follows:

- The material should be reasonable fit for the purpose for which it was supplied and
- The material should be of merchantable quality.

For the 'Fitness for purpose' term to be applicable it must be shown that the employer informed the contractor of the purpose and then relied on him to provide materials to suit that purpose. In this case the main point the court addressed was did the employer trust the judgement of the contractor or did he rely on his own judgement or the judgement of or his agents the architect and the quantity surveyor?

In answering this question the court firstly considered the provisions of the contract. The contractors 'obligation was clearly 'to carry out and complete the works ... described by and referred to in the ... contract documents'. In this respect the job was to fill hardcore around the foundations. The material was to be of the quality and standard specified in the contract documents. The description of the material to be supplied was (granular) hardcore and the specification stipulated that it: 'Shall be graded or unbrushed gravel, stone, rockfill, crushed concrete or slag or natural sand or a combination of any of these'.

Secondly, the court considered the relative skill and knowledge of the contractor as compared to that of the employer or his agents the architect and quantity surveyor. It concluded that in reality the architects and quantity surveyors assumed the responsibility for the whole design and specification of the work. They specified hardcore to include steel slag because they assumed that slag was suitable for the purpose. They trusted their own knowledge and did not need to rely on the contractors' skill and knowledge.

Having considered these points the court held therefore that it was unreasonable to expect that reliance was being placed on the contractor's skill and judgment and on this basis **a warranty of fitness for purpose could not be implied**.

With regard to the implied term for merchantable quality, the court first considered whether such a term should be implied into a building construction contract, and concluded that it should be implied.

However, they did not consider that in this case the term had been breached. The court held that in order to comply with the requirement of merchantable quality, the goods did not have to be suitable for every purpose within the range of purposes for which goods were normally brought under that description. It was sufficient that they were suitable for one or more purposes. Here the description was of (granular) hardcore, the purpose was as infill around the foundations but that was only one of several purposes for which steel-slag was commonly used. In other situations such as in bituminous macadam it was entirely satisfactory. **The steel slag was therefore, commercially saleable; it was, therefore, of merchantable quality**.

Accordingly, the court held firstly that although in a building contract it would often be appropriate to impose on the contractor an implied duty that the materials should be reasonably fit for the purpose, in this case the architect had extensive powers over the materials under the express terms of the contract and had himself (or with the quantity surveyor) determined that the material was fit for the purpose of fill material. It was therefore not appropriate to imply into the contract any undertaking that the steel slag should be reasonably fit for this purpose.

Secondly whilst it was appropriate to imply into the contract a term that the material should be of merchantable quality, the material was in fact of merchantable quality, since it was reasonably saleable under the description 'steel slag'.

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