Is there an implied fitness for purpose at common law?

The inclusion of fitness for purpose warranties in construction contracts and consultancy agreements is frequently the subject of fierce debate between principals, contractors and consultants. This article considers circumstances where a fitness for purpose warranty may be implied at common law into certain contracts, thereby rendering such debate futile.

We specifically focus on construction contracts but our comments apply equally to a range of professional services contracts in which fitness for purpose is often sought to be implied.

What is a "fitness for purpose" warranty?
A fitness for purpose warranty is a contractual or implied warranty given by a contractor, consultant or supplier to deliver a product (or a building or service) that is capable of being used in the way that the principal *intends* to use it. The warranty is included as the principal is reliant on the contractor's particular skill and expertise to design, build and/or supply a product or service that will perform as required.

A contractor/consultant has a separate duty at common law to exercise a duty of care in accordance with professional standards, and may be liable for breach if it is proven not to have met that level of care (subject to relevant common law tests). In comparison, breach of a fitness for purpose warranty only requires evidence that the product (or building) does not meet a certain standard that the principal has made clear is required (or sometimes which can reasonably be inferred from the principal's requirements). This lower threshold makes fitness for purpose warranties far more onerous for the contractor and very often will have adverse insurance repercussions.

A fitness for purpose warranty may be:

- created by an express contractual provision;
- implied by statute, such as under section 362I of the Building Act 2004 (in relation to household units) and under section 8 of the Consumer Guarantees Act 1993 (in relation to goods supplied to consumers); or
- in some circumstances, implied into a contract by common law.

Implied fitness for purpose warranty
Generally, a fitness for purpose warranty may be implied by common law into a construction contract if the contractor has some level of input and control over the design of the final product. In this scenario, the principal is reliant on the contractor's knowledge and skill to ensure the product is suitable for the stated or implied purpose. If a contractor is merely following designs prepared by another party, the contractor will

not have sufficient control over the design and there is therefore limited scope for such a warranty to be implied by common law.

For any term, including a fitness for purpose term, to be implied into a contract, the test in *BP Refinery (Westernport) v Hastings Shire Council*, must be met. The implied term must:

- be reasonable and equitable;
- be necessary to give business efficacy to the contract;
- be so obvious that it goes without saying;
- be capable of clear expression; and
- not contradict an express term.

In Greaves v Baynham Meikle, a contractor engaged to construct a warehouse to be used, in part, for the storage of oil drums on the first floor under a design and construct contract was sued after the first floor cracked, necessitating expensive remedial works. The English Court of Appeal found that the purpose for which the warehouse was required (including that oil drums would be stored on the first floor) was made known to the contractor and became the "*common intention of the parties*". Therefore, an implied warranty existed that the design would be fit for such purpose. In this case, the design, for which the contractor was responsible, was inadequate and constituted a breach of such warranty. Through the same failure, the contractor was also held to be in breach of the duty to use reasonable care and skill imposed by law, showing that the two duties will overlap.

In IBA v EMI Electronics Limited and BICC Construction Limited, a broadcasting authority sought specific assurances from the contractor that a television mast would meet specifications and would not break, the broadcasting authority having experienced problems previously. The contractor assured the broadcasting authority that the mast would be suitable and no tests would be needed. The mast subsequently failed and the Court found it "could see no reason why" a contractor who contracts to design, supply and erect a mast (and by analogy other projects) would not be "under an obligation to ensure it is reasonably fit for the purpose for which he knows it is intended to be used".

What does this mean for consultants? In *Global Switch (Property) Singapore Ltd v Arup Singapore Pte Ltd,* the Singapore High Court dismissed a US$17.5m claim brought by Global Switch against Arup Singapore, over alleged failures of duty that led to a data centre outage. Global Switch claimed that it was Arup's responsibility to design a chilled water system to cool the data centre in a way that reflected the needs of Global Switch. The Court found no implied fitness for purpose because the high threshold for implying a term w*as not met and* the contractual documents were not clear as to the standard of design or purpose that was required. The absence of sufficient clarity meant an implied term "was too vague and ambiguous to succeed", and was not required for business efficacy. Other relevant considerations included that Arup was already under a contractual duty to use reasonable care and skill in performing its obligations and likely would not have accepted an additional (unnecessary) fitness for purpose term.

This case should not be taken as a carte blanche rejection of fitness for purpose warranties in consultancy agreements – each case should and will be considered on its particular circumstances. It does, however, indicate that in principle, providers of professional advisory services will generally be under an obligation to use reasonable care and skill, but are not responsible for providing a perfect result unless that has been expressly provided for. In other words, fitness for purpose warranties will not always be readily implied.

Insurance repercussions

It is important for contractors (especially in construct-only contracts with limited temporary design) and consultants to identify if they have unwittingly taken on a fitness for purpose warranty. Depending on the level of professional indemnity cover the party holds, it may only respond where a claim arises from professional negligence and the

policy may be invalidated altogether. Contractors, especially design and build contractors, should err on the side of caution and assume they are taking on a fitness for purpose obligation when carrying out design work. While some overseas design and build contracts (i.e. JCT and ICE) expressly exclude fitness for purpose obligations, the New Zealand Standards suite does not.

Finally, a couple of tips for those design and construct contractors or consultants that may accept a fitness for purpose warranty (under NZS 3916 construction contract or possibly on an Australian project where fitness for purpose is more reflective of market practice):

- check the interaction with your professional indemnity insurance; and
- limit the express fitness for purpose warranty to a measurable standard against which you can design and construct.

Our experienced construction law team can assist with any queries regarding the matters raised in this article.

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