

Contractors' obligation of diligence and duty to inform persist even after termination

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Introduction

Under Swiss law, contractors have a broad obligation of diligence and loyalty towards their employer. This obligation includes a duty to inform the employer of any important circumstances that may affect the performance of the works and to take the necessary steps to avoid causing the employer any harm. In a recent decision (4A_273/2017, 14 March 2018), the Swiss Supreme Court made clear that these duties continue to exist even after termination, regardless of the grounds for termination.

Facts

The case before the Supreme Court dealt with relatively minor works: the installation of a hardwood floor for a sum of approximately Sfr50,000. Nevertheless, the judgment has implications for parties involved in projects large and small.

The employer, a home owner, suspended the works well before completion on the grounds that they were seriously defective. The parties then together agreed to seek the opinion of an expert, who concluded that the floor as it was installed was unusable and had to be replaced entirely. On this basis, the employer purported to exercise her right under Article 368 of the Code of Obligations, which allows an employer to refuse works on the grounds that they are so defective that they cannot be used or that the employer could not equitably be required to accept them.

The employer went on to initiate proceedings against the contractor to recover the costs of hiring a substitute contractor to redo the works. The court appointed its own expert, who took a different view than the initial expert; he opined that although the partial works had been performed in an unorthodox manner, it would have been possible for the contractor to complete them properly. However, the expert also found that the partially installed hardwood floor had become unusable after the works were suspended because the contractor had left temporary wedges in place and had not yet installed expansion joints. The wedges prevented the floorboards from expanding as they reabsorbed humidity, which caused the floor to heave and deform.

Decision

In light of the opinion of the court-appointed expert, the lower courts first ruled that the employer had not been entitled to refuse the works. Instead, her actions amounted to a termination for convenience under Article 377 of the Code of Obligations, entitling the contractor to full compensation.

Despite this finding, the contractor – who had failed to bring a claim for compensation for the termination – was nevertheless ordered to compensate the employer for the cost of redoing the

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works on the grounds that they had breached its duty to inform. The lower courts found that the contractor had a duty to inform the employer of the risk that the floor would deform if the wedges were not quickly removed and expansion joints installed.

The contractor appealed this decision to the Swiss Supreme Court, arguing that the employer's termination had extinguished its duty to inform. The court rejected the argument. It ruled that the contractor's duty of loyalty continues even after the contract comes to an end and regardless of the grounds of any termination. According to the court, when a contractor stops works for any reason, it has the duty to take all necessary measures to prevent any harm to the employer and must provide all information on any particularities of the works it performed for the employer.

The court also rejected the contractor's further argument that it was relieved of its duty to inform because the employer already knew about the risk of deformation. While the court acknowledged that the duty to inform does not extend to circumstances that the employer knew about or should have known about, it found that the initial expert report obtained by the parties did not mention the risk of deformation. The fact that the employer's spouse was an architect and that she had retained an architect in connection with the works also did not mean that the employer should have known of the risk.

Comment

Although contractors that are terminated may not be inclined to provide additional assistance to an employer, their obligation of loyalty and their duty to inform continue to exist post-termination, irrespective of any dispute over the lawfulness of the termination. Therefore, contractors must ensure that they provide the employer with any relevant information on the works in order to prevent the employer from suffering any harm. Failure to do so could be costly, as demonstrated by this Supreme Court decision. As a last resort, the contractor can attempt to show that the employer knew or should have known about the circumstance that subsequently caused damage.

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