FEATURE ARTICLE

Architecture in Rotterdam, The Netherlands. Credit: SeanPavonePhoto/Adobe Stock

Liability for innovation: the *Prodema* case in the Netherlands

Leendert van den Berg
The Hague

In this rapidly changing world, society's demands escalate. Innovation is key to keeping up with these demands. The construction industry is no exception to this trend. Building methods change in order to build better and more rapidly. Building materials change to allow more daring designs or faster or cheaper construction. Design methods change to allow for a more integrated and foolproof process. This leads to ever-increasing possibilities. At the same time, this leads to ever-increasing challenges, both from a factual and from a legal perspective. The main legal question is, who bears the responsibility for the implementation of innovative methods, materials and designs?

The answer will be heavily influenced by all relevant circumstances. Primarily, the contractual provisions will be relevant. What did the contracting parties agree on when concluding their agreement? Then the applicable legal system will be of relevance. Were the parties allowed to allocate the risks as they did? Last but indeed not least, the factual circumstances will be relevant. Who chose the innovative product or innovative construction method? Did the other party have a choice of methods and/or materials? If an innovation leads to damage, was such damage the result of the innovation itself or of faulty work (or design) when implementing that innovation? And finally, when defects

manifest themselves, is there any recourse against the contractor or other parties involved in the construction, or is it the owner who bears all the risks?

As it seems impossible to give general answers to these questions, a case study concerning an innovative product used in a series of construction projects in the Netherlands almost two decades ago may provide some guidance.

Prodema SA[1] was a Spanish company which decided to break into the Dutch market in 1995. Its flagship product was a type of cladding panel that was marketed to be all weather resistant and maintenance-free. The product was said to come with a ten-year insured warranty. It was particularly appealing to architects as it featured a natural wood look. The combination of outdoor durability and aesthetics proved irresistible to architects and the product was widely used in many projects across the Netherlands. The use of the panels was stipulated by architects in technical descriptions and project developers ordered construction according to those descriptions. The panels were used in many housing projects and the houses were sold to buyers.

Then, after some time, the Dutch weather proved to be too harsh for the Spanish panels. The wooden veneer in the panels turned to grey and the panels delaminated. Some panels became hazardous, others turned aesthetically unacceptable. All panels had to be replaced.

One of the larger Dutch project developers had the panelling installed in three different housing projects which were built in 1998 and 1999. In all three projects, the panelling became defective. For these projects, the standard Dutch forms for housing construction were used, which provide for an overall six-year guarantee and contain a very accessible and effective arbitration mechanism. The buyers made use of both the guarantee and the arbitration clause. As the panels were clearly defective and as a guarantee had indeed been provided, these cases were all settled in 2006. The result was an obligation for the project developer to replace the panelling at its own costs. These costs ran into millions, so of course the project developer sought to recover them from other project participants.

This is where the problem of the use of an innovative material occurred. The contractors had merely used the materials that were chosen and prescribed by the architects (and therefore by the project developer). Under their contractual terms, such choice of materials by the project developer shifted the responsibility for defectiveness to the project developer. Consequently, the project developer had no recourse. At the time of construction, there was no general knowledge available about potential defects, so the contractors were under no obligation to warn the project developer about the use of these materials.

As for the architects, they had researched the material. As the panelling was innovative, the only information available at the time was the product information provided by Prodema itself. Furthermore, Prodema had claimed that it could provide a ten-year insured warranty. The architects had acted according to the ordinary standards of care. Again, there was no recourse for the project developer (also, under the Dutch standard forms of contract for architects, recourse is regularly rather limited).

A final option for the project developer was to seek recourse against Prodema itself. Of course, the project developer had not purchased any goods from Prodema as the panels were procured by the contractors (and their subcontractors). This could be remedied by a transfer of rights by the (sub) contractors to the project developer. However, under Dutch law, a limitation period of two years applies in relation to non-conformity of purchased goods. Moreover, an overall limitation period of five years after the delivery of such goods applies. Apparently, direct recourse on Prodema through a transfer of rights from the (sub) contractors to the project developer proved not to be possible. The published verdicts do not indicate why. Given the factual circumstances of the matter it seems reasonable to assume that the limitations periods were at the root of said impossibility.

Then there was the insured warranty. Prodema had sold the panels with a warranty, so the most promising way of recourse would be to call on the insurers. However, it then transpired that Prodema had indeed contracted insurance for its panelling but had since changed the structure of its panels – after all, it was an innovative product which was still under development. The insurance policy related to the former structure of the panelling and did not apply to the panelling which had actually been delivered for the litigious projects. As a result, no payment was obtained from insurers.

In a final attempt to seek compensation, the project developer sued Prodema. It did so on the grounds of false advertising. In its sales information, Prodema had suggested that the panelling was weatherproof and that this was backed up by relevant research. Although research had indeed been performed, the research reports available to Prodema at the time did not cover all aspects of the claims made in the sales information. These proceedings took over 12 years before a verdict was rendered by the Dutch Supreme Court in 2019.[2]

From the proceedings before the Supreme Court, it follows that an expert witness established that the panelling was indeed unsuitable for the more harsh Dutch weather. The Court of Appeals established that the advertising was indeed false, as the claims for weatherproofness were not suitably backed up by research. Then the Court of Appeals heard all the designers and architects involved in the projects in order to establish whether the false advertising had influenced on their decision to use the panelling. These hearings showed that the designers were indeed influenced by the false advertising, which led to the use of the panelling. As a result, the Court of Appeals decided that Prodema was liable for the false advertising and that that false advertising had indeed led to the use of defective panelling and consequently to damage. This was not a final verdict, as the Court of Appeals then decided that the project developer should substantiate which damages were a direct result of the false advertising. The Supreme Court upheld the verdict of the Court of Appeals.

Whether the project developer ever obtained any compensation in these proceedings remains unclear as there are no further published rulings on this case. Whether the company formerly known as Prodema survived is equally unclear.

What this case shows is that the use of innovative materials can be a risky affair and that if defects manifest themselves, it may be too late to intervene and to seek compensation. This calls for sufficient front-end legal reasoning about how to manage these risks, or as to which party will absorb such risks. Solutions may be found through adequate insured warranties and financial guarantees. From a factual point of view, starting with small-scale applications of innovative products whilst doing extensive research may be a better solution. However, given the number of innovations taking place, and given the need to innovate, this factual solution may not always be feasible.

Notes

1 It should be noted that this company later changed its name, and the brand name Prodema remained in use by a different company. This article addresses the problems with the panelling that were experienced in the past and do not in any way concern the panelling currently produced under the brand name Prodema.

2 Dutch Supreme Court decision, 29 March 2019, ECLI:NL:HR:2019:444.

Leendert van den Berg FCIArb, is a partner at Severijn Hulshof Advocaten, The Hague, and can be contacted at **l.berg@shadv.nl**.