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Court of Appeal Decision: Concurrent Liabilities in Contract and Tort

Robinson v PE Jones (Contractors) Ltd [2011] EWCA Civ 9

This special edition of the Construction Newsletter focuses on a recent decision of Lord Justice Jackson which is of great interest to construction practitioners. Jennie Gillies considers the significance and implications of the decision; an edited version of this article is soon to be published in the New Law Journal.

It will come as little surprise to those practising in the construction field that, following elevation to the Court of Appeal, Lord Justice Jackson has continued to take an interest in TCC matters. An example of this is his recent decision in Robinson v PE Jones (Contractors) Ltd, where he seized the opportunity to give guidance on two important issues:

- (1) The thorny issue of concurrent liabilities so far as building contractors are concerned; and
- (2) The appropriate forum for lower value construction and engineering claims.

The Facts

In December 1991 the claimant entered into a written agreement whereby the defendant builder agreed to build and sell a new build residential property. The property carried with it an NHBC Guarantee, and the contract incorporated clauses restricting the defendant's liability for defects to mirror those found under the NHBC Guarantee (both as to extent and duration). The completion of construction and the claimant's occupation of the property took place in April 1992.

Just over 12 years later, the claimant discovered that the chimney flues had not been constructed properly. Proceedings were launched (in the County Court) in 2006 to recover the cost of remedial works to the flues. Given the lapse in time, the claimant did not have an actionable claim in contract and thus, so as to benefit from the provisions of section 14A of the Limitation Act 1980, it was alleged that the defendant owed a concurrent duty of care in tort. As no physical damage had been caused, the claim was for economic loss only.

The Decision At First Instance

Following transfer to the Manchester TCC in 2009 (2 ½ years post issue) two preliminary issues were determined by HHJ Stephen Davies:

- (i) Whether, as a matter of law, a builder owes a co-extensive duty of care in tort; and
- (ii) Whether, on the facts of the case, the defendant had assumed any such duty.

It was held that whilst it was *possible* for a builder to owe a duty of care to protect a client from suffering economic loss, on the facts no such duty was assumed in light of the limitation clauses in the contract. The claim was accordingly dismissed. Thereafter the claimant sought leave to appeal and limited leave was permitted by Lord Justice Aikens.

The Court Of Appeal's Decision

The claimant's appeal was unanimously dismissed. The main decision was provided by Lord Justice Jackson whose reasoning was endorsed by fellow judges Stanley Burton LJ and Maurice Kay LJ. Two aspects of the decision are worthy of note.

(1) Concurrent Liabilities

Whether a building contractor should, in addition to and by virtue of his contractual obligations, also be deemed to owe a co-extensive tortious duty of care to protect his client from suffering economic loss, has been a bone of contention for a number of years. Opinion amongst official referees and TCC Judges fell into two camps –see, on the one hand, HHJ Hicks QC in *Storey v Charles Church Developments plc* [1995] 73 Con LR 1 and HHJ Seymour QC in *Tesco Stores Ltd v Costain Construction Limited* [2003] EWHC 1487 (TCC) (holding that a concurrent duty of care was owed) as against HHJ Humphrey Lloyd QC in *Payne v John Setchell Ltd* [2002] BLR 489 and HHJ Toulmin CMG QC in *Mirant Asia Pacific Limited v OAPIL* [2005] PNLR 10 (stating that no concurrent duty was owed). The issue has been awaiting clarification by the Court of Appeal or Supreme Court for some time.

With characteristic clarity, and after making it clear that he was addressing the very issue which required reconciliation, Lord Justice Jackson explained the legal position in his judgment. The key aspects were as follows:

- Contracts and the law of tort are separate sources of obligations and there is no reason why the law of tort should impose duties identical to obligations negotiated by the parties. Whilst the existence of a contract does not prevent a tortious duty from arising, every contractual obligation to do something does not necessarily carry with it a parallel tortious duty to the same effect.
- Duties of care which are co-extensive with contractual obligations do not spring up between parties automatically, and a party will only acquire tortious liabilities to prevent financial loss through the doctrine of assumption of responsibility.
- Beyond the realms of professional retainers, it does not follow that every contracting party assumes responsibilities (in the *Hedley Byrne* sense) to other parties which are co-extensive with their contractual obligations; whilst it is *possible* that a particular set of facts may give rise to identical contractual and tortious duties, that will not always be the case.

In this case, the dismissal of the action at first instance was upheld; there was nothing on the facts to indicate that the defendant builder had assumed co-extensive tortious responsibilities (particularly given the nature of the contractual clauses which limited the defendant's liability). Of more interesting general application, Lord Justice Jackson also commented that, even absent the limitation clauses, there was nothing to show that there had been any assumption of responsibility on the part of the defendant.

Lord Justice Stanley Burton's supporting judgment was framed in stronger terms and, after agreeing fully with all that had come before in Lord Justice Jackson's judgment, he added:

"In my judgment, it must now be regarded as settled law that the builder/vendor of a building does not by reason of his contract to construct or to complete the building assume any liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss."

Cases where a building contractor will also be held to owe a co-extensive duty of care in tort will now be the exception rather than the rule. The strong sense given by the Court of Appeal is that absent authority, the court would have erred strongly against the imposition of *any* tortious duty beyond those to prevent physical damage. Lord Justice Jackson did not disapprove of the decisions in *Storey v Charles Church* and *Tesco v Costain* but Lord Justice Stanley Burton did expressly state that they had been wrongly decided. Thus whilst there may still be scope for argument to rage over the additional circumstances required to show that a builder has assumed responsibility to his client and whilst much may 'turn on the facts', it is likely that it will only be in a very compelling case that an assumption of responsibility will be proven.

(2) The Appropriate Forum for Lower Value TCC Claims

The claimant's claim for remedial works was for a modest amount (approximately £35,000). The nature of the action was such that it was classified as a 'TCC Claim' (under paragraph 2.1 of the Part 60 Practice Direction) and, seemingly in accordance with CPR 60.4, the claimant issued proceedings in the Manchester County Court (one of the permitted courts listed in paragraph 3.4 of Practice Direction 60). It is impossible to determine, on the basis of the Court of Appeal's decision, why the claim was not thereafter dealt with expeditiously and whether fault lay with the parties or with the court. What is clear, however, is that the

matter was listed for trial in the spring of 2009 and that it was only shortly before that trial that the parties made a joint application for transfer to the TCC – which was duly granted.

Lord Justice Jackson took a dim view of the fact that the claim had been issued in the County Court and also of the fact that, following issue, it had lingered in the general list:

“This action proceeded, most inappropriately, in the Manchester County Court...I should at this point mention that cases of this nature should be commenced in the Technology and Construction Court. If they are not so commenced, then the action should be transferred as soon as possible after issue to the Technology and Construction Court, so that the action can have the benefit of case management by a judge with specialist expertise in this field. I deplore the fact that this litigation ran on for 2 ½ years before it was transferred to the Technology and Construction Court and placed before a judge with appropriate expertise”. (paragraphs [19] and [21])

These comments are a useful reminder that it is not solely the financial value of a claim but also the complexity and specialist nature of an action which determines whether it is a matter which should be dealt with in the TCC.

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