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Engineers' negligence – reliance on specialists, causation & damages, and use of expert evidence

Co-operative Group Limited v John Allen Associates Limited [2010] EWHC 2300 (TCC)
Mr Justice Ramsey's judgment, dismissing this claim for engineers' negligence, contains important reviews of the law on reliance by construction professionals on specialist advice and design, and causation and measure of damages in engineers' negligence claims. It is notable also for findings on expert qualifications, and use of expert evidence of other parties. **Jeremy Nicholson QC** and **Kate Livesey** acted for the successful civil and structural engineers, John Allen.

The claim concerned settlement of the floor slab at a Co-operative Group ("Co-op") supermarket in Kent, constructed in difficult ground conditions using vibro replacement stone columns ("vibro"). Co-op claimed that vibro could never have worked at the site and was negligently proposed by John Allen. They argued that John Allen could not discharge the duty of care owed by relying on advice from a specialist contractor about feasibility of vibro, which amounted to delegation of duty. They also contended that John Allen had failed to carry out adequate checks of design calculations by the specialist sub-contractor engaged to carry out the vibro works, and should have advised the client to get advice from a geotechnical engineer.

Mr Justice Ramsey rejected the allegation that vibro could never have worked. He held that John Allen had exercised reasonable care, and excess settlement of the floor slab had been caused by factors for which they were not responsible.

After reviewing the authorities on reliance by construction professionals on specialist advice and design, the Judge summarised the principles, holding that construction professionals can discharge their duty to exercise reasonable care by relying on specialists provided they act reasonably in doing so, as John Allen had in this case. He also held that John Allen were entitled to rely on the sub-contractor's detailed design and calculations, and their duty to check was limited to checking input data and other matters within the competence of a civil and structural engineer.

The Judge went on to review the law on the correct approach to causation and measure of damages in engineers' negligence claims.

Co-op had supported their case with expert evidence from a geotechnical engineer on all engineering issues. John Allen relied on expert evidence from a civil and structural engineer, and two other engineers. The Judge held that, whilst Co-op's expert geotechnical engineer was qualified to give evidence on the practice of civil and structural engineers, John Allen's expert civil and structural engineer had the advantage of viewing matters from the perspective of practising in that capacity, and his evidence was preferred.

The Judge also considered a procedural question on which there has been little authority to date: namely, whether parties can rely at trial on expert evidence in reports and joint statements on behalf of former parties to a multi-party action. In this case, Part 20 proceedings against two additional parties were compromised on Day 2 of trial. The Judge held that CPR r35.11 permits the parties to the main action to rely on written evidence of Part 20 parties' experts even though not called at trial, but with much less weight than if they had been.

Supreme Court ruling on new exception to without prejudice principle

Oceanbulk Shipping & Trading SA v TMT Asia Ltd [2010] UKSC 44
Although not a construction case, this Supreme Court decision is of wide general importance, since it establishes a new exception to the ambit of the without prejudice principle. The Supreme Court held that statements made in without prejudice negotiations may be admissible as "matrix of fact" evidence to inform the meaning of a settlement agreement reached as a result of those without prejudice negotiations. **James Leabeater** acted for the successful appellant, TMT.

It is well established that, whilst evidence of pre-contractual negotiations are not in general admissible for the purposes of drawing inferences about what the contract meant, evidence of the negotiations may be admissible to prove a fact which may be relevant as background to the contract that was known to the parties, or to support a claim for rectification or estoppel: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 A.C. 1101. The question for this appeal was whether that principle was overridden for settlement agreements by the without prejudice rule.

The underlying dispute arose out of swap contracts based on the freight market, called forward freight agreements ("FFAs"). In 2008 the freight market was highly volatile: in May 2008, the daily cost of hiring a capesize bulk carrier was just over $200,000; by December, it had fallen to about $3,000. Accordingly, the FFA market was extremely volatile as well.

Oceanbulk and TMT had entered into a large number of FFAs. TMT was short against the market and Oceanbulk was long. For the month of June 2008, TMT was obliged to pay Oceanbulk over $40m under the FFAs, and sought time for payment. The parties held without prejudice negotiations, and reached a settlement agreement giving TMT more time to pay. Part of the settlement agreement required the parties to co-operate to close out various FFAs against the market by 15 August 2008.

However, the FFAs were not in fact closed out. Meanwhile, the market turned significantly in TMT's favour, so that by the end of 2008, on the FFAs that remained open, Oceanbulk owed TMT over $72m. The parties fell into dispute about various matters. In particular, Oceanbulk denied liability to TMT because it said that TMT had breached its obligation to co-operate to close out the FFAs against the market by 15 August 2008. This in turn led to a dispute about the meaning of that phrase. Oceanbulk said that it meant simply that Oceanbulk and TMT had to agree closing out figures between themselves. TMT said that the phrase arose out of the fact that the FFAs between Oceanbulk and TMT were in fact "*sleeves*" – FFAs Oceanbulk had entered at TMT's request back to back with others – and that the obligation to co-operate to close them out included an obligation to close out Oceanbulk's opposite market positions, as well as the FFAs between Oceanbulk and TMT. Put simply, Oceanbulk said that the obligation was bilateral; TMT said it was trilateral.

In support of its contention that the FFAs were sleeved to the knowledge of both parties, TMT pleaded reliance on statements made by Mr Pappas of Oceanbulk to Mr Su of TMT in the course of the without prejudice negotiations. Oceanbulk sought to strike out those parts of TMT's pleading, on the basis that they were inadmissible, because the statements had been privileged from disclosure by reason of the without prejudice rule.

At first instance, Andrew Smith J declined to strike them out: [2009] EWHC 1946 (Comm); [2009] 1 W.L.R. 2416. He noted that that it was well established that without prejudice statements could be adduced in evidence to prove the existence of a settlement agreement. It would make little sense for the law to admit evidence about whether there was a settlement agreement without also admitting evidence about what the terms of a settlement agreement were. If that was right, there was no cogent reason why statements should not also be admissible on the meaning of those terms.

A majority of the Court of Appeal, Longmore and Stanley Burnton LJJ, disagreed and allowed the appeal against the first instance decision: [2010] EWCA Civ 79; [2010] 1 W.L.R. 1803. They held that the policy of protecting without prejudice negotiations should trump the general policy of enabling the court to have the maximum assistance in ascertaining the parties' intentions.

Ward LJ, on the other hand, dissented, in very strong terms. If one can use the antecedent negotiations to prove the agreement, to rescind it, or to rectify it, he asked rhetorically, why could one not use the negotiations to establish the truth of what the concluded contract means? He described the argument to the contrary as "*barmy*" and "*illogical*" and added, no doubt with a degree of hyperbole, that the majority's decision "*goes to prove what every good old-fashioned county court judge knows: the higher you go, the less the essential oxygen of common sense is available to you.*"

The issue went to the Supreme Court which, sitting as a panel of seven, decided unanimously in TMT's favour (agreeing with Ward LJ). Lord Clarke, giving the lead judgment, noted that it was common ground between the parties that such statements should be admissible on a plea of rectification. In those circumstances, the law should also recognise a new exception, which he described as the "*interpretation exception*", so that the law relating to the construction of settlement agreements was consistent with the general law. Such an exception would further the policy of encouraging settlements, since the parties would know that their settlement agreements would be construed in the light of background facts known to the parties.

Any other approach would, he held, introduce an unprincipled distinction between this class of case and two others which had already been accepted as exceptions to the without prejudice rule, namely cases where the issue was whether without prejudice communications had resulted in a concluded compromise agreement and cases where a party was seeking rectification of a settlement agreement.

Court refused to order pre-action disclosure where dispute was to be referred to arbitration

Travelers Insurance Co Ltd v Countrywide Surveyors Ltd [2010] EWHC 2455 (TCC)
This case concerned the circumstances in which the court may make orders for disclosure in advance of arbitration proceedings. Mr Justice Coulson held that the court has no power to order pre-action disclosure under CPR r31.16 where the underlying dispute would be decided in arbitration, not in court. **Sean Brannigan QC** represented the Claimant, Travelers.

Countrywide provide residential surveying services. It took out a professional indemnity insurance policy which was underwritten by Travelers. Many claims were made against Countrywide arising out of allegedly fraudulent surveys carried out by a former employee of Countrywide, Mr Morley, for the same commercial client. Countrywide sought to refer these claims to Travelers.

Travelers were considering avoiding the policy on grounds of misrepresentation and/or non-disclosure. They brought an application in the TCC under CPR r31.16 for pre-disclosure of documents to establish the extent of Countrywide's knowledge about the possibility of fraud on the part of Mr Morley at the time it entered into the policy.

Countrywide opposed the application. The policy contained an agreement to arbitrate any disputes about whether there had been misrepresentation or non-disclosure when the policy was entered into (although all other disputes under the policy were to be resolved by the courts). Countrywide argued that, as a consequence, the Court had no jurisdiction to order pre-action disclosure.

There was a dispute about the construction of the arbitration agreement. Travelers argued that any dispute over whether there had been misrepresentation or non-disclosure in the first place was to be determined by the court; it would then fall to the arbitrator to determine whether any such misrepresentation or non-disclosure was fraudulent. Mr Justice Coulson rejected this interpretation of the clause. He held that the arbitration agreement must be construed in a sensible way so as to give effect to the commercial purpose of the clause (following *Fiona Trust Co v Yuri Privalov* [2007] UKHL 40) and that the parties' commercial purpose here was to ensure that all allegations involving misrepresentation, non-disclosure and possible fraud would be dealt with in a confidential forum.

Mr Justice Coulson held that, as a matter of statutory construction, s.33(2) of the Senior Courts Act 1981, and hence CPR r31.16, could only be invoked where the applicant was likely to be a party to subsequent proceedings in the court; therefore the court had no power to make an order for pre-action disclosure where there was a clause in the contract requiring that the underlying dispute be determined in arbitration. Mr Justice Coulson emphasised that arbitration pursuant to the Arbitration Act 1996 is an entirely separate dispute resolution process in respect of which the court's powers to intervene were extremely limited.

Travelers argued in the alternative that the court had power to make pre-action disclosure under s.44(3) of the Arbitration Act. This provision gives the court the same power to make various orders in relation to arbitral proceedings as it has in relation to legal proceedings if the case is one of urgency. This includes orders in relation to the preservation of evidence. Mr Justice Coulson rejected Travelers' argument, finding that s.44(3) was intended to be invoked in exceptional circumstances where the critical evidence is about to be lost forever, or there was a risk that it would be destroyed or tampered with. The Judge found that this was not such a case.

The Judge therefore refused the application "with a certain amount of regret"; he urged Countrywide to make early provision of the documents sought to enable Travelers to make an informed decision as to whether to bring the proposed proceedings.

Scope of quantity surveyor's duty where works 'defective'

Dinesh Dhamija & anr v McBains Cooper Consulting Ltd & ors [2010] EWHC 2396 (TCC)
This is an important decision about the scope of a quantity surveyor's duties where it is alleged there are defective works. Mr Justice Coulson confirmed that a quantity surveyor is responsible for quantities, not quality. **Jonathan Lewis** acted for the Claimants.

The Claimants brought an action arising out of alleged defects in the design and construction of their home; the action was brought against the building contractor, the architect, and the quantity surveyor (McBains). As against McBains, the Claimants alleged (a) over-valuation; and also (b) breach of an implied duty only to value work properly executed by the contractor that was not obviously defective ("the defects claim").

McBains brought an application seeking to strike out the defects claim on the basis that, as a matter of law, they did not owe the duty alleged.

Coulson J held that a quantity surveyor's contract of retainer would include an implied term (in order to give the contract business efficacy) that the quantity surveyor act with the reasonable skill and care of quantity surveyors of ordinary competence and experience when valuing the works properly executed for the purposes of interim certificates.

However, the Judge held that the quantity surveyor would not owe an implied duty to exclude from his valuations the value of defective works, however manifest and obvious the defects. This was the exclusive responsibility of the architect appointed under the contract. Further, the quantity surveyor owed no implied duty to report the existence of defects to the architect, however manifest and obvious.

Coulson J held that the defects claim was "unsustainable", but dismissed the strike-out application, and ordered a preliminary issue hearing (with disclosure) to decide whether McBains' methodology in relation to the valuations fell below the standard expected from a quantity surveyor of ordinary competence and experience valuing properly executed works.

This is an important decision, not least because it is the first reported decision on the scope of a quantity surveyor's duties in connection with defective work since the first instance decision of *Sutcliffe v Chippendale & Edmondson* [1971] 18 BLR 149, decided 40 years ago. Further, Coulson J held that a passage in *Hudson's Building and Engineering Contracts, Volume 1* (11th ed, 1995) at para 2-230 was incorrect and unsupported by authority because it wrongly stated that *Sutcliffe* was authority for the proposition that a quantity surveyor may be liable for defects that were so glaring that they should have been identified in the course of valuation inspections.

Adjudication – allegations of apparent bias of the adjudicator

Fileturn v Royal Garden Hotel [2010] EWHC 1736 (TCC)
This judgment of Mr Justice Edwards-Stuart concerns allegations of apparent bias arising out of connections between adjudicators and referring parties. **James Bowling** represented the Defendant.

It is not uncommon for responding parties to complain about connections between adjudicators and referring parties, due to the relatively small "pool" of adjudicators and professional advisers, and the liberal approach that some nominating bodies take to appointing adjudicators requested by the referring party.

In certain exceptional circumstances, such connections can lead to the adjudicator's decision being held unenforceable on grounds of a breach of natural justice. However, as this judgment confirms, the TCC's general approach is that it is only in the clearest and most extreme cases, where a recent, powerful and close connection between the referring party and an adjudicator can be established, that the adjudicator's decision will be invalidated.

The referring party, Fileturn, was represented by a firm of construction claims consultants ("the Firm") in an adjudication against Royal Garden Hotel ("the Hotel"). Fileturn successfully requested the specific nomination of a Mr Sliwinski as adjudicator. However, unbeknown to the Hotel, Mr Sliwinski was a former partner in the firm and had known the partner in charge of running the adjudication for Fileturn ("the Partner").

After Mr Sliwinski's decision was published, the Hotel learned of the connection between Mr Sliwinksi and the Firm. The Hotel discovered that the Partner had asked for Mr Sliwinski to be appointed on 12 occasions in the past, although he had only been appointed on one previous occasion. He had been appointed in disputes involving the Firm on a further 10 occasions. The Hotel refused to pay the award, and in the ensuing enforcement proceedings argued that there had been a breach of natural justice.

Edwards-Stuart J enforced the decision. He found that the connection between the Firm and Mr Sliwinski was slight: he had left the Firm several years beforehand and retained no connection with them. He had not known the Partner representing Fileturn in the adjudication particularly well, and they had not had any more than passing contact after his departure. The Judge also found that there was no evidence that Mr Sliwinski was aware that the Firm had requested his appointment on previous occasions: the fair-minded observer would not therefore have concluded that this was likely to affect Mr Sliwinski's judgment. Further, the Judge held that the relatively small number of cases that Mr Sliwinski had dealt with involving the Firm meant that the fair-minded observer would not conclude that Mr Sliwinski was in any way dependent on them for his work.

Edwards-Stuart J held that there is no inherent objection to the fact that legal representatives of one party may be well known to a judge; the same therefore applies to adjudicators, who are professional persons. The Judge found that there was no objective danger of a real risk of bias, and consequently no requirement for the adjudicator to disclose his connection with the Firm. The failure to disclose the connection and give the Hotel the opportunity to elect was not a free-standing alternative ground on which an allegation of bias could be made, even if in fact the Hotel would have objected had disclosure been made.

This case therefore follows the decision in *Makers UK Ltd v London Borough of Camden* [2008] EWHC 1836 (TCC) in taking a robust approach to enforcement and allegations of breach of natural justice. It confirms that only in extreme cases will undisclosed connections between adjudicators and referring parties or their legal advisers render a decision unenforceable.

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