



LEGAL BRIEFING

James Andrew Robinson v P.E. Jones (Contractors) Ltd [2011] EWCA Civ 9, Lord Justice Jackson

The case examines the extent to which building contractors owe duties of care in tort to their clients alongside their contractual duties.

The Facts

In December 1991 Mr Robinson and his wife entered into a contract with P.E. Jones (Contractors) Ltd (the "Contractors") for the purchase of a house then still under construction. The contract incorporated building conditions between the parties which provided (at Clause 8) that the parties would enter into a standard form NHBC agreement (1986 edition). This provided a ten year warranty for certain structural defects. Clause 10 further provided that the builder would not be liable for any defect, error or omission in the execution or completion of the work, save to the extent and for the period it was liable under the provisions of the NHBC agreement.

The works were completed in April 2002 and the Robinson family moved into the property. In September 2004 a British Gas service engineer attended to service the gas fires at the property and disconnected them for safety reasons as they had a "poor flue run". A surveyor later reported that the flues had not been constructed in accordance with good building practice and the relevant Building Regulations. Substantial remedial works were required at a cost of £35,000.

Proceedings were finally commenced in 2006 (in the County Court) following extensive correspondence. Mr Robinson claimed for the cost of the remedial works and also general damages for loss of use of the gas fires in both contract and/or tort.

Two and a half years later (following the transfer of the case to the Manchester TCC), the claim was struck out on the basis that any tortious duty had been excluded by contract and the claim under contract was statute barred.

Mr Robinson appealed.

The Issues

The key issues were as follows:

- (i) Can a builder owe his client a concurrent duty of care in tort in relation to pure economic loss and did the contractors owe a duty to prevent pure economic loss on the facts?
- (ii) Did the limitation provisions within the contract satisfy the reasonableness requirements in sections 2 (2) and 3 of UCTA?

The Decision

In relation to the issue of whether a builder can owe his client a concurrent duty of care in tort, the Court held that they could. In accordance with *Henderson v Merrett Syndicates Ltd*, there was no reason why the existence of a contract should prevent a tortious duty from arising. The law does not however automatically impose upon every contractor tortious duties of care that are co-extensive with the contractual terms and carry liability for economic loss. The tortious duty imposed on a contractor is in general much more limited namely to take care to protect the client (and other who would foreseeably own or use the property) from personal injury or damage to other property.

The Court went on to hold that there could only be liability for pure economic loss if there had been an assumption of responsibility along the lines of that in *Hedley Byrne* coupled with reliance by the owner. There was nothing on these facts to suggest there had been such an assumption of responsibility. There was no professional relationship and the builder had not provided any professional reports to the Robinson family. Lord Justice Jackson was of the opinion that, even if clauses 8 and 10 had not existed, he would have been disinclined to find that the contractors owed Mr Robinson a duty of care to prevent economic loss in these circumstances.

The Court further held that the provisions of clause 8 and 10 and the NHBC agreement passed the UCTA reasonableness tests. The NHBC agreement did not provide total protection for defects but it did provide very substantial benefits. This included substantial protection in the event that a builder became insolvent. It was therefore "quite impossible" to say that the terms of the NHBC agreement were unreasonable.

Comment

This case finally provides Court of Appeal guidance on the thorny issue of the extent to which contractors owe duties of care which are co-extensive with their contractual liabilities. Whilst there is no reason why in principle a builder can not owe tortious duties of care alongside their contractual liabilities it is clear that, absent an assumption of responsibility, these will be limited to a duty to protect the client (and those who foreseeably own or use the property) from personal injury or damage to other property.

Practitioners should also take note of Lord Justice Jackson's warning regarding the need to issue claims in the appropriate forum. As Lord Justice Jackson stated:

"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."

Even where claims are for modest amounts they should still be issued in the TCC if their subject matter falls within the meaning of a TCC Claim under the CPR.

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