Fenwick Elliott
The construction law specialists

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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Concurrent liabilities in contract and tort - UCTA

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

In December 1991 Mr Robinson and his wife entered into a contract with Jones for the purchase of a house then still under construction. Clause 8 provided that the "building conditions" annexed to the contract were incorporated into the contract between the parties. The conditions provided:

"8. The Vendor shall not be liable for any defect in or failure or inadequacy of any article item of equipment or fitting supplied to the Vendor by the manufacturer thereof (whether or not personally selected by the Purchaser) which is not within the terms of the Certificate of the National House-Building Council nor for any injury loss or damage arising from any such defect failure or inadequacy.

10. ...The Vendor shall not be liable to the Purchaser or any successor in title of the Purchaser under the Agreement or any document incorporated therein in respect of any defect error or omission in the execution or the completion of the work save to the extent and for the period that it is liable under the provisions of the N.H.B.C. Agreement on which alone his rights and remedies are founded."

During construction Mr Robinson informed Jones that he would like to have two gas fires fitted. The specification only provided for one. It was agreed that Jones would construct a second chimney flue to serve a second gas fire. Mr Robinson would then contact British Gas directly to supply and install the second gas fire itself. The construction works were duly completed. In September 2004 a British Gas service engineer attended to service the fires and disconnected the fires for safety reasons. It was later reported that the flues had not been constructed in accordance with good building practice and the relevant Building Regulations. Remedial works were required at a cost of £35,000. 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.

The key question was whether or not Jones owed a concurrent duty of care in tort to Mr Robinson in respect of the defects to the flues. If Jones did, could this liability be limited by clauses 8 and 10 of the contract? And if that happened, would the Unfair Contract Terms Act 1977 ("UCTA") prevent such limitations taking effect?

At first instance the Judge held that whilst, in principle, a builder can owe a duty of care in tort to his client that would cover pure economic loss, in this case they did not. The reason for this was that clause 10 of the contract satisfied the requirements of reasonableness under UCTA and excluded concurrent liability in tort. The result of this was that the contractual claim was time barred under the Limitation Act 1980. Mr Robinson appealed. The CA agreed. In the CA's view clauses 8 and 10 of the contract were not harsh provisions. Under the NHBC Agreement, a builder has extensive liability to a house owner for defects during the first two years after completion and these are underwritten by the NHBC. During the following 8 years the NHBC undertakes to meet the cost of putting right major damage as defined in the NHBC Agreement. Whilst this did not provide total protection, it gave very substantial benefits to households across the country. 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.

The CA also considered whether a builder can owe his client a concurrent duty of care in tort in relation to economic loss. It held that it could, but the relationship between the builder of a building and the immediate client is primarily governed by the contract between the two parties. The law does not, however, automatically impose upon every contractor or subcontractor tortious duties of care that are co-extensive with the contractual terms and carry liability for economic loss.

The law of tort imposes a different and more limited duty upon the builder. This duty is namely to take reasonable care to protect the client (and any others who foreseeably own or use it) against suffering personal injury or damage to other property. In the context of pure economic loss, which was what had been suffered by Mr Robinson, it was necessary to look at the relationship and dealings between the parties in order to ascertain whether there had been an assumption of responsibility coupled with reliance so as to give rise to tortious duties.

However, here, there was nothing to suggest that Jones had "assumed responsibility" to Mr Robinson. The contract was a normal building contract with warranties for quality and specific remedies were provided for should those warranties be breached. There was no professional relationship between the parties. Mr Robinson was not paying Jones to give advice or prepare reports which would then be relied or acted upon. Indeed even if the building contract had not included clauses 8 and 10, Lord Justice Jackson stated that he would still have been disinclined to find that Jones owed a duty of care to Mr Robinson in relation to the defects in question.

Finally the CA considered the UCTA. Again, the CA agreed that the exclusion clauses in question satisfied the requirements of reasonableness - for the very same reasons set out above in relation to the limitations placed on Jones' contractual liabilities.

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Public procurement: the 3-month rule

Mears Ltd v Leeds City Council

[2011] EWHC 40 (QB)

Mears brought a claim concerning the public procurement by Leeds City Council in respect of refurbishment works for social housing. During the procurement process, after the deadline for the submission of certain "Outline Solutions Submissions (Quality and Cost)" had closed and after all tenderers had been received, Leeds issued a clarification by letter dated 14 May 2010 to all the tenderers. The letter required that tenderers take into account certain new information. By letter on 18 May 2010 Mears resubmitted its revised pricing. On 2 July 2010 Leeds informed Mears that it had been unsuccessful. After further correspondence, on 12 October 2010 Mears issued proceedings. Leeds submitted that Mears were in breach of Regulation 47(7)(b) in failing to bring these proceedings within 3 months of 14 May 2010 or, at the latest, 18 May 2010 and that there are no good reasons for extending the period. It was accepted that what was needed was knowledge of the infringement and not knowledge of the loss but Mears said that date when was when its answers to the PQQ were alleged to have been unfairly evaluated.

Mr. Justice Ramsey took the view that it was necessary to analyse the relevant breach or infringement of the Regulations. He summarized previous case law as follows:

(1) The "date when grounds for the bringing of the proceedings first arose" will depend on the nature of the claim in the proceedings.
(2) The grounds for making certain claims may arise before there has been any decision to eliminate a tenderer from the procurement process or not to award a contract to a tenderer.
(3) Where the claim is based on infringement of the Regulations occurring during the procurement procedure and before any decision has been taken to eliminate a tenderer or award a contract to another tenderer, the date when the grounds arise will depend on when the claimant knew or ought to have known of that infringement.
(4) Where a claimant knows or ought to know of the infringement, the grounds for bringing the proceedings will then arise. They do not arise only when there has been a decision to eliminate a tenderer or award a contract to another tenderer.
(5) Where the claim is based on grounds which arise out of a decision to eliminate a tenderer or award a contract to another tenderer then those grounds will only arise when the tenderer knew or ought to have known of the infringement and this will generally depend on the tenderer being given the reasons for the decision.
(6) The requirement of knowledge is based on the principle that a tenderer should be in a position to make an informed view as to whether there has been an infringement for which it is appropriate to bring proceedings. There is not a separate requirement relating to the appropriateness of bringing proceedings.

Therefore here, it was clear that Mears had full knowledge of both the contents of the letter of 14 May 2010 and the time allowed to respond. By the time the period given in the letter of 14 May 2010 had expired, that is, at the latest, 18 May 2010, Mears had sufficient knowledge to take an informed view as to whether there had been an infringement of the Regulations for which it was appropriate to bring proceedings. Therefore the allegations relating to the May letter were brought out of item.

Arbitration agreements

Walter Llewellyn & Sons Ltd & Anr v University Hospitals Coventry and Warwickshire NHS Trust

[2010] EWHC 3415 (TCC)

Here, Mr Justice Akenhead had to consider whether a stay should be granted under section 9 of the Arbitration Act 1996. What this meant was that he had to examine the dispute resolution provisions within the subcontract to ascertain whether the parties had, or had not, chosen arbitration. Llewellyn was a main contractor employed to design and build 121 timber framed buildings in South London. They employed Excel to carry out certain works on the site between mid-2002 and December 2003. In December 2003, Llewellyn's business and assets were sold to Rok. The assets included the benefit of the subcontract with Excel. Damage was discovered in a number of the properties in August 2004. Llewellyn and Rok claimed that this was the contractual and/or tortious responsibility of Excel.

The subcontract included a Subcontract Order which was a pro forma document. This incorporated the second edition of the NEC Subcontract including Option A as well as numerous amendments contained primarily in an Additions Document. The Additions Document was said to override NEC2. Its purpose was to make the subcontract compliant with the Housing Grants Act. The Subcontract Data which forms part of NEC2 had not been filled in. Llewellyn argued that the NEC2 provided for arbitration only if the parties had expressly selected that form of dispute resolution.

The Judge held that, as a matter of construction, the parties had not selected arbitration. There was nothing in any of the subcontract documents which demonstrated an express or conscious agreement that arbitration should be used. In particular, the Additions Document was predicated upon a conditional hypothesis ("if the standard subcontract form makes a provision for settlement of disputes by arbitration"); the NEC2 provided for a tribunal but did not define it; and the Subcontract Data itself was predicated upon the condition that if the tribunal was an arbitral tribunal then it should be identified. A party must make express and clearly drafted choices for their dispute resolution processes. Where the NEC2 Subcontract or its more recent forms are used it is essential to fill in the Subcontract Data. Failure to do this can result in expensive and unnecessary arguments that can be easily avoided.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.
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