

Legal Briefing

Ted Lowery looks at an application for reverse summary judgment in connection with a fire safety strategy for a PFI project

Avantage (Cheshire) Ltd and others v GB Building Solutions Ltd (in administration) and others [2022] EWHC 171 (TCC)

Before the Honourable Mrs Justice Joanna Smith DBE

In the Technology and Construction Court

Judgment delivered 31 January 2022

The facts

Under a 2007 PFI agreement made with Cheshire East Borough Council, Avantage undertook to finance, construct, and thereafter manage and maintain five retirement homes. Avantage engaged GB Building Solutions as its design and build contractor.

Under an appointment document made in 2006, GB retained WSP as a consultant to produce a fire safety strategy for the homes. The appointment acknowledged the PFI arrangements. WSP completed the fire safety strategy in October 2007 and this was provided to GB with a disclaimer that it should not be relied upon by any third party. During 2008 and 2009, for an extra fee, WSP prepared for GB an operational fire safety management report and a fire risk assessment for one of the homes - Beechmere Retirement Village in Crewe.

The five homes were completed in 2009. During August 2019, Beechmere was destroyed by fire. Avantage was liable to the council for the estimated £30m reinstatement costs and, in 2019, commenced proceedings against GB (now in administration) and its sub-contractors, including a claim in negligence against WSP.

WSP applied to summarily dismiss the claim against them on the grounds that there was no real prospect of establishing that they owed a duty of care at common law to protect Avantage from economic loss and that there was no other compelling reason for the claim against them to go to trial.

Avantage contended that there was a real prospect of establishing a duty of care at trial and that, having been made

before Extended Disclosure, the application was premature. In addition, the claim should go to trial where it concerned a developing area of law, where it was likely that documents pertinent to WSP's duty of care would be disclosed in due course, and where contribution claims against WSP created a risk of inconsistent findings.

The issue

Was WSP entitled to reverse summary judgment?

The decision

The judge noted that the principles governing summary dismissal applications were not controversial. In particular, the court should consider that, if the claimant had a realistic rather than a fanciful prospect of success, they should avoid conducting a mini-trial, and should acknowledge the possibility that relevant facts might subsequently emerge through discovery or at the trial.

The judge observed that the written submissions reflected detailed arguments over: (i) the existence of a duty of care by reference to numerous authorities, (some 25 authorities were collectively cited by the parties); (ii) the potential for there to have been an assumption of responsibility in respect of WSP's services when providing the fire safety strategy; (iii) the incorporation of WSP's standard terms into the appointment; (iv) the effect of the third party disclaimer in the fire safety strategy; (v) the interactions between WSP and agents of Avantage whereby a duty may have been assumed; and, (vi) the status of the operational fire safety management report and a fire risk assessment; in particular, whether these documents, issued in 2008 and 2009, were purely operational and discrete from or connected with the fire safety strategy issued in 2007.

The judge concluded that the identification of numerous potentially complex issues, many of which appeared to involve disputes of fact that could not be resolved at the application hearing, raised an immediate question mark over the suitability of WSP's application for summary judgment, an application which, in his view, bore the hallmarks of an attempt to persuade the court to conduct a mini-trial of the issues, contrary to the established practice.

The judge found that Avantage's case concerning the existence of a duty of care was at least arguable in a number of respects, including that, in the context of a PFI arrangement, WSP understood that the operators of Beechmere would rely upon the fire safety strategy, that WSP's third party disclaimer was ineffective and that WSP's advice concerned operational issues. In addition, the judge thought that the

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as yet unaddressed requests for Extended Disclosure from WSP and the other defendants might produce documents relevant to the question of whether WSP had assumed a responsibility to Avantage.

Commentary

The judgment implies that WSP's chances may have been undermined by the prolixity of their skeleton argument, which at 49 "dense" (as per the judge) pages, might have appeared antithetical to an application for summary relief.

In PFI arrangements, the design and build contractor and its principal consultants will ordinarily provide a collateral warranty direct to the local authority and the project company. Had that happened here, Avantage would have had a more straightforward claim against WSP.

Ted Lowery
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