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January 2022

Legal developments in construction law

1. Court of Appeal says architect who left the door unlocked owes duty of care

An architect inspected an unoccupied cinema, with other professionals, for about an hour. During the visit he left the door unlocked and the alarm switched off. That evening the cinema caught fire and was extensively damaged. The cinema owner, who claimed that one or more intruders had gained access through the unlocked door and started the fire, sought damages of £6.5 million. The court that first heard the case decided that this was a case of pure omission, for which the architect did not owe a duty of care, and struck out the claim, but did the Court of Appeal agree?

The common law does not impose liability for *"pure omissions"* but there are two exceptions to this principle, where the parties' relationship gives rise to an imposition or assumption of responsibility, or where the defendant negligently causes, or permits to be created, a source of danger, and it is reasonably foreseeable that third parties may interfere with it and spark off the danger, thereby causing damage to the defendant's neighbours. But was the architect's failure to lock the door a *"pure omissions"* case?

The Court of Appeal said arguably it was not and was, in any event, a case that fitted within the case law, which potentially rendered the respondent liable for the consequences of their failure to take reasonable steps to ensure that the cinema was properly protected during the architect's visit. There are two strands in the case law, the first being the case law giving rise to the *"pure omissions"* principle. Foreseeability of harm is not of itself enough for the imposition of a duty of care; the law does not normally impose a positive duty on a person to protect others and it does not impose a duty to prevent a person from being harmed by the criminal acts of a third party, based simply upon foreseeability.

The second strand is the case law concerned with a failure to keep property secure, in which there is a significant difference of approach between the situation where the defendant is carrying out some activity, in the course of which they have failed to keep the claimant's property secure and the claimant has suffered loss as a result, and the situation where the defendant has done nothing whatsoever with its own property, which has then been misused in some way by third parties, causing loss to the owners of adjoining property. Liability has been readily found in the first type of case, but not in the second.

In the Court of Appeal's judgment, this case fell within the first situation. In the relevant particulars, it was indistinguishable from ***Stansbie v Troman***, where a decorator did not lock the door and, as was foreseeable, a third party got into the house and stole property. In the present case, the architect did not lock the door and, as was foreseeable, a third party got into the property and started a fire

Rushbond Plc v The JS Design Partnership LLP [2021] EWCA Civ 1889

2. Expert determination "final and binding" – does it mean what it says?

An agreement for the sale of the share capital of a business that owned and operated a car

franchise dealership contained an expert determination clause. The clause said that the price adjustment expert's decision as to any matter referred to them would be final and binding "… save in the case of manifest error or fraud,…". But did that stop a Scottish court from interfering with the expert's decision?

The court noted that case law clearly shows that a clause in such terms leaves little scope for a court challenge to the expert's ruling. This is because the parties agreed to accept the expert's decision on any matter referred to them, except where the decision was vitiated by fraud or was manifestly wrong. The law attaches a strong degree of respect to the parties' agreement as to the finality of their chosen dispute resolution procedure. As explained in ***Campbell v Edwards*** [1976] 1 WLR 403, even if the expert has made a mistake, the parties are still bound by the decision, unless there has been fraud or a manifest error.

If, however, it can be shown that the expert departed from their instructions in some material way, they have not done what the parties agreed that they were appointed to do and the decision is open to challenge. In this case, the court ruled that it had no jurisdiction to interfere with the expert's conclusions on either of the issues referred to the expert for determination.

The court also said that, in the context of the case before it, it considered that what constituted a *"manifest error"* required there to be *"…a glaring mistake that jumps off the page."* It agreed with the judgment in ***Veba Oil and Trading GmbH v Petrotrade Inc ("The Robin")*** [2002] CLC 405 that, for a manifest error, the defendants must be able to show "*oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion*". A mere difference of opinion cannot be described as a *"blunder"*.

https://www.bailii.org/scot/cases/ScotCS/2021/2021_CSIH_67.html

3. Failure to consider a liquidated damages defence – can the rest of the adjudicator's decision be enforced?

In July 2021 a court decided that an adjudicator's failure to consider an employer's defence, that it was entitled to set off its liquidated damages claim by way of a legal set off, was a material breach of the rules of natural justice. But could the liquidated damages claim of £343,000 be deducted from the award, with the balance to be paid in full?

In deciding that it could, the court said that the adjudicator's failure to consider a defence which should have been considered was a failure by the adjudicator to exercise the totality of their jurisdiction. That, however, was very different from a breach of natural justice taking the form of bias on the part of an adjudicator or a failure to hear one party or the like. The liquidated damages argument was only part of the employer's case in the adjudication and was eminently severable. The fact that a decision of an adjudicator is severable, as a matter of law, does not mean that the court should necessarily sever it but the two questions run into each other because the test of whether there is a safe nucleus of the decision, or whether the invalid element of the decision taints the reasoning in the balance of the decision, gives little scope for discretion. If there has been such tainting, or if there is no safe nucleus, it is hard to see how there can be scope for severance. Conversely, if there a safe nucleus and if there has been no such tainting, then the scope for discretion is quite limited, as it is hard to see a proper basis for declining to sever.

The court noted that there is a theoretical possibility that an adverse finding against a party on one point will influence an adjudicator, or indeed any decision-maker, to make an adverse finding against the same party on a different point but the court must look at the reality of the particular case. It was satisfied that the prospect of the other elements of the adjudicator's decision being different, if the adjudicator had taken account of the liquidated damages claim, was so negligible as to be discounted. The failure to take account of the liquidated damages argument did not taint the reasoning in the other parts of the decision.

CC Construction Ltd v Raffaele Mincione [2021] EWHC 3138
(No link for this judgment available)

Future issues

4. Government seeks residential developer commitments on cladding cash, remediation and historic fire safety data, by March

The Secretary of State for Levelling Up, Housing and Communities, Michael Gove, has written to the residential property developer industry, seeking clear commitments to resolve the cladding crisis. He is asking developers to:

- agree to make financial contributions this year (and in subsequent years) to a dedicated fund to cover the full outstanding cost of remediating unsafe cladding on 11-18m buildings (currently estimated at £4bn);
- fund and undertake all necessary remediation of buildings over 11m (including those over 18m) that they have played a role in developing; and
- provide comprehensive information on all buildings over 11m with historic fire safety defects which they have played a part in constructing in the last 30 years.

Mr Gove is to open discussions through a roundtable that brings together 20 of the largest housebuilders and developer trade bodies, followed by ongoing negotiations with all those in scope. The government will announce a decision on which companies are in scope for funding contributions following discussions with industry, but expects it to cover all firms with annual profits from housebuilding at or above £10 million.

He expects a public commitment to this framework by early March and says that, at that point, there must be a clear, fully-funded plan of action that can be made available to the public and to affected leaseholders. He is prepared to take all steps necessary to make this happen, including restricting access to government funding and future procurements, the use of planning powers, the pursuit of companies through the courts and, if the industry fails to take responsibility as he has set out – the imposition of a solution in law, if necessary.

See: https://www.gov.uk/government/news/government-forces-developers-to-fix-cladding-crisis

5. Government announces further measures on building safety

In addition to his request to residential developers for commitments to resolve the cladding crisis, the Secretary of State for Levelling Up, Housing and Communities, Michael Gove, has announced a four point plan to deal with building safety:

- opening up the next phase of the Building Safety Fund to drive forward taking dangerous cladding off high-rise buildings, prioritising the government's £5.1 billion funding on the highest risk;
- establishing a new team to pursue and expose companies at fault, making them remedy the buildings they built and face commercial consequences if they refuse;
- restoring common sense to building assessments: indemnifying building assessors from being sued and withdrawing the misinterpreted government Consolidated Advice Note, interim guidance wrongly interpreted by the industry as requiring remediation of all cladding irrespective of building height, and which prompted too many buildings being declared as unsafe; and
- providing new protections for leaseholders living in their own flats, with no bills for fixing unsafe cladding and new statutory protections for leaseholders within the Building Safety Bill;

The government is to introduce a series of rapid measures, including an additional £27 million for fire alarms to be installed in all high risk buildings and amendments to the Building Safety Bill to extend, retrospectively, the legal right of building owners and leaseholders to demand compensation, from the developer of their building, for safety defects up to 30 years old.

The government is also to support updated guidance, produced by the British Standard Institution, to help fire risk assessors take a proportionate approach to the assessment of walls and avoid wholescale cladding replacement, where safe to do so.

In the minority of buildings where valuers deem EWS1 forms are still necessary, the government will introduce an indemnity scheme for building assessors. It will also begin auditing building assessments to make sure expensive remediation is only being advised where necessary to remove a threat to life.

See: https://www.gov.uk/government/news/government-sets-out-new-plan-to-protect-leaseholders-and-make-industry-pay-for-the-cladding-crisis

6. New collaborative procurement guidance for design and construction to support building safety

To support building safety, the Department for Levelling Up, Housing and Communities has published new collaborative procurement guidance for design and construction. The guidance has been developed to support clients and industry in adopting and implementing procurement practices that will deliver safer buildings. It:

- examines evidence of the ways in which collaborative procurement can lead to safer, better-quality outcomes; and
- explains how clients and their project teams can use collaborative procurement in practice.

See: https://www.gov.uk/government/publications/collaborative-procurement-guidance-for-design-and-construction-to-support-building-safety

7. Government to block companies with track record of poor delivery from winning public contracts

The government has announced significant changes to the procurement regime, which will allow the government to exclude previously poorly performing suppliers, such as those who have not delivered previous projects on budget or on time. Suppliers can also be banned if they have undertaken unethical practices, such as a lax approach to safety, or where there are national security or environmental concerns.

New measures on transparency will be introduced, through procurement data being published in a standard, open format and competition will be introduced into emergency buying. Procurers will also be able to give more weight to bids that create jobs for communities, build back better from the Covid-19 pandemic and support the transition to net zero carbon emissions.

Primary legislation to give effect to the government's plans is to be brought forward when Parliamentary time allows and there will subsequently be secondary legislation (regulations) to implement specific aspects of the new regime.

The government plans to produce a detailed and comprehensive package of published resources (statutory and non-statutory guidance on the key elements of the regulatory framework, templates, model procedures and case studies). In addition, and subject to future funding decisions, it intends to roll out a programme of learning and development to meet the varying needs of stakeholders. Since the scale of the changes is significant, and organisations will need time to prepare for the new regime, the government intends to provide six months' notice of "go-live", once the legislation has been concluded, to support effective implementation. The new regime is unlikely to come into force until 2023, at the earliest.

See: https://www.gov.uk/government/news/government-toughens-rules-to-exclude-underperforming-suppliers

8. 15 June 2022 start for Building Regs CO2 reductions for new buildings

Changes to the Building Regulations, to come into force on 15 June 2022, will require CO2 emissions from new build homes to be around 30% lower than current standards, and emissions from other new buildings, including offices and shops, must be reduced by 27%. All new residential buildings, including homes, care homes, student accommodation and children's homes, must also be designed to reduce overheating, and ventilation improvements will also be introduced to support the safety of residents in newly-built homes and to prevent the spread of airborne viruses in new non-residential buildings.

Under transitional arrangements, if a building notice, initial notice, or full plans for building work are submitted to a local authority before 15 June 2022, then provided the building work commences by 15 June 2023, work on that individual building is permitted to continue under the previous standards.

The government response to the Future Buildings Standard consultation also sets out plans for the implementation of the Future Buildings Standard from 2025, including starting a full technical consultation on the FBS in 2025.

See: https://www.gov.uk/government/news/new-homes-to-produce-nearly-a-third-less-carbon

and

https://www.gov.uk/government/consultations/the-future-buildings-standard

9. Action PPN 10/21: New threshold values and inclusion of VAT in contract estimates

Procurement Policy Note 10/21 sets out the new threshold values applicable to the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011. It also sets out a change to the methodology for estimating contract values to be inclusive of VAT, for the purposes of applying the thresholds, but does not require a change to the publication of procurement notices.

The PPN applies to all contracting authorities, as defined by the Regulations, which includes all central government departments, their executive agencies, non-departmental public bodies and the wider public sector, which must apply the provisions of the PPN from 1 January 2022.

See: https://www.gov.uk/government/publications/procurement-policy-note-0921-thresholds-and-inclusion-of-vat

10. FIDIC Green Book 2nd edition: 2021

The 2021 update of the FIDIC Green Book, Short Form of Contract, was published in December. It is aimed at international construction projects where the perceived level of risk is low and/or where the parties need a contract form that is simple to use and does not require significant contract administration and management resources. New features include a prolongation cost mechanism, a tabulated summary of contractor's entitlement for employer's risks, insurance certification and communication forms provided as guidance for practitioners.

See: https://fidic.org/node/34702

11. New Homes Quality Code published

The New Homes Quality Board has published its New Homes Quality Code, the new code of practice for the house building industry. Included in the Code, and addressing the biggest gap in the existing arrangements, is a requirements for builders to have an effective after care service to deal with issues or 'snagging' problems customers might have, together with a robust complaints process. If a customer is not satisfied with the handling of any complaint, they can refer it to the independent New Homes Ombudsman Service.

The NHQB has also published a Developer Guidance Document, a Glossary and a report setting out how the final version of the Code was agreed following the consultation.

Developers start to register this January and will then be provided with support and training to transition to the new arrangements. When both parties are ready and the arrangements are activated, customer reservations of a new home will then have to comply with the Code and come under the remit of the New Homes Ombudsman Service, which will have power to require developers to undertake work or rectification measures and to award compensation. The intention is to introduce the new arrangements ultimately on a UK wide basis and all developers in Great Britain will be expected to register with the NHQB in 2022. The NHQB will ultimately have the power to de-register developers, for instance based on decisions of the Ombudsman.

See: https://www.nhqb.org.uk/new-homes-quality-code-published/

12. Public sector construction frameworks review – setting the 'Gold Standard'

An independent review, published in December, sets a new 'Gold Standard' for public sector construction frameworks and framework controls. It does not suggest a single kitemark or a box-ticking approach to compliance with the Construction Playbook, but provides 24 Gold Standard recommendations, with detailed supporting actions.

It is designed to help clients and suppliers to measure Gold Standard frameworks against Construction Playbook policies and to ensure that their framework strategy, procurement, contracting and management practices deliver a number of outcomes, including, for example, better, safer, faster and greener outcomes from projects and programmes of work, net zero carbon and social value targets through agreed joint actions and improved safety through whole life value and optimal use of digital information.

See: https://www.gov.uk/government/publications/an-independent-review-of-public-sector-construction-frameworks

13.Infrastructure for charging electric vehicles: Approved Document S

Amendments to the Building Regulations and a new Approved Document S, covering the installation of infrastructure for the charging of electric vehicles, have been issued. The Amendment Regulations come into force on 15 June 2022.

Approved Document S provides technical guidance regarding the installation and charge point requirements in Part S to the Building Regulations and applies to new residential and non-residential buildings, buildings undergoing a material change of use to dwellings, residential and non-residential buildings undergoing major renovation, and mixed-use buildings that are either new, or undergoing major renovation.

See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040975/Circular_letter_02-2021.pdf

and

https://www.gov.uk/government/publications/infrastructure-for-charging-electric-vehicles-approved-document-s

14.RICS to consider impact of government plan to deal with unsafe cladding

The RICS, which, prior to the announcement by the government, on 10 January 2022, of its plans to deal with unsafe cladding had resisted the earlier government call to phase out EWS1, has welcomed the announcement. While noting that the proposed solution will not cover all historic fire safety defects, it says it will consider its impact on valuation practice carefully with stakeholders.

See: https://www.rics.org/uk/news-insight/latest-news/news-opinion/rics-statement-on-building-safety-announcement---10th-january-2022/

15. BSI publishes PAS 9980:2022

The BSI has published the new code of practice for the fire risk appraisal of external wall construction and cladding of existing multi storey and multi occupied residential buildings:

PAS 9980:2022, Fire risk appraisal of external wall construction and cladding of existing blocks of flats – Code of practice

Primarily developed to support changes to the Regulatory Reform (Fire Safety) Order and as part of the Government's promotion of a risk-based approach to assessment of fire safety, the standard is sponsored by the Department for Levelling Up, Housing and Communities and the Home Office.

See: https://www.bsigroup.com/en-GB/about-bsi/media-centre/press-releases/2022/january/code-of-practice-for-the-fire-risk-appraisal-of-external-wall-construction-and-cladding-of-existing-blocks-of-flats-published/

If you have any questions or require specific advice on the matters covered in this Update, please contact your usual Mayer Brown contact.