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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.

Limitation

Renwick & Anr v Simon and Michael Brooks Architects & Others
[2011] EWHC 874 (TCC)

The Second Defendant, William Attwell and Associates, ("Attwell"), applied to strike out the claim against them on the grounds that its limitation defence was bound to succeed. Attwell, a firm of structural engineers, was engaged by the Renwicks in the period 2000 to 2002 as part of a project to extend and refurbish their home. The Renwicks said that they engaged Attwell to provide "*structural advice on design...such that the completed Garden Room would be suitable for both building regulation approval and construction purposes, which…required that the said structural advice and design should deliver a watertight structure.*" Work was finished by about November 2001. Fairly soon thereafter, quantities of water came into the Garden Room and had to be pumped out. There clearly was a serious problem which continued into 2002. Remedial works were carried out however, between June 2002 and May 2008 and isolated damp spots appeared in the ceiling of the Garden Room which were repaired. But by the summer of 2008 water started to accumulate under the flooring in the Garden Room.

The Renwicks issued a claim for over £900k in July 2010. The claim included an allegation that since 2008 they had caused investigations "to be carried out to show that the internal render and/or reinforced concrete has cracked and/or that the internal render has become de-bonded from the reinforced concrete structure". Attwell claimed that the claims in contract and in tort were statute barred. Any claim in contract ran from the date of the relevant breaches (if any) which must all have occurred no later than 2002, i.e. some eight years before the issue of proceedings. Any claim in tort, Attwell said must run from the date when damage first occurred which was between late 2001 and about March 2002 when serious flooding occurred. For the purposes of Section 14A of the Limitation Act 1980 (which essentially serves to extend the limitation period by three years from the date of knowledge of the claim) Attwell said that more than enough had occurred and was known about by the Renwicks in 2002 to set the three-year time period to start running. The Renwicks' argued however that this was not a case which is suitable for summary judgement because there may have been separate damage flowing from the possibly negligent involvement of Attwell in 2002 or indeed from earlier breaches of duty on its part. The Renwicks said they should not, at least on a summary judgement application, be judged as having had sufficient knowledge before 2007 to justify the three-year period referred to in Section 14A to start running.

Mr. Justice Akenhead noted that Section 14A has been considered in a number of cases, the upshot of which was that:

(a) The starting date for the three-year period under Section 14A is the "earliest date" on which any given Claimant had the knowledge required for bringing a claim in damages in relation to the damage ...Knowledge in this context does not mean certainty but knowledge of sufficient essential facts or matters to institute either a claim or the taking of advice or the collation of evidence will often suffice to institute the "earliest date".

(b) This "knowledge" is of the material facts about the damage for which damages are claimed and of other facts relevant to the claim (Section 14A (6)). These are such facts as would lead a reasonable person who had suffered the damage in question to consider it sufficiently serious to justify instituting proceedings for damages... such facts include that the damage in question is attributable at least in part to the basic acts or omissions said ultimately to constitute negligence and the identity of the defendant

One difficulty for the Renwicks was that, with one exception, all the complaints of breach of duty, related to alleged failures of Attwell which had occurred up to the supposed completion of the works. For example, the complaint that Attwell had failed to specify adequate reinforcement must have been at design stage or at latest during construction of the reinforced concrete work. Further, the pleaded facts did not suggest that Attwell actually advised on the remedial solution. The evidence also suggested that it had crossed Mrs Renwick's mind that Attwell were at least in part to blame in that they had some sort of supervision or inspection obligation.

So the Renwicks knew that there was a serious water and flooding problem, that the workmanship was culpably poor and that the waterproofing had failed. They had knowledge of the material facts about the damage, that damage being either the fact of serious water penetration or the financial loss of having a concrete structure which, not being waterproof, was substantially valueless, or both. The Judge therefore formed the clear view that for the purposes of Section 14A of the Limitation Act the Renwicks must have had the requisite knowledge required for bringing an action for damages in respect of the relevant damage; certainly they had the right in 2002 to bring an action for damages. The Renwicks had sufficient knowledge to justify embarking on the preliminaries to the issue of a claim, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence. There must have been more than mere suspicion. In other words, the Renwicks must have known enough for it to be reasonable to begin to investigate further. This meant that the vast majority of the claims brought against Attwell were indeed brought out of time.

The only area of the claim against Attwell which did not automatically justify summary judgement were the allegations about culpable advice to the Renwicks that the problems should or could be remedied by applying internal render as opposed to replacing the defective concrete. On that assumption then, the damage from that breach of duty (if ever established) would not arise in 2002 but when damage flowing from that breach occurred, namely when the remedial solution failed. That damage might occur when more than insignificant water penetration first occurred, or if Section 14A was engaged again, when the Renwicks had the required knowledge for bringing an action in relation to this further and later type of damage.

Adjudication: Tolent clauses & Yuanda

Profile Projects v. Elmwood (Glasgow) [2011] ScotCS CSOH 64

It is still not known for sure when the changes to the adjudication legislation are due to come into force, although 1 October 2011 is currently the date most people favour. One of the clauses of the 2009 Act seeks to outlaw so-called Tolent clauses which require a party to pay both parties' costs of the adjudication, win or lose. In England & Wales, the 2009 Act was followed by the case of Yuanda v Gear Construction (see Issue 119) where Mr Justice Edwards-Stuart held that Tolent clauses served to discourage adjudication and so accordingly were contrary to the requirement of the HGCRA that parties should be able to refer a dispute to adjudication at any time. However in Scotland there is no such symmetry between the forthcoming legislation and the courts. Profile Projects' contract included a clause which said that:

"the referring party shall bear the whole costs of the adjudication including, but not limited to, the Adjudicator's fees and costs in their entirety and both parties' legal expenses (on a solicitor client basis and upon the scale of charges applicable to Court of Session business) in and incidental to the adjudication..."

The view of Lord Menzies was that this clause was not incompatible with the HGCRA. He said that if Parliament had wanted to make provisions regarding the allocation of costs in adjudication, it could have done so. The clause here was not identical to the Yuanda version requiring the referring party to pay the costs, and so was not as one-sided as the Yuanda contract where the contractor had to pay regardless as to whether they were the referring party or respondent. In addition, here, there was a clause limiting costs to a figure based on the Court of Session scale. However, Lord Menzies went further and also commented upon the likely meaning of the new Act. He reviewed the Parliamentary debates and noted that the "mischief" that Parliament was seeking to address was to prevent the "party with greater clout" from using the costs of the adjudication process as a barrier. The judge was of the view that the effect of the new S108A would be to render a "Tolent" clause ineffective unless it was made in writing, was contained in the construction contract and conferred power on the adjudicator to allocate his fees and expenses as between the parties, or was made in writing after the giving of notice of intention to refer the dispute to adjudication. In other words the Judge thought that the new Act does not prevent the enforcement of "Tolent" clauses, as parties will still be entitled to agree such clauses in some circumstances.

This lead the Judge to comment that if the decision in Yuanda was correct and Tolent clauses had been nullified then the new Act will "*actually have a liberalising effect*" by allowing agreements as to allocations of costs which, on the reasoning of Yuanda were already banned. As the Judge noted this was precisely the opposite of what Parliament thought it was doing. So the law on adjudication cases diverges between England and Scotland and a surprising question mark has seemingly been raised about a clause many had previously thought was pretty straightforward.

Collateral Warranties

Scottish Widows Services Ltd v Building Design Partnership [2011] ScotCS CSIH 35

Scottish Widows Property Management Ltd granted a lease for a plot of land to a developer. The architect was BDP who were obliged to give collateral warranties to various third parties. The developer assigned the benefit of the lease to another Scottish Widows company who later granted a sub-lease to a further Scottish Widows company, who at the same time assigned their right in the sub-lease to Scottish Services, who occupied the building. Scottish Services was also assigned the benefit of a collateral warranty given by BDP. Defects were found and Scottish Services carried out remedial works, and looked to BDP to recover its losses. BDP said that as Scottish Services did not have a repairing obligation under the sub-lease, they could not be liable for the costs incurred. Only the building owner could recover such losses. BDP also said that the warranty itself restricted recoverability to the building owner, and to limited third parties who sustained injury from a defect. The Scottish CA taking a commercial view, disagreed:

"There is, in our view, nothing inherently impossible, or even difficult, in the notion of an architect, or other member of the professional team... granting indemnity to a named prospective occupier, or that occupier's assignees, for the costs of rectifying defects, impinging on the occupiers enjoyment, for which defects the granter is responsible by reason of breach of professional or other contractual duty...while the primary physical loss may be sustained by the owner or tenant of the building at the time when the defective work was performed, that physical loss has economic consequences, and any party who suffers those economic consequences, such as a subsequent owner or tenant, may sue for that loss provided that a contractual relationship exists between the party responsible for the defective condition of the building and the person who suffers the economic consequences."

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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