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

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Dispatch

Negligence: damage by intruders

Rushbond Plc v The JS Design Partnership LLP Services Ltd

[2021] EWCA Civ 1889

This negligence claim arose out of damage caused by an intruder who, it was said, gained access as a result of a breach of duty by JSD. JSD applied to strike out the claim, which meant that the CA considered the case on the assumption that the critical factual material presented by Rushbond was correct.

The property was an empty cinema building in Leeds. JSD were advising a firm about the suitability of the premises for leisure use. Representatives of JSD had previously made a number of visits accompanied by marketing agents. On this occasion, the representative went alone and was given the keys and alarm code. Rushbond said that JSD owed them a duty of care to take reasonable security precautions whilst at the property and that, during the visit, which lasted an hour, an intruder entered through an unlocked (and possibly open) door and was not detected in the dark. After the JSB team left, later that day, a fire was started by an intruder and the interior was destroyed.

LJ Coulson noted that JSD was a visitor to Rushden's property, present with Rushden's permission. It was therefore "fanciful" to suggest that, whilst the sole occupant of the property, trusted with the keys, JSD owed no duty of care to Rushden to take reasonable precautions as to security. The Judge gave the example of if, for example, during their visit, the JSD representative had carelessly tossed away a burning cigarette end which caused a fire that burned down the property, then they would arguably be liable in negligence for the consequences.

Here, during questioning by the Judge, JSD had agreed that, if it had been said to JSD when the keys were handed over: "don't forget to lock the door", and JSD failed to do so, there would arguably have been a relevant duty and a breach. The Judge could not accept that the failure expressly to remind someone to do something which, on Rushden's case, was so obvious, could make the critical difference on an application to strike out. Therefore, on an ordinary application of general principle, all the necessary ingredients of a negligence action were in place here: duty, foreseeability, breach, and causation.

It was suggested that this was a "pure omissions" case, namely one where the defendant did nothing, or nothing of any legal relevance to the claim. For example, cases where a defendant property owner did nothing, simply owning a property which intruders got into. Here, there would be no duty of care owed to the adjoining owners. These could be contrasted with cases where the defendant was involved in a particular activity, and it was the negligent carrying out of that activity that gave rise to the claim. Here, JSD was involved directly in the activity which allowed the intruder to enter the property. The representative unlocked the door and deactivated the alarm. Then, once inside, that representative chose not to lock that door with the snib lock, or to take any other precaution in the vicinity of the door. It was left unlocked/open, and unguarded.

On the pleaded case, it was therefore because of these acts and omissions that the door was unlocked. JSD had not just provided the opportunity for the intruder to get in, they positively made things worse. The question of negligence was left for the hearing, but it could not be said that JSD did not owe a relevant duty of care because such a duty would be based on "pure omissions". The failure to lock or otherwise guard the door after entering the property was a central part of the alleged activity that allowed the intruder into the property.

Settlement agreements

Fairgrove Homes Ltd v Monument Two Ltd

[2021] EWHC 3450 (TCC)

In September 2020, an adjudicator decided that Fairgrove was entitled to immediate payment of £50k plus interest following a dispute about the construction of clause 2.1(d) of an earlier settlement agreement.

Monument paid the adjudicator's fees but failed to pay the £50k. Fairgrove sought summary enforcement of the decision. Monument raised jurisdictional defences and sought a stay because Fairgrove was in a CVA. On the day before the application was due to be heard, the parties entered into a further settlement agreement, or Tomlin Order.

This Order was in standard form, providing for a stay of the proceedings save for the carrying into effect the terms of a confidential schedule appended to the Order. As part of the agreement, Monument paid the £50k into an escrow account.

The Order made various provisions for the release of the escrow monies. Fairgrove said that these provided for three possible outcomes: first, that the parties reach a further settlement; secondly, that the court determined, on a final basis, whether or not Fairgrove was entitled to the £50k; and, thirdly, if Monument failed to commence relevant proceedings to determine its liability pursuant to clause 2.1(d) within 120 days, then the funds were to be released to Fairgrove.

Two days before the end of the 120-day deadline, Monument issued a Part 8 Claim seeking a declaration that the funds held in the escrow account remain there pending the outcome of the final account which was currently being prepared.

Fairgrove said that Monument had not commenced proceedings *"to determine its liability to pay any sums pursuant to clause 2.1(d)."* The Part 8 Claim asked merely that the funds in escrow remain there pending the outcome of a final account process.

Monument said that it had commenced proceedings to determine its liability to pay the £50k.

Mr Justice Morris said that the starting point was that the Tomlin Order had compromised the disputed issues in the enforcement proceedings, including Monument's defence based on jurisdiction and the stay. The Order replaced those issues with the rights and obligations arising under the Schedule. The purpose of the Order was to settle the then existing dispute (around jurisdiction and stay) and "to hold the ring" to allow Monument to seek to establish by a final judgment that the adjudicator was wrong on the construction of clause 2.1(d).

Whilst usually Monument might be expected to "pay now and litigate later", because of the CVA and the risk of non-recovery back, the parties agreed to pay the sum into escrow, pending any prompt challenge by Monument. On the other hand, by entering into the Tomlin Order, the parties did not intend to defer to a later date the issues of jurisdiction and stay raised by Monument in its defence to the Enforcement Proceedings. Contrary to Monument's case advanced in the Part 8 Claim, it was not open to Monument to run those defences in those proceedings or at all.

The proceedings envisaged by the Order were proceedings to determine - once and for all - entitlement under clause 2.1(d). But the relief sought in the Part 8 Claim did not seek to and would not achieve this. Monument did not seek a final declaration as to liability under clause 2.1(d). Instead, the final relief sought of leaving the £50,000 in escrow "*pending the determination of the proceedings*" (or "*dependent on the progression of the proceedings*") left matters hanging in the balance.

Therefore, the Part 8 Claim were not "*proceedings ... to determine liability to pay the Claimant any sums pursuant to clause 2.1(d)*" within the meaning of the Schedule to the Order and the money held by the escrow agent was to be paid to Fairgrove without deduction.

Final certificates: adjudication & conclusivity

D McLaughlin & Sons Ltd v East Ayrshire Council

[2021] CSOH 122

DM&S was engaged by EAC to construct a new single storey extension at a primary school. A dispute arose regarding sums claimed and DM&S issued a claim in the sheriff court. DM&S later successfully referred certain matters to adjudication. DM&S then issued summary enforcement proceedings which EAC defended. EAC also lodged a counterclaim. The court enforced the award, EAC paid, but the counterclaim remained, as did the original sheriff court action.

The key dates were as follows: on 17 July 2019, a Final Certificate was issued which valued the works at £3.3million. EAC paid this sum. On 12 September 2019, DM&S issued proceeding arguing that the Final Certificate did not accurately reflect the proper value of the works, including variations. On 23 March 2020, DM&S started the adjudication and the decision was issued on 11 May 2020.

In the adjudication, DM&S argued that payment was due under an Interim Payment Notice. EAC, amongst other arguments, said that, even if payment was due under the Interim Payment Notice, the award should be nil because the Final Certificate was conclusive evidence of the sums due, and that sum had been paid.

The Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) 2011 included the following in respect of the Final Certificate:

1.9.3 If adjudication, arbitration or other proceedings are commenced by either Party within 60 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 1.9.1 save only in respect of the matters to which those proceedings relate.

1.9.4 In the case of a dispute or difference on which an Adjudicator gives his decision on a date after the date of issue of the Final Certificate, if either Party wishes to have that dispute or difference determined by arbitration or legal proceedings, that Party may commence arbitration or legal proceedings within 28 days of the date on which the Adjudicator gives his decision.

As a starting point, Lord Clark noted that the factual details of the work done, and its true value, remained in issue in the separate court action. Specifically, DM&S said that the Final Certificate did not reflect the variations and the measured works. This action was raised within 60 days of the Final Certificate being issued.

In essence, EAC's position was that, as the adjudication commenced outside the 60-day period stated in clause 1.9.3, the Final Certificate was, for the purposes of the counterclaim, conclusive evidence of the sum due. Here, the adjudication had proceeded and the adjudicator reached the view that the Final Certificate was not conclusive evidence, but on a proper construction of the contract terms, in any form of proceedings commenced after the specified period, the Final Certificate must be conclusive evidence.

Lord Clark considered an English decision, *Trustees of the Marc Gilbard Settlement Trust*, [2015] EWHC 70 (TCC), where Mr Justice Coulson as he then was) considered the exception to the Final Certificate being conclusive evidence as expressed here, in clause 1.9.3, as "*save only in respect of the matters to which those proceedings relate*". Those words were taken to limit the exception only to the proceedings raised within the specified period. The Judge rejected the alternative construction put to him (also relied upon by DM&S here) that, if the same matters are raised in proceedings after the specified period, the exception will also apply.

Lord Clark accepted that clause 1.9 was not expressed with absolute clarity but agreed with Mr Justice Coulson (and so EAC), holding that the clause, limited the period during which the exception to the Final Certificate being conclusive would apply.

However, as Lord Clark noted, there was a "twist in the tale." The Judge referred to the case of Jerram Falkus Construction Ltd v Fenice Investments Inc [2011] EWHC 1935 (TCC), where the adjudicator rejected a challenge to the final account and no proceedings were raised within 28 days. The adjudicator's decision was, therefore, conclusive. Here, EAC's counterclaim was lodged on 17 July 2020, but the adjudicator's decision was issued on 11 May 2020, more than 28 days earlier. On that basis alone, Lord Clark said the challenge must fail.

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.

Dispatch is a newsletter and does not provide legal advice.

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