

BRIEFINGS

25 January 2008

The Arch

Welcome to this inaugural edition of the new quarterly newsletter prepared by the **Construction and Engineering Team** at Harvey Ingram LLP.

In this edition we report on a Court of Appeal decision which affects architects' liability for defective design in situations where it could be expected that the client or other professionals should have noticed the defect before any damage was caused by it. We also report on proposed changes to the scope of statutory adjudication which, if implemented, will have a detrimental effect on its usefulness.

Four Floods and two judgments

Last year the Court of Appeal had cause to consider the liability of a firm of architects for damage to property in circumstances where an inspection of the property prior to the damage could have revealed the defective design, but did not. The case, **Pearson Education Limited v The Charter Partnership Limited**, arose out of damage done to a store of books owned by Pearson when the guttering of a warehouse on the Magna Park Industrial Estate in Lutterworth overflowed in a heavy rain storm in July 2002. A sub-contractor, Fullflow originally designed and installed the siphonic drainage system, but to a 75 millilitre capacity specified by the architects. It was common ground in the case that the capacity of 75 millilitres was negligently specified, and should have been 150 millilitres.

Eight years previously there had been a similar incident when the guttering had overflowed and books stored in the warehouse had been damaged. However, at that time the warehouse was leased to a different company, International Book Distributors. Their insurers appointed loss adjusters to investigate the cause of the damage and they discovered that the capacity of the rain water system was inadequate but, perhaps surprisingly, did not convey this information to IBD.

Whilst it was accepted by the architects that the design had been negligently produced, they argued that the first flood in 1994 brought their potential liability to an end in that it was not reasonably foreseeable that any further damage would flow from the defective design once it had led to a flood for it was reasonable to expect that this would lead to the identification of the defect. Indeed, in this case the defect had been identified, but its existence had not been made known to the then occupiers of the premises, nor had steps been taken to remedy it.

In putting forward this argument the architects relied on an earlier Court of Appeal decision, **Baxall v Sheard**, which arose out of very similar facts. In that case the architects had negligently designed the capacity of a siphonic drainage system, flooding had twice been caused, and damage occasioned to the contents of a warehouse. However, in the Baxall case the claimants had undertaken a survey of the premises before they took on the lease, and also investigated the design of the drainage after the first flooding, but on neither occasion had the inadequate capacity of the system being identified. In that case, the Court of Appeal took a slightly different view and held that the cause of the flooding was the absence of overflows, and that this absence ought to have been appreciated by the surveyors acting for the claimant, both when they first undertook the pre-purchase survey and when they carried out the survey in the aftermath of the first flood. The Court of Appeal held that in these circumstances the failures by the surveyors, who were appointed by the claimants, broke the chain of causation such that the architects were not liable for the consequences for the second flooding.

The Court of Appeal's view was that where an occupier could reasonably have been expected to carry out an inspection that would have revealed the defect, failure to carry out such an inspection

or to carry it out with reasonable skill and care, breaks the chain of causation, thus relieving the architect of liability. In the Pearson case the Court of Appeal had difficulty in supporting the earlier decision in Baxall. It was their view that if an architect, who has the primary responsibility for producing a safe design, produces a defective design, it is not reasonable that he should be absolved from any liability in respect of its consequences on the ground that another professional could reasonably have been expected to discover the shortcoming.

In the present case, the Court of Appeal concluded on the facts that Pearson neither knew or should have known of the first flood, so there was no reason for them to carry out an investigation of the capacity of the rainwater system, and consequently the architects could not escape liability. However, this is a decision which, to some extent, conflicts with the earlier Court of Appeal decision in Baxall, which was appreciated by the Court of Appeal as they clearly invited the House of Lords to offer guidance on the correct law, which it is hoped that they will do at some stage.

So, in what circumstances will an architect be able to rely on the failure of a third party to identify his error prior to damage occurring to relieve him of liability for such damage? In practice, it is likely that the Baxall defence will be restricted to glaringly obvious examples of cases where no reasonably competent adviser carrying out an inspection of a building could have failed to notice the defect. Thus, for example, if the error should have been picked up during a pre-purchase survey of a building, subsequent damage due to that error is unlikely to be the responsibility of the original designer. The surveyor, on the other hand, may have a case to answer.

Oral Contracts? Not Worth The Paper They Are Written On

The Housing Grants Construction and Regeneration Act 1996 ("the Act") introduced the concept of adjudication in an attempt to reduce the number of construction and engineering disputes that result in litigation or arbitration. In contrast to those procedures, adjudication is a relatively inexpensive and speedy process which also enables work to continue on a project whilst a dispute is being resolved.

Parties to a contract are not entitled to refer a dispute to adjudication unless there is in place a construction contract as defined by the Act. Section 107(1) of the Act states that its provisions will only apply where the construction contract is in writing. Section 107(2) of the Act provides further guidance as to what is meant by "an agreement in writing":-

- An agreement which is made in writing (whether or not signed by the parties).
- An agreement made by exchange of communications in writing;
- An agreement evidenced in writing (ie, one where the parties agree otherwise than in writing but refer to terms that are in writing).

In the case of **ART Consultancy Limited -v- Navera Trading Limited**, Navera employed ART to carry out certain design and construction works. ART commenced adjudication proceedings for unpaid sums and was successful, however Navera still refused to pay. ART therefore sought to enforce the adjudicator's award in Court.

Navera argued that the adjudicator had no jurisdiction to make an award on the basis that the contract for the design works was not in writing. The Judge rejected this argument and upheld the adjudicator's award because:

- The design works contract was separate to the contract for the construction works. As its terms were not in writing the Adjudicator correctly declined to decide disputes arising from it
- However, there is no need for an all-encompassing contract between the parties, but rather there may be a series of contracts only some of which fall within the ambit of the Act
- The adjudicator's decision was based solely on the construction works contract, the terms of which were in writing

However, this type of case may become a thing of the past as a result of a proposed change to the Act announced by the Government on 20th June 2007. The change would ensure that the Act

applies not only to contracts in writing but also to “oral” and “partly oral” contracts. Whilst at first sight, this may appear to be a welcome change which would eradicate arguments about whether a building contract falls within the definition under Section 107 of the Act, the proposal also causes potential problems.

By allowing adjudication on oral contracts, an adjudicator will need to see witness evidence upon the terms of a contract in order to assess each party’s interpretation as to what has been agreed. In contrast to litigation, adjudication does not require parties to sign statements of truth on evidence nor is there any sanction in the event that a party is deceitful. As a result, there is a very real risk that this could lead to unmeritorious claims being made.

Furthermore, the Government’s proposal may well increase costs as an adjudicator will probably need to hold a hearing in order that witnesses’ evidence can be tested by questioning. This will drag out the procedure which would become more similar to litigation or arbitration. Finally, it may be queried whether an adjudicator is the most suitably qualified person to determine the terms of a contract which is not set out in writing.

In summary, whilst the Government’s proposed change to the Act will undoubtedly have been announced with good intentions, it remains to be seen whether such an amendment (if adopted) will ultimately cause more problems than it solves.

New Arrival

We are pleased to announce that Mark Jones has recently joined the Construction & Engineering Team. Mark has over 20 years experience acting for architects and other professionals in the construction industry, having previously been a partner in a niche construction law practice in London.

We hope that you have found this newsletter interesting and informative, and if you have any comments on it, or any suggestions for articles for future editions, please do not hesitate to contact any of the following members of the team:

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