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Insights

I TORT I WAS COVERED? MANAGEMENT COMPANIES PROCURING MAINTENANCE WORKS – A COMMON PITFALL

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SUMMARY

Tenants and building owners frequently devolve management of their repair and maintenance responsibilities to management companies, who often enter into agreements with contractors for the repair and maintenance of the buildings they manage.

This can be an attractive prospect from an administrative point of view, keeping such contractual arrangements at arm's length from an occupier who lacks the resource, expertise or appetite to manage and monitor such relationships.

However, devolving responsibility for entering into maintenance contracts is not without risk if no provision is made for recourse should things go awry as illustrated by the recent first instance case of *John Innes Foundation and others v Vertiv Infrastructure Ltd*.

What happened?

In March 2015 there was a fire at the Genome Centre near Norwich caused by faulty batteries in the building's emergency lighting system which were well beyond their service life. The fire caused considerable damage, both to the property itself and to the plant and equipment of the tenants of the property.

Prior to the fire occurring, responsibility for carrying out regular inspections of the emergency lighting system had been outsourced to a speciality maintenance contractor. The maintenance contractor was under a *best endeavours obligation* to undertake biannual inspections of the fire system. It was common ground that in the two years before the fire no maintenance inspections had taken place.

The maintenance contractor was directly engaged by the management company that was set up on behalf of the owner and tenants of the property. The maintenance agreement did not provide for

third party rights or *collateral warranties* in favour of the owner or tenants. There was therefore no direct contractual link between the owner, tenants and the maintenance contractor and consequently no contractual right for these parties to bring a claim when damage was caused by the maintenance contractor failing to perform its maintenance obligations.

The claim

With the contractual recourse route barred, the owner and tenants brought a subrogated claim against the maintenance contractor that it owed them a *tortious duty of care* to prevent damage to their property by carrying out the maintenance regime with skill and care. They relied on the decision of HHJ Coulson QC (as he then was) in *John F Hunt Demolition Ltd v ASME Engineering Ltd* that where damage consists of physical damage to property, then the starting point is that, subject to questions of foreseeability, a duty of care will **usually** be owed. They argued that because they were the owners and occupiers of the property that the contractor maintained, this meant it was foreseeable that damage caused to the property by the contractor's failure to carry out its maintenance services would cause them loss.

Judgment

Unfortunately the court did not agree and struck out the claim, ruling that no tortious duty was owed.

The court's commentary on the following issues underlined the scale of the battle that the occupiers faced to argue that a clearly negligent contractor owed them a duty of care:

- **Physical damage or economic loss?** The claims in this case were for loss caused by physical damage to the building (first claimant) and to computers, machinery and equipment and losses in respect of business interruption and increased costs of working (second to fourth claimants). The court commented that this may be loss consequent on the damage to the relevant claimant's property or may be pure economic loss. Considering the authorities, the court decided that where a negligent **act** of a person causes physical damage, that type of act will normally be actionable, In other words, a duty of care will usually be owed (*John F Hunt*). However, the court also commented that physical damage causes loss of an economic type and in some cases the loss may be an indirect loss to property interests. On this basis, the court concluded that where a novel situation arises – a failure to act rather than a negligent act – the court should approach the development of the law incrementally by reference to analogous decided cases, applying the *threefold Caparo test*, while always bearing in mind the willingness of the courts to find that a duty of care exists in respect of **acts** causing physical damage.

- **Differing tortious treatment of omissions vs positive acts of negligence.** As mentioned above, the court emphasised the difference in the law's approach to cases involving omissions and cases involving positive acts of negligence, noting that the law of negligence does not as

readily impose liability for mere omissions. In cases where there is an omission to act, as here with the maintenance contractor's failure to undertake inspections, there is a higher bar to be met when establishing the existence of a duty of care in tort.

- **The danger of not directly appointing the maintenance contractor**. The court held that there was no factual basis that could be relied on to say that the maintenance contractor assumed responsibility to the tenants and owner to undertake the inspections or to remind them of the need for maintenance. The court looked to *Henderson v Merrett* in respect of whether it would be reasonable for there to be an assumption of responsibility by the maintenance contractor. It concluded that by setting up the management company the owner and tenants deliberately acted to distance themselves from the contractual arrangements with maintenance contractors. This was seen as inconsistent with an assumption of responsibility.
- **Even though damage foreseeable, inadequate "proximity" meant no duty was owed**. The court held that the risk of damage occurring if the inspections were not carried out was foreseeable. However, the parties lacked the required proximity, and it would not be fair and reasonable to impose a duty of care on the maintenance contractor in these circumstances. Therefore the *three limbs of the Caparo test* for establishing a tortious duty of care between two parties were not met and consequently there was no duty of care from the maintenance contractor to the owner and tenants.

Final thoughts

The key message from this judgment for occupiers in a similar set up who do not directly appoint their maintenance contractors is: don't assume you can rely on the tort of negligence if things go wrong. Instead, before you enter into such an arrangement think about what protections you can put in place to ensure you have adequate recourse against negligent third parties. Obvious steps to consider include:

- **Enter into the contract with the maintenance contractor**: Even if a management company is taking the lead on procuring maintenance contractors, a building owner or tenant with repair responsibilities should consider entering into the maintenance agreement with the contractor itself. This way a contractual claim can be brought if the maintenance contractor fails to carry out its contractual obligations.
- **Third party rights/collateral warranties**: If the management company is entering into the maintenance agreement directly with the maintenance contractor, then a right of recourse for an owner or tenant should be included. Collateral warranties in favour of an owner and multiple tenants might seem heavy handed in some circumstances, in which case a more general ability for interested third parties to enforce the provisions of the maintenance agreement could be used.

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Bethany Cradick

London

bethany.cradick@bclplaw.com
+44 (0) 20 3400 3102
