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TORT CLAIMS FOR ECONOMIC LOSS ON CONSTRUCTION PROJECTS – AVANTAGE V WSP

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Construction *claims* usually arise out of a *breach of contract*, because it is easier to establish liability than under a *tortious claim*. However, where there is no contract or the contractual *limitation period* has expired, or a contracting party is insolvent or is uninsured, parties may have no choice but to bring a claim in tort.

To succeed in an action for negligence at common law, it is well established that a claimant must prove that the defendant owes it a duty of care, that the defendant has breached that duty, and that such breach caused the claimant to suffer loss.

But how do the courts apply these rules where there is a claim in tort for *pure economic loss* in the context of complex construction projects involving carefully negotiated construction contracts?

The starting position is the much-quoted statement of Lord Goff in *Henderson v Merrett Syndicates*:

"Let me take the analogy of the common case of an ordinary building contract… there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility."

The idea is that a construction project involves such carefully negotiated, complex contractual arrangements, that, in the words of Lord Mustill in *White v Jones*, there is:

"no room for any obligations other than those which [the parties] have expressly chosen to create"

In addition, we know from Fraser J's decision in *Multiplex v Bathgate* that:

- If a party brings a tort claim, but there are alternative claims in contract against other parties in respect of the same issue, that can prevent a tortious duty of care arising.

- A court will not be persuaded to find that there was a duty of care simply because an alternative contractual defendant is penniless, in administration or without insurance.
- Exchanges and conduct which “cross the line” directly from a defendant to a claimant are an important factor in establishing an assumption of responsibility, but subjective intentions of either party are not. If communications are passed through other parties on a construction project, that makes a finding that there is a duty of care less likely.

All of this makes jumping over the contractual chain to bring a construction claim in tort rather difficult.

However, those parties that have no choice but to bring such a claim were recently handed a useful case, which appears to go against the general trend – *Avantage v GB Solutions Ltd*.

BACKGROUND

The claimant, Avantage, was engaged through a PFI agreement, and appointed GB Building

Solutions Ltd (formerly known as Gleeson Building Ltd) as the *design and build* contractor in relation to a supported living facility in Crewe. Gleeson in turn engaged WSP as a *consultant* in relation to fire engineering design. This involved producing a fire safety strategy (FSS), which expressly disclaimed liability to third parties. WSP subsequently produced an Operational Fire Safety Management report and a Fire Risk Assessment in relation to the facility in question.

In 2019, in the course of some hot works to the roof, a fire was ignited destroying much of the building.

Gleeson went into administration, so Avantage focused its £32m claim on the supply chain. It had no *collateral warranty* from WSP, so it brought a claim in tort. It claimed that WSP owed Avantage a duty of care to exercise reasonable care and skill in the performance of its obligations to advise on the FSS, which duty extended to protecting it from physical damage to property and from pure economic loss.

No doubt emboldened by cases such as *Henderson* and *Multiplex*, WSP applied to the court for disposal of the claim by way of summary judgment before the disclosure stage in the case.

JUDGMENT

The application came before Joanna Smith J, who cited extensively from the established case law, including *Multiplex*, but, interestingly, concluded that:

- The subjective state of mind of the defendant does matter, and if a defendant consents to, intends or knows that information or advice provided will be passed on to and relied on by a third party, that can be sufficient to establish a duty of care whether or not there is evidence of communications between the parties "crossing the line".
- The existence of a contractual structure or chain will not, on its own, provide the answer to the question of whether a duty of care in tort is owed in any given situation.
- While a disclaimer may be an important factor in determining whether a duty of care arises, its significance must be determined having regard to its true construction in the context of the relevant factual matrix.
- The court must consider not only the facts surrounding entry into the contractual structure, but it must also examine the extent to which any conclusions it may reach by reference to that contractual structure need to be moderated to have regard to conduct of the parties that takes place at some later time. The contractual matrix is the starting point, but it will not fix the tortious relationship between the parties for all time.

Applying these principles, the judge rejected WSP's application, and held that the existence of a duty of care was at least arguable (the low threshold required to dismiss an application for summary judgment).

The state of mind of the defendant, WSP, and in particular its alleged knowledge of the existence of the PFI arrangement and its knowledge that Avantage, together with the other claimants, would be made aware of its advice and recommendations, and would rely on them, was an important factor in the judge's finding.

In addition, she emphasised the fact that Avantage had taken part in various meetings and direct discussions involving WSP long after the project contracts had been entered into, all of which could be seen as "crossing the line", thereby arguably establishing the existence of a duty of care.

COMMENT

In one sense the judge's decision to reject WSP's summary judgment application is not surprising. The issues in the case were meaty, involving detailed factual and legal argument, and summary

resolution was therefore inappropriate, particularly since the case had not reached disclosure stage. It would therefore have been possible to reject the application just on that basis.

However, in addressing the relevant legal principles on whether a duty of care had arisen, Joanna Smith J made some interesting comments on when such a duty might arise in the context of construction projects. She stepped away from focusing solely on objective communications "crossing the line" and, for cases where there are subsequent events and conduct that could establish that a duty of care has arisen, expressly limited the effect of the existing contractual structure to the point in time when those contracts were executed.

It remains to be seen whether this case will proceed to full trial, and if it does, it will be interesting to see the court's approach to these issues when the factual matrix has been established. Overall, the basic position remains that it is usually easier to recover economic loss by bringing a claim for breach of contract.

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