



CONSTRUCTION CASE NOTES

By Kim Franklin



Her practice includes building, civil engineering and construction related work in the Technology and Construction Courts, arbitration and adjudication. It includes contractors claims and fees claims by construction professionals, professional negligence claims against architects, engineers and surveyors, disputes arising from construction projects. Her practice includes building, civil engineering and construction related work in the Technology and Construction Courts, arbitration and adjudication. It includes contractors claims and fees claims by construction professionals, professional negligence claims against architects, engineers and surveyors, disputes arising from the JCT, ICE and other standard forms of construction & contract, insurance claims and claims relating to defective and damaged buildings.

Kim Franklin regularly writes the 'Legal Matters' column in The Architect's Journal, which is published on a weekly basis. The column seeks to explain a variety of topical construction law issues to the Journal's non-lawyer readership of about 16 thousand.

Below are three of her recent notes that have been or are to be published. They cover three areas, being: construction managers and the recent case of Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd (Judgment 16.1.2006); Limitation as considered in Aer Lingus v Gildacraft Ltd & Sentinel Ltd (Judgment 17.1.2006); and the problems quantifying landlords losses in Green v Alexander Johnson (28.6.2005).

Armageddon

'Armageddon' - now there is a word for a columnist to conjure with, evoking as it does unsettling images of the end of the world. The reference to Armageddon in the Book of Revelation is, in fact to the more prosaic 'hill of

Megiddo' which, popular perception has it, will be the site of the last, climactic battle between the forces of good and evil to be fought at the time of Christ's return.

It is hard to imagine that such powerful imagery could possibly be evoked in the name of construction law. But the 'Armageddon scenario' was a central element in the recent case of Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd (Judgment 16.1.2006). What could have so concerned the parties that the court agreed it could be likened to doomsday?

The claimant cladding contractors carried out work on the defendants' Grosvenor Waterside development. They were engaged under trade management contracts with Mace acting as the construction manager. Mid-contact the developers and Mace parted company by mutual agreement. Rather than appoint a replacement, the defendants decided to take on the mantle of construction manager themselves. Scheldebouw called foul saying this amounted to a fundamental breach entitling them to determine the contract and claim consequential losses.

The Judge distilled the duties of a construction manager into two main functions. The first was to act as the developers' agent and implement their instructions. The second was quite different as it required the construction manager to act as 'decision maker' on matters where the contractor and employer have opposing interests. When making decisions the construction manager is required to be independent, impartial, fair and honest. Decision makers use their professional skills to reach the right decision, not one which favours the interests of the employer.

The Judge gave several reasons why the developers were not entitled to appoint themselves as construction manager.

- It was unusual for the employer to act as certifier. It could only be done if the contract expressly provided for it.
- The contractual structure required the employer and construction manager to act as separate entities. Endless anomalies arose if they became one and the same.
- Whilst it was not impossible for the employer to make decisions contrary to its own interests, it is easier for a professional person to put their employer's interests to one side.

- Whilst it is in both parties' interests for the construction manager to make the right decision, property developers are in business to make profit and do not always welcome large financial awards to contractors, however well merited.

- In previous cases where the certifier was a direct employee of the employer, the contractor knew of the situation before hand and went in with open eyes.

Ultimately, if the developers could appoint themselves as contract manager they could also dismiss the entire professional team and act not only as construction manager but also architect and cost consultant. This, the Judge acknowledged could amount to Armageddon for Scheldebouw, utterly transforming the contract they entered into.

Limitation Labyrinth

Justice requires that claims are dealt with promptly. Jurisprudentially, justice delayed is justice denied. Practically it is very difficult to try cases long after the relevant events when documents are lost or destroyed, witnesses have forgotten or emigrated or both. For this reason, the Limitation Act 1980 imposes a statutory time bar on claims.

But there is no single limitation period applicable to all claims. Instead the Act has spawned, hydra-like, numerous different limitation periods, depending the nature of the claim. Claims for personal injury must be started within 3 years of the accident. Claims for breach of contract have a 6 year limitation period, unless the contract was executed as a deed, when the limitation period is 12 years. Claims in negligence are time barred after 6 years.

Another complexity is when time starts to run. The clock starts ticking for claims in contract from the date of breach. In actions for negligence, however, it is the date of damage. Professional appointments potentially involve both a contract and a duty of care. The breach of contract, for example the design of a defective foundation, may be committed long before any consequential structural damage is caused. The designer can breathe easy 6 years after practical completion so far as any claims in contract are concerned but may remain on the hook in negligence. A statutory 15 year longstop was therefore imposed, but nevertheless the unsuspecting designer may still be hauled out of retirement to face the consequences of a design they had long forgotten they ever produced.

Another tendril of the limitation conundrum was considered recently in Aer Lingus v Gildacraft Ltd & Sentinel Ltd (Judgment 17.1.2006). William Smith was badly injured whilst working for Aer Lingus when his hand was trapped in a document lift installed by the defendants. Aer Lingus were judged to be liable in 2000 and his claim was compromised in 2003 when they consented to a judgment of £490,000. Aer Lingus then commenced proceedings against the defendants claiming a statutory contribution towards these losses. The many headed Limitation Act stipulates that for contribution claims the limitation period is two years from the date of judgment. But the question then arose – which judgment? Aer Lingus’s proceedings were brought within 2 years of the money judgment but well out of time for the liability judgment.

The judgment of the Court of Appeal demonstrates quite what a complex beast the Limitation Act is, particularly when placed in the statutory labyrinth that is the Civil Liability (Contribution) Act 1978. Waiting for quantum to be decided causes further delay. But until quantum is decided Aer Lingus had no claim to pass on. The statute was silent on the point which had not been before the courts before. Despite these difficulties the court picked its way through the maze and concluded that the quantum judgment prevailed and Aer Lingus’s claim was in time.

Lord Hoffmann’s Climber 10.5.06

Here’s an exam question for you. A mountaineer, about to undertake a difficult climb, is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee. Does he have a claim against his doctor?

This particular example was posed by the law lord, Lord Hoffmann to test causation - the causal link between breach and damage. On one view the doctor was liable for the mountaineer’s injury because, had he been given correct advice, he would not have gone climbing and would not have suffered the damage. In Lord Hoffmann’s view however, the doctor’s bad advice and the injury were unconnected because, even if the doctor’s advice had in fact been correct, the climber would still have been injured.

These lofty legal principles were called upon to assist in the more prosaic case of Green v Alexander Johnson (28.6.2005) which involved the quantification of a landlord’s losses on an investment property in north London. The claimant trustees owned two adjacent Edwardian buildings with shops at street level and flats above. The property was attractive for investment purposes because most of the flats were let on assured shorthold

tenancies, leaving the landlord free to manage the block without becoming embroiled in the complexities of service charge recovery. Three flats, however, were let on long leases to a Mrs Tuttle, who applied under the Leasehold Reform Act 1993 to acquire new leases at a premium. The claimants settled these proceedings on advice that turned out to be wrong. Independently, counter-notices subsequently served by the claimants were invalid. The claimants were obliged to grant new long leases to Mrs Tuttle below market value. This reduced both the claimants' revenue and the investment value of the block as a whole.

When assessing the claimants' losses, the court calculated the difference in investment value between the block with, and without the long leases. It then deducted the higher market value, not the actual price, of the leases sold to Mrs Tuttle and came to a figure of £200,000 which satisfied neither party. The defendants appealed the calculation of investment value and the claimants cross appealed the allowance made for the value of the leases.

The Court of Appeal upheld the calculation. They confirmed that the conventional market approach to assessing capital losses was the diminution in value. Any departure from this approach was not necessarily objectionable but should be clearly argued and justified by the evidence. Lord Hoffmann's climber assisted with the allowance for the leases sold to Mrs Tuttle. The claimants would have received a reduced premium for the flats even if the advice they received had in fact been correct.

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