



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 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 five of her recent notes that have been or are to be published. They cover three areas, being: latent defects in the case of *Pearson v The Charter Partnership Limited*; economic duress in building cases and *Carillion Construction v Felix (UK) Ltd*; and costs in adjudication after *John Roberts Architects Limited v Parkcare Homes (No.2) Ltd* (9.2.06).

Latent Defects

'The concept of a latent defect is not a difficult one. It means a concealed flaw.' So said the Court of Appeal in Baxall v Sheard Walshaw Partnership. In that case the defendant architects under-designed the roof of a warehouse which caused unexpected flooding as a result of ordinary, expected rainfall. But, as the House of Lords pointed out in Murphy v Brentwood, 'it is the latency of the defect which constitutes the mischief'. If a person has the opportunity to inspect the product before using it, and becomes aware of the defect, they have no remedy. So, if a latent defect causes loss or damage, there may be a claim. But if the defect is discovered, it becomes patent and capable of remedy. In the Baxall case, the court went one stage further and held that where the building was inspected by a surveyor who ought to have unearthed the hidden flaw, the defect is deemed to have been revealed, whether or not the surveyor actually spotted it. In that case the architects avoided liability because although the claimants had not, in fact, discovered the defect, they had had an opportunity to do so.

Latent defects are of concern to designers who may be responsible for any damage they cause for up to 15 years from the construction of the building. Throughout that time, the building may be inspected by various interested parties. Does the designer owe a new duty to each occupier, even if the defect was discovered, or discoverable, by previous occupiers?

This far from straightforward problem was considered in detail by TCC Judge Thornton QC in the recent case Pearson v The Charter Partnership Limited. The case concerned a warehouse roof designed by architects CPL. During a storm in July 2002, 140 cubic metres of water damaged more than 2 million stored books. Reprinting costs exceeded £1.3m. The roof, which comprised 4 double pitched roofs, required a siphonic rainwater drainage system. CPL designed for a rainwater intensity of 75 mm per hour whereas the experts agreed the design capacity ought to have been for not less than 150 mm. Between 1990 and 2002 the warehouse was owned, insured, leased and sub-let by various concerns. In 1994 there was a severe flood and the roof was inspected by loss adjustors who reported on the inadequate drainage system. The occupiers, who subsequently assigned their lease to the claimants, however, never learnt of the defect.

The judge found that a purely visual inspection of the building would not reveal the under capacity of the siphonic drainage system and that the Claimants knew nothing of the previous flood, or its cause, when they acquired the building. He rejected the architects' contention that if one person discovers the defect it ceases to be latent to subsequent parties. He concluded that 'the latent quality of the defect survives for everyone unless and until the defect becomes obvious to all'. In this case the architects were found liable because although someone had previously discovered the defect, the claimants had not.

Economic Duress

In our daily lives we are all subject to certain pressures that require us to act in order to achieve necessary objectives. The alarm clock requires us to get up, the mortgage necessitates a trip to the office, the needs of our stomachs involve a supermarket or, if we are lucky, a restaurant. It is no different in the commercial world where the need to complete a project requires those involved to make demands and act accordingly. There is a difference however between the application of ordinary commercial pressure with a view to driving a hard bargain and obtaining the same result by commercial blackmail. But where do you draw the line between the rough and tumble of commercial bargaining and economic duress?

The boundaries of the doctrine of economic duress can perhaps best be illustrated by some examples. In Carillion Construction v Felix (UK) Ltd (2000) cladding contractors agreed to provide bespoke tailor-made for an office building in London by a specified date. They failed to do so and then intimated that they could only deliver if their disputed final account was agreed. The main contractors were unable to obtain the cladding units elsewhere and no legal proceedings, not even adjudication, could resolve the problem in time to protect the building from the weather. The contractors had no choice but to agree the final account in a figure much higher than their valuation. As soon as the cladding was delivered, the contractors applied to the court to rescind the agreement and the court agreed.

In Williams v Roffey Bros (1991) a carpentry sub-contractor underpriced work for a number of flats and then experienced difficulties completing. In order to speed things up, the main contractor promised an additional payment for each completed flat. The court held that the extra money was payable even though the contractor was doing no more than he had agreed to do in the first place.

The main distinction between these two cases is the element of threat. In the Carillion case, the sub-contractors threatened a clear breach of contract. In the Williams case, the sub-contractors made no such threat, they just told it like it was. When the courts are faced with a plea that an agreement was reached only as a result of economic duress, they have to consider not only the threat, but also its legitimacy. Threatening to do something that is within your lawful rights in order to drive a hard bargain will not normally amount to duress. The victim needs also to demonstrate that the threat left them with no practical alternative but to capitulate.

Otherwise almost every commercial contract could be undone on the basis that when faced with an offer to provide a service for the cheapest price within the shortest time the contracting party had no alternative but to

accept if they wanted to achieve the desired result. In answer to the plea ‘they made me do it’, the court will respond, ‘yes, but were they entitled to?’

Costs in Adjudication

Increasingly the lie is being put to the notion that adjudication provides rough and ready justice, quickly and cheaply. It may be rough and ready. Whether it is justice depends upon your standpoint. Just as the definition of an easy question can only be, one to which you know the answer, whether an adjudicator got it right will depend entirely on whether they found in your favour. Even viewed objectively, the plethora of cases in which the courts have unpicked adjudicators’ decisions for breach of natural justice, suggests that justice is not always seen to be done, or in some cases, done at all. Adjudications are not necessarily conducted quickly; in fact most adjudicators will allow the parties as long as they like to exchange layer after layer of submissions, building up like a compost heap of disparate ideas from which the adjudicator is expected to extract, good organic reasoning. And the cost? Well there is the rub. Not only is adjudication protracted and formless, but the requirement to produce a lot of detailed information in impossibly impractical time limits is like a blank cheque to lawyers and construction consultants alike. Startling sums of money are spent on adjudication and they are irrecoverable – win or lose.

The RIBA must have had this unhappy state of affairs in mind when they drafted the Standard Form of Appointment for Architects for it contains a nifty provision (Clause 9.2) which both incorporates and amends the Construction Industry Council’s Model Adjudication Procedure (MAP). The standard version of MAP requires the parties to bear their own costs of an adjudication. The RIBA version empowers the adjudicator to award costs as part of the decision.

This clever wheeze was put to the test in the recent decision of the Court of Appeal in *John Roberts Architects Limited v Parkcare Homes (No.2) Ltd* (9.2.06). Parkcare started an adjudication claiming in excess of £1m from the architects for alleged poor performance. The architects devoted considerable resources to defending the adjudication. Parkcare discontinued the adjudication before a decision was given and paid the adjudicator’s fees. The architects asked the adjudicator to award them their legal costs. Parkcare argued that costs could only be awarded ‘as part of the decision’ and as no decision had been given, there was no power to award costs. The adjudicator took advice and decided that Parkcare should pay the both the architects and his own legal costs. Parkcare refused.



The appeal court recognised that some construction adjudications are fierce adversarial and expensive. It would be 'commercially unsurprising' therefore if the parties gave the adjudicator power to direct payment of costs. It would 'very odd indeed' if that power could only be exercised if there were a substantive contested decision. Instead the court held that the RIBA amendment meant that the adjudicator may award costs 'as part of what he may decide'. Parkcare were required to pay the architects the costs incurred in the adjudication which were a very quick, cheap and modest £87,131.04.

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