Trouble in Magnolia Rise – the case of the defective flues, tort, contract and economic loss

***Robinson v PE Jones (Contractors) Limited* [2011] All ER (D) 111 (Jan)**

The interplay between breach of contract, tort and economic loss has long been one of the most complex and uncertain issues in construction disputes. Thankfully, the Court of Appeal has now considered the issue and delivered a judgment of admiral brevity (14 pages) and clarity which sorts it all out.

The case is one of a recent run of claims involving residential property which has considered important legal issues of general application to the construction industry and to commercial projects.

The difference between claims in tort and contract

There are important differences between claims in contract and tort, which, very briefly summarised, are as follows:

- Limitation. Contractual claims must be brought 6 years from the date of the breach of a simple contract (or 12 years in the case of a deed). Tortious claims must be brought within 6 years of the date of the loss (or within 3 years of the date of knowledge of the loss under the Limitation Act). Tortious limitation periods are generally longer than contractual limitation periods, so it is possible to be barred from bringing a contractual claim but still to have a tortious claim.

- Quantum. Damages for a contractual claim are awarded to put the wronged party in the position that they would have been in but for the breach. Tortious damages are reasonably foreseeable losses which flow from the tort.

- Sources of obligations. In the words of Lord Justice Jackson "Contractual obligations are negotiated by the parties and then enforced by law because the performance of contracts is vital to the functioning of society. Tortious duties are imposed by law (without any need for agreement by the parties) because society demands certain standards of conduct." Society does intervene occasionally into contractual obligations, for example in consumer protection legislation or the Construction Act, but the courts take the principle of freedom to contract very seriously and give it primacy where possible.

- Extent of obligations. Contractual obligations tend to be more extensive and rigorous than tortious ones.

- Economic Loss. Economic loss is recoverable in contractual claims, but not tortious claims.

The Fact of Robinson v Jones

In December 1991, Mr Robinson agreed with PE Jones (Contractors) Limited ('Jones') to buy a house which was still being built, and which eventually became known as 12 Magnolia Rise.

Before it was finished, Mr Robinson told Jones that he wanted a second gas fire. Jones agreed to build the flue. British Gas would then supply and install the fire. In April 1992, work was finished and the Robinsons moved into their new home.

In September 2004, a British Gas engineer came to service the fires. He found that one had a poor flue run. He disconnected the fires. A surveyor found that the flues did not meet building regulations. Understandably unhappy, Mr Robinson tried to get Jones to rectify the problem.

In 2006, Mr Robinson issued proceedings in the County Court to claim the cost of the remedial works and damages for the loss of use of the fires. Two and a half years later the claim was transferred to the TCC, whence it found its way to the Court of Appeal.

Mr Robinson signed the contract with Jones in 1991 and started his claim in 2006. His claim in contract was therefore time-barred under the Limitation Act 1980. However, he had discovered the defect within the last three years, so he was within the limitation period for a claim in tort, taking advantage of section 14A of the Limitation Act.

This is a classic example of a case where there is a longer limitation period for a tortious claim than a contractual one.

The courts had to consider whether or not Mr Robinson had a tortious claim at all, and if he had such a claim whether or not he could recover the economic loss he had suffered.

Concurrent liability in tort

The first question for the court was this: where the parties enter into a contract, is it possible for there to be a concurrent liability in tort?

One line of cases had established that liability in tort was limited to personal injury and damage to other property. So Mr Robinson would not be able to recover damages for the remedial works to the flues, as this was categorised as pure economic loss. It was a defect in the thing itself, rather than damage caused to another thing.

Another other line of cases says that there is a duty encompassing pure economic loss where there is a special relationship between the parties or an assumption of responsibility (under *Hedley Byrne v Heller* [1964] AC 465). This would almost certainly have applied where Mr Robinson had been suing a professional who had advised him, for example an architect or engineer.

The Court of Appeal looked at authorities stretching back as far as Roman jurists and agreed with the judge at first instance that there could, in principle, be a liability in tort as well as contract, but that there was none here. To quote Jackson LJ, tort “imposes a different and more limited duty upon the manufacturer or builder. That more limited duty is to take reasonable care to protect the client against suffering personal injury or damage to other property” (68). “When one moves beyond the realm of professional retainers, it by no means follows that every contracting party assumes responsibilities to the other parties co-extensive with the contractual obligations. Such an analysis would be nonsensical” (76). Mr Robinson here was not paying Jones to give advice or prepare reports or plans on which he would act.

The crux of the matter here is the principle of freedom of contract. Mr Robinson and Jones had entered into a contract, and the court would enforce that contract in the face of a breach. But tortious liability has to be imposed by the court, and the court will be reluctant to do so without a demonstrable need, such as the “special relationship” above. The Court of Appeal

commented that the contract served to allocate risk between Mr Robinson and Jones, and that the defect was out of the scope of the NHBC precisely because they had allocated this risk. Mr Robinson could not now call upon the law of tort to impose extra liabilities on Jones where he had already agreed the issue with them.

Limitation of liability

The second question for the court was whether Jones was able to limit any liability (had it existed) in the contract. Clauses 8 and 10 of the building conditions signed by Mr Robinson and Jones provided that Jones's liability would be limited as set out in the National House Building Council (NHBC) agreement. Jones had extensive liability for defects for two years after completion. After that, NHBC underwrote any risk for another eight years. That was the limitation of their liability.

Did this breach the Unfair Contract Terms Act 1977 ('UCTA')? This is one of the exceptions to the primacy of contract in English law, and it says that parties cannot restrict liability for death and personal injury (section 2(1)) and that any restriction on liability for other negligence must be reasonable (s 2(2)). Had the defects in the flue caused personal injury or damage, the exclusion would have been unreasonable. But they did not – and the court held that it was reasonable to exclude pure economic loss. Under section 3 of UCTA, parties to a contract cannot exclude liability for a breach of contract unless it is reasonable to do so. The court held that it was.

Conclusion

Stanley Burton LJ summarised the Court of Appeal's finding as follows:

> "In my judgment, it must now be regarded as settled law that the builder/vendor of a building does not by reason of his contract to construct or complete the building assume any liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss." (at 92)

Only in exceptional cases therefore will claimants be able to demonstrate a tortious liability for economic loss. They will need to establish a "special relationship". Had Jones been a design-and-build contractor, the court may have put it in the same category as an architect and Mr Robinson may have been more fortunate. But we will have to wait for another case to find out.

Michael Shaw, trainee solicitor
Jane Hughes, partner