LEGAL NOTEBOOK

Recent cases, headline issues and new legislation

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CASE STUDY: JOHN GRIMES PARTNERSHIP LIMITED V GUBBINS

SNAPSHOT

The English Court of Appeal's recent decision in *John Grimes Partnership Limited v Gubbins* [2013] EWCA Civ 37 has confirmed that, in certain circumstances, a third party involved in a property development transaction can be held liable for damages suffered by a property developer due to a fall in market values that occurred during a period of delay. However, this certainly does not mean that valuers will therefore be found liable for a similar fall in market values.

FACTS

Mr Gubbins engaged John Grimes Partnership Ltd (JGP), a consulting and engineering company, to design and complete a road and drainage system on land acquired by Mr Gubbins for residential development purposes. JGP was to complete this work by March 2007. In breach of the expressly agreed period, the work remained incomplete at the end of March 2007. In fact, over a year later, the work was still not complete.

In April 2008, Mr Gubbins engaged another consulting engineer who redesigned the road and drainage layout and submitted it to council for approval. Approval was obtained two days later.

JGP initially commenced proceedings to recover £2893, in addition to the £20,000 it had already received by way of fees, which Mr Gubbins refused to pay. Mr Gubbins counterclaimed for the sums previously paid on the basis that the work had been defective and, in addition, sought damages for JGP's failure to complete the work by the expressly agreed deadline.

Mr Gubbins claimed that JGP's delay had resulted in "a reduction in market value of the private residential units, a reduction in the offer from a housing association for the affordable units and an increase in building costs".

A recap on remoteness of damage

The 'classic test' of remoteness of damage in contract cases comes from the English decision of *Hadley v Baxendale* (1854) 9 Exch. 341, still referred to in Australia, in which it was held that damages will not be too remote if the loss:

- flows "naturally" and "according to the usual course of things" from the breach – this is known as the first limb of the rule in *Hadley v Baxendale* and is colloquially referred to as "direct loss"; or
- ought reasonably have been in the contemplation of the parties at the time the contract was made as likely to result from a breach of the contract – this is known as the second limb of the rule in *Hadley v Baxendale* and is colloquially referred to as "indirect loss"

This classic test on remoteness has been applied in numerous cases. However, there has (at times) been some uncertainty about whether and,

if so, in what way the long standing approach to remoteness had been modified by the more recent decision in *The Achilleas* (2009) 1 AC 61 (another English case).

In *The Achilleas*, Lord Hoffmann suggested that a party should not be liable for a particular type of loss if there are particular circumstances demonstrating that the party could not have contracted to assume responsibility for such types of loss. In essence, *The Achilleas* placed emphasis on "the presumed intention of the parties at the time of the contract".

At first instance

At first instance, His Honour Judge Cotter, Q.C., sitting at Exeter County Court, found that it was an express oral term of the contract that, in return for a fee of £15,000, JGP would complete the agreed work by March 2007. The judge found that the delay in the development, by some 15 months, was caused by JGP's breach of the contract and that that delay had resulted in a loss to Mr Gubbins because of the reduced value of the development over that time.

The judge also found that, but for JGP's breach, Mr Gubbins would have achieved completion of the development by June 2008. It was agreed by expert valuers for each side that the value of the site at that date was £3.8 million. There was also evidence that by July 2009, when the development was actually completed (having been delayed by JGP's breach), that figure had fallen by £398,000.

The remaining issue, and the subject of JGP's appeal, was therefore whether that loss of market value was irrecoverable by reason of it being too remote. On this issue, the trial judge found that at the time of entering into the contract, it would clearly have been within the contemplation of the parties that "delay brought with it the risk that the property market might move considerably, including to the significant disadvantage of Mr Gubbins". For that reason, the standard approach to remoteness of damage established in *Hadley v Baxendale* was the "one to be taken" – and JGP was therefore liable to Mr Gubbins in respect of that loss of market value.

MOST CLAIMS AGAINST VALUERS ARE BASED UPON ALLEGED NEGLIGENCE OR MISLEADING AND DECEPTIVE CONDUCT IN THE PREPARATION AND PROVISION OF VALUATION REPORTS

On appeal

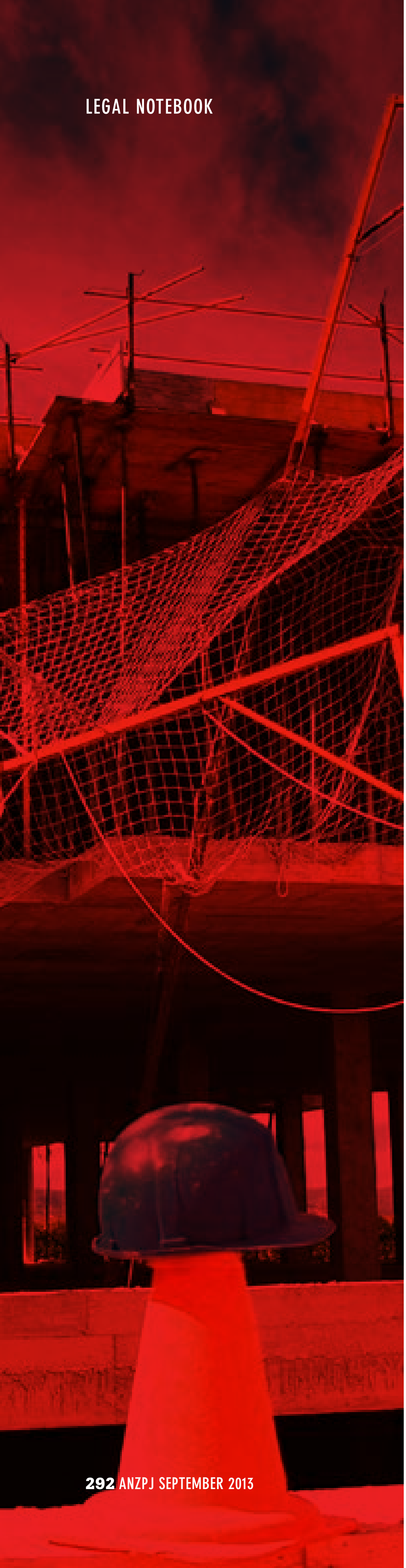
In dismissing the appeal, the Court of Appeal noted that the trial judge's approach to and summary of the legal principles could not be "faulted". The Court of Appeal found that this was "patently not an *Achilleas* type case" as there had been no evidence put before the trial judge to show that there was some "general understanding or expectation in the property world" that a party in JGP's position would not be taken to have assumed responsibility for losses arising from movement in the property market where there had been a delay in the performance of the contract.

The Court of Appeal held that, to the extent that there are no express terms dealing with the types of losses a party assumes responsibility for in the case of a breach of contract, the law implies a term accepting responsibility for the types of losses which can be reasonably foreseen at the time of the contract to be "not unlikely" to result if the contract is breached. In that way, a "contract-breaker" will only be able to escape liability if the nature of the contract and the commercial background "render that implied assumption of responsibility inappropriate for a type of loss".

The Court of Appeal found that the fact that JGP had no control over the property market and that a loss was suffered because of a change in market values during a period of wrongful delay, it did not of itself render the case "out of the ordinary" so as to sidestep the conventional approach to remoteness of damage in contract cases.

Sir David Keene, who wrote the leading judgment, noted that the trial judge had considered whether – and had concluded that – losses arising from movements in the property market were reasonably foreseeable at the time of contract as a consequence of delay by JGP. Indeed, JGP actually knew that the property market could go up or down and knew what Mr Gubbins intended to do by way of development and when.

Put simply, it did not matter that JGP had no control over the property market. The Court noted that there



are many decided cases where a delay in the delivery of goods has been held to give rise to damages for loss suffered through a change in the market price. It is true that sometimes a market is unusually volatile, so there can be a dramatic change in prices in the course of a few days, but that was not the case here. The evidence in the present case was that property values fell by about 14% in just over a year.

JGP also pointed to the fact that there were very few decided cases where a decline in the property market during a period of delay had been held to give rise to an actionable loss. Whilst the Court of Appeal agreed that this was the case, it also noted that there was also a lack of cases "from the property world" deciding the other way.

THERE ARE MANY DECIDED CASES WHERE A DELAY IN THE DELIVERY OF GOODS HAS BEEN HELD TO GIVE RISE TO DAMAGES

Impact

The case highlights the general rule that unless a party can demonstrate a general understanding or expectation that it would not assume responsibility for a particular type of loss, it will usually assume all loss that is reasonably foreseeable to flow from a breach of the contract. In practice, this means that a party – such as a valuer – may be found liable for loss resulting from a fall in the market value of a property by reason of that valuer's delay if such losses were reasonably foreseeable at the time of entering into the contract. We do not consider that this case would be decided any differently if it fell to be decided pursuant to Australian law.

Yet claims against valuers are not normally based upon a fall in market value due to a delay. Most claims against valuers are based upon alleged negligence or misleading and deceptive conduct in the preparation and provision of timely – although allegedly incorrect – valuation reports. However, we have seen examples where third parties have made allegations against valuers and claimed (or threatened the potential to claim) damages for a rise or fall in market rents due to the delay by a valuer in undertaking rental determination work.

It is also important to note that the trial judge found that JGP was responsible for loss flowing from the property market decline "in this specific contract". In our view, these words are important and demonstrate that, as always, each case will rise and fall on its own facts.

In that light and by way of example, the Court of Appeal noted that "sometimes a market is unusually volatile" – and specifically left open the question of whether a third party could be found liable for a loss due to such "unusually volatile" market movements. Given the impact of the global financial crisis on property values, it remains arguable that – in certain contexts – valuers should not be found liable for such losses. This is particularly so given the comments of the various Justices in the well-known decision of *Kenny & Good Pty Ltd v MGICA* (1992) Ltd (1999) 199 CLR 413. ■