Can a contractor be held liable to an employer for economic loss on the basis of a negligent breach of a duty of care where the contractor is not liable under the contract?

**Key Points**

- Liability for economic loss for negligence in the absence of contractual liability.
- Does a contractor assume responsibility to an Employer in relation to economic loss?
- What about design and build / management contracting models?
- Use of contract terms to exclude liability.

This is an area on which the law has for a long time been uncertain with conflicting decisions coming from the courts. The answer according to the most recent Court of Appeal case in England of *James Andrew Robinson v PE Jones (Contractors) Limited* [2011] EWCA Civ 9, 134 ConLR 26, is no – a contractor does not automatically owe a duty of care to his client in tort over and above its contractual duties.

The contractor had carried out work to the chimneys of Mr Robinson's house. Over 12 years later it was found the work was defective. Any claim under the contract was time barred. However, if it was possible to establish that there was a claim in tort based on breach of a duty of care then that would still be live.

The contractual provisions were of course still relevant firstly for consideration of whether a concurrent duty of care in tort would be inconsistent with these and secondly because arguments were put forward on the basis of the *Unfair Contract Terms Act 1977* (UCTA 1977).

The provisions included a clause stating:

“The vendor shall not be liable to the purchaser ... in respect of any defect, error or omission in the execution or completion of the work save to the extent and for the period that it is liable under the provisions of the NHBC Agreement on which alone his rights are founded.”

The NHBC Agreement provided for an initial guarantee period of 2 years followed by a further guarantee period of 8 years in relation to major damage. Performance of these obligations was underwritten by the NHBC.

**The resonableness test**

The UCTA provides that a person cannot exclude or restrict liability for loss or damage unless the contract term is fair and reasonable. It was argued by Mr Robinson that the contract did not satisfy the reasonableness test.
The Court of Appeal rejected the *UCTA* argument. It did not consider the contract terms to be harsh. The contract gave the contractor extensive liability to the house owner for defects. It was recognised the protection offered was not total but it was considered to amount to a substantial benefit, particularly taking account of the NHBC's underwriting role.

**Liability for economic loss**

In relation to liability for economic loss, the decision contains a review of the numerous previous cases. These included *Murphy v Brentwood DC* [1990] 2 All ER 908 (HL).

There, the local authority was found not to have a duty of care to owners or occupiers of property for economic loss except in relation to defects which caused personal injury or physical damage to property other than the defective property itself. In the same case the Court commented on potential liability of a contractor. It was considered that the contractor would also not, in the absence of a special relationship of proximity, owe a duty of care in tort to protect the building owner from suffering economic loss due to defects. Such losses could be recoverable if they flowed from breach of a relevant contractual duty.

They also included *Henderson v Merrett Syndicates Ltd, Hallam-Earnes v Merrett Syndicates Ltd, Hughes v Merret Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Goode Walker Ltd (in liq)* [1994] 3 All ER 506 (HL). In that case it was found that a party could have assumed responsibility to another party for provision of information or services so as to give rise to a duty of care not to cause economic loss. That requires there to be more than just a contract. The relationship would need to involve reliance by one party on the other's advice. This duty could sit in parallel with contractual liabilities and the pursuer could choose the most advantageous route to its remedy.

In the *Robinson* case, there was no issue of personal injury and no damage to other property. The claim was for pure economic loss due to defects in the property.

**The starting point**

The starting point for the Court was to find that, absent any assumption of responsibility, there were no duties of care between the parties which sat alongside their contractual obligations.

It was considered it would be inconsistent with the whole contractual scheme if the law imposed on the contractor duties of care in tort far exceeding its contractual responsibilities. The contract contained the term quoted above which said that the Contractor was not liable for any defect, error or omission in the execution or completion of the work except to the extent to which it had liability under the NHBC Agreement.

In other words, the contract expressly excluded any liability in negligence which might otherwise arise.

In the absence of an assumption of responsibility by the Contractor, it was decided the Contractor did not owe a duty of care in tort to the Employer, concurrent to its contractual duties, in relation to economic loss. A more limited duty to take reasonable care to protect the Employer, or future owners / occupiers of the property against suffering personal injury or damage to other property did exist.
Assumption of responsibility
The question then was when did a contractor assume responsibility so as to acquire such liabilities.

Previous case law on whether contractors owed duties in tort to protect employers against economic loss contained mixed advice.

In Storey v Charles Church Developments plc (1995) 73 ComLR 1 and Tesco Stores Ltd v Costain Construction Ltd [2003] EWHC 1487 (TCC), there was held to be such a duty.

In Payne v John Setchell Ltd [2002] BLR 489, it was held there was not.

In Ove Arup & Partners Ltd v Mirant Asia-Pacific Construction (Hong Kong) Ltd [2003] EWCA Civ 1729, (2003) 92 ConLR 1, although engineers were considered to have this duty, it was said that contractors might be in a different category.

It was said in the Robinson case that professional people assumed responsibility for economic loss to their clients based on a so called "special relationship". This has been held to include engineers, architects, lawyers and managing Agents at Lloyds. These categories of people expect their clients to act in reliance on their advice, often with financial or economic consequences.

In Riyad Bank v AHLI United Bank (UK) plc [2006] 2 All ER (Comm) 777, banks operating Sharia compliant funds were found to owe a duty in tort to take reasonable care to protect investors against economic loss on the basis of assumption of responsibility.

Extent of responsibility
How far does that go and to what other classes of people should it extend?

It was said to be necessary to look at the relationship and the dealings between the parties to ascertain whether a contractor or subcontractor assumed responsibility. This means that these cases will depend on their individual facts and circumstances.

In the Robinson case there was nothing to suggest any assumption of responsibility. The Court took as its starting point that the relationship between a contractor and an employer is primarily governed by the contract and each party's obligations and remedies will be primarily determined by the contract provisions. Parties can allocate risk as they see fit within that contract.

In this case, there was a building contract and a specification. The contract contained provisions about the quality of the work to be carried out and the Employer's remedies if this was not done. The contract did not equate to one of a professional relationship whereby the Contractor was being paid to give advice or prepare reports or plans on which the Employer would act. The contractor had no design responsibility. The contract provided extensive but not total protection against defects and allocated risk between the parties.

The Court considered on the basis of the above that the Contractor did not have a duty of care in tort as was being suggested. In addition, and as further support to this, there were contract clauses limiting liability for building defects to the first two years. It was further agreed that the Contractor's only liability to the Employer was to be that in the NHBC Agreement. This was regarded as an express exclusion of liability in negligence which might otherwise arise.
Lord Justice Stanley Burton said:

"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."

What the case did not deal with was the issue of design and build contracts. It was seen from the Mirant-Asia Pacific case above that the engineer will be held to have a duty in tort to protect clients against economic loss.

In Bellefield Computer Services v E Turner & Sons Ltd [2002] EWCA Civ 1823 as between a contractor and a firm of Architects which the Contractor had employed to do design work, it was found that the Architect owed duties in tort to the Contractor. As Architects & Engineers have been found liable on the basis of assumption of responsibility, it seems likely that design and build Contractors could be found to be in the same position. It may be arguable that the liability would only extend to the design elements of their work. However, it was noted in Bellefield that the borderline between design work and construction work was blurred. It is therefore conceivable that the duty would be found to have wider application.

Management contracts may also be treated differently given the reliance being placed on the management contractor to deliver the project. The Management Contractor's obligations would tend to include cooperation with the professional team during the design stages and in the planning, programming and cost estimating for the project, in addition to the management of the construction phase of the project. It may therefore be considered that there is sufficient in terms of assumption of responsibility by the Management Contractor and reliance by the Employer to extend the duty to Management Contractors.

Exclusion of liability

It is also evident from the case that it is possible to include contract terms to exclude such liability and that these will be given effect to by the courts as long as they do not fall foul of the reasonableness test in the UCTA. In this contract there were clauses limiting the contractor's liability for defects to the first two years. In addition, there was the clause quoted above which limited the contractor's liability exclusively to that in the NHBC Agreement. This, the court considered, was an express agreement to exclude any liability in negligence which might otherwise arise. This finding was consistent with that in Henderson v Merrett where it was said that

"...the nature and terms of the contractual relationship between the parties will be determinative of the scope of the responsibility assumed and can, in some cases, exclude any assumption of legal responsibility to the Plaintiff..."

If there is any doubt about whether or not there is an assumption of responsibility or the potential for duties in tort to apply, inclusion of a suitable contract term should be considered.

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