Hidden dangers

The question of the circumstances in which architects (and their insurers) can be held responsible to subsequent owners for latent defects in buildings is a difficult one, on which different judges have often reached different conclusions. However, there does now appear to be some definitive guidance on the issue, in the form of the Court of Appeal’s decisions in two cases: Baxall Securities Ltd v Sheard Walshaw Partnership\(^1\) and Pearson Education Ltd v Charter Partnership Ltd\(^2\).

Coincidentally, both cases involve the under-design of siphonic systems of rainfall guttering in warehouse premises. Both also related to the liability for damage to contents rather than repairs to the buildings themselves, and therefore did not involve the liability for the cost of repairing latent defects and pure economic loss considered in Murphy v Brentwood\(^3\).

In Baxall, the warehouse was constructed in 1992 and had siphonic drainage running from a central valley gutter. The siphonic system, which should have featured a capacity of 150mm, was only designed for 75mm. In addition, the valley gutter had no overflows to deal with any overcapacity of rainfall. Before the claimant tenants bought the warehouse in 1994, engineers had noticed evidence of earlier water leaks and had concluded that the flooding had been caused by debris in the valley gutter. After Baxall bought the property, there were two further incidents of flooding: the first, in May 1995, was attributed to a lack of rainwater outlets and guttering; the second, in September 1995, was the subject matter of the proceedings against Sheard Walshaw Partnership. The Court of Appeal upheld the decision at first instance that the second incident of flooding was caused by a combination of an absence of adequate overflows and an under capacity in the rainfall system. The Court also found that the intervening surveys and inspections should have noted the absence of overflows and as a result, the failure to spot this patent or evident defect broke the chain of causation.

Steel J considered the difference between patent and latent defects and described a latent defect as one “that would not be discovered following the nature of inspection that the Defendant might reasonably anticipate that the article would be subject to”.

The judge stated that “actual knowledge of the defect, or alternatively, a reasonable opportunity for inspection that would unearthe the defect, will usually negative the duty of care or at least break the chain of causation unless (as is not suggested in the present case) it is reasonable for the Claimant not to remove the danger posed by the defect and to run the risk of injury…”. The Court upheld the finding that the only effective
cause of both floods was the absence of overflows. There was therefore no finding of liability in relation to the latent defect with the design of the downpipes that had contributed to the second flooding.

In March 2007, the Court of Appeal had an opportunity to review the *Baxall* decision, when it heard the appeal in *Pearson*. This claim related to the performance of downpipes in a warehouse completed in April 1990. The property was originally leased by International Book Distributors Ltd (IBD). Stock was damaged by severe flooding in July 1994. Loss adjusters identified the inadequacy of the siphonic drainage system, but there was no evidence that IBD were ever informed of this.

The lease was then transferred to the claimant, Pearson. No survey was undertaken before Pearson took over the lease and flooding again damaged the contents of the warehouse in July 2002.

In contrast to *Baxall*, the defects in this case were entirely latent and could not have been discovered by reasonable inspection. Furthermore, the Court found that Pearson was not aware of the previous flooding.

The architects argued that, given the first incident of flooding and the identification of the under-capacity in the system, the defendant’s potential liability was brought to an end. They also argued that it was not reasonably foreseeable that further damage would flow from the defect in the design once it had led to a flood. Both the court at first instance and the Court of Appeal reviewed but distinguished *Baxall*. The Court of Appeal concluded that “if an architect who has the primary responsibility for producing the safe design produced a defective design, it is not obviously fair, just and reasonable that he should be absolved from any liability in tort in respect of its consequences on the ground that another professional could reasonably be expected to discover his shortcomings”.

The Court of Appeal also found that it was foreseeable that, if an architect designed an inadequate drainage system in the warehouse, owners of property might suffer water damage. The Court found that there was no reason why the claimants should have carried out any investigation into the adequacy of the rainwater system - in effect, following the trail of patent defects that had existed in *Baxall*. The Court considered that the chain of causation had not been broken by a failure to obtain an intermediate inspection.

The decision confirms the principle that a designer is liable for loss or damage to a third party as a result of a latent defect in the design of a building, which had not been discovered or brought to the attention of the affected party by way of intermediate examination. The possible causation arguments successfully adopted in *Baxall* appear unlikely to make significant inroad into this principle, except in very limited circumstances.

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1 [2002] Civ 09
2 [2007] EWCA Civ 130
3 [1991] 1AC 398

... we can see no basis ... why the fact that a third party becomes aware of a latent defect should be deemed to make the defect patent to others who neither know, nor ought to know of the discovery.
When does ‘all risks’ mean ‘all risks’?

Despite their description, ‘all risks’ policies can nevertheless give rise to disputes as to the meaning and intention of the cover. The Commercial Court has recently considered the question of the extent of cover under a ‘Contractors All Risks’ Policy, in the case of CA Blackwell (Contracts) Limited v Gerling Allegemene Versicherungs-AG¹.

Blackwell were earthwork subcontractors to Balfour Beatty and were contracted to provide the necessary earthworks to nine kilometres of the M60 around Manchester. Part of this work involved the formation of a “capping” layer. During the course of the contract, the composition of this layer was changed to shale. This material is susceptible to deterioration if its moisture level increases. The contract works ran late as a result of wet weather and damage occurred to the capping layer in two incidents, causing losses agreed by adjusters at £46k and £490k.

Insurers resisted the claims under the policy on a number of bases. First, they argued that the losses were inevitable and did not have the necessary element of fortuity about them to constitute claims under the policy. Insurers referred to a bad weather allowance amounting to 16% of the contract sum to illustrate the fact that the parties had clearly anticipated the likelihood of this loss. Second, they argued that the losses were caused by Blackwell’s willful misconduct in continuing earthworks late into the year without ensuring that the shale was adequately protected from the water damage by installing adequate temporary drainage to take away excess water. Insurers also sought to rely on a defective work provision which excluded:

Exclusion (a) above shall not apply to other Property insured free of the defective condition but is damaged in consequence thereof.”

Mr Justice Mackie QC found in favour of the contractors. He held that the losses claimed featured

There was nothing inevitable about incidents caused by ... the coming together of different factors in heavy falls of rain.

‘loss of or Damage to and the costs necessary to replace, repair or rectify:

a) Property insured which is in a defective condition due to a defect in design plan specification materials or workmanship of such Property Insured or any part thereof

b) Property insured lost or damaged to enable the replacement repair or rectification of the Property insured excluded by (a) above.

a sufficient degree of fortuity. The losses occurred as a result of a number of factors - heavy rainfall, earthworks being undertaken out of season and the adequacy of temporary drainage - which occurred concurrently. Whilst the damage to the roadbed had been caused by rainfall, either because it was of an unexpected amount, or because insufficient precautions had been taken by Blackwell to remove excess water, the damage was still covered by the policy.

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Exclusion (a) above shall not apply to other Property insured free of the defective condition but is damaged in consequence thereof.”
As to the allegations about Blackwell’s alleged wilful misconduct, insurers referred to the case of CP v Royal London Mutual Insurance2, in which Turkey LJ described a wilful act as being one where:

“the insured is aware that what he is about to do risks damage of the kind which gives rise to the claim or does not care whether there is such a risk or not, he will act recklessly if he goes ahead and does it ...” Insurers argued that the inadequacy of the temporary drainage, the change in capping material to shale and the extended working into the winter of 1999/2000 all pointed to wilful misconduct.

The Court disagreed and found that the arguments raised by insurers did not amount to recklessness. On the evidence, there was no evidence of the deliberate risk taking referred to in the CP case.

Finally, in relation to the defective workmanship exclusion, insurers argued that the defective condition arose as a result of the absence of effective temporary drainage. Blackwell argued that the drainage was separate from the damage to capping and sub-formation. The works themselves, which were the subject of the claim, were “free of the defective condition and damaged in consequence thereof.” The Court found that the temporary drainage itself did not constitute “Property insured.” under the terms of the policy, whereas the subject matter of the claim, the replacement and repair to capping and damaged sub-formation, did.

In short, the Court concluded that, notwithstanding the potentially strong grounds for resisting the claims by insurers at the outset, the Contractors All Risks policy covered the two claims. The decision is an interesting example of the Court’s approach to the interpretation of an all risks policy where damage from ostensible operating risks was nevertheless covered.

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The case of R v Adomako1 sets out the requirements of involuntary manslaughter. In that case, the Court held that a conviction could be sustained on the basis that the defendant had been “grossly negligent” from a largely objective (rather than a subjective) standpoint. Whether the prosecution could satisfy such a test depended on the seriousness of the breach of duty committed by the defendant and all the circumstances facing the defendant when the accident occurred.

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Corporate manslaughter

The failure of the prosecutions following the Herald of Free Enterprise disaster in 1987 and Paddington Train Crash ten years later have highlighted the difficulties faced by the CPS when attempting to prosecute companies for corporate manslaughter.

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In short, had the defendant’s conduct fallen below the expected level such as to categorise the negligence as criminal?

The few cases in which a company has been successfully convicted of manslaughter involve cases against a defendant that is a small company, so that it has been possible to discern a “controlling mind” responsible for failing to take steps to avoid the victim’s death. In practice, this has been a managing director, or senior company official, who has a clear connection with the running of the company and the circumstances of the incident that has given rise to the fatality, such as following the Lyme Bay tragedy in 1993. In effect, the prosecution has had to identify a person who could also be prosecuted in his personal capacity in order to secure a conviction.

The judgment of Scott Baker J following the Paddington Train Crash made clear that, notwithstanding the prosecution’s case that a finding of gross negligence could be deduced objectively following Adomako, not all acts of negligence could be categorised as criminal when applied to a defendant company. The Court also refrained from making any comments concerning the possible attribution and aggregation between offenses and breaches across the company, to satisfy the elements of corporate manslaughter. Furthermore, the Court also found that any conviction of corporate manslaughter would still require elements of foreseeability, proximity, fairness, justice and reasonableness.

In response to the apparent inability of the law to punish companies responsible for such tragedies as the Paddington Train Crash, the government resolved to make prosecutions for corporate manslaughter easier. The resulting Corporate Manslaughter and Corporate Homicide Bill is currently awaiting its first reading in the House of Commons and is intended to remedy the difficulty by basing convictions on a system of organisation failure.

An organisation will be guilty of an offence if the way in which its activities are managed or organised causes a person’s death and amounts to a gross breach of a duty owed by the organisation to the deceased\(^1\).

A gross breach is one that falls “… far below what can reasonably be expected of the organisation in the circumstances\(^2\).

Senior management is defined as those persons who play significant roles in:

- “the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
- the actual managing or organising of the whole or a substantial part of those activities”

This will allow the prosecution to examine two potentially different groups of managers in a large company structure. The issue is whether the actions of the senior management identified amount to a substantial element of the breach.

A “relevant duty of care” includes: a duty owed by an organisation to its employees; a duty owed as an occupiers of premises; a duty owed in connection with the supply of goods or services; the organisation of any construction or maintenance operations; any other commercial activity; and the use or maintenance of any plant, vehicle or other machinery\(^3\).

The bill also provides further guidance on the meaning of “gross breach”. In particular, the jury must consider whether there has been a failure to comply with health and safety legislation and other guidance relating to the alleged breach and, if so, how serious that failure was and how much risk of death it posed. The jury may also consider “the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure … or to have produced tolerance of it\(^4\).

The objective assessment of a gross breach of a relevant duty of care by senior management therefore dispenses with the need to identify a directing mind in order to secure a conviction.

It remains to be seen whether ultimately the Bill will give rise to a significant increase in the number of manslaughter prosecutions. If so, the disproportionate incidence of fatal accidents in the construction industry may result in more frequent prosecutions of companies involved in construction. It may also result in increased costs to insurers. However, the availability of Health & Safety prosecutions (with similar sentences of unlimited fines) may remain the preferred prosecution route and the Act may only be applied in the type of high profile case, like Paddington, in which public opinion will push the CPS into seeking a conviction for manslaughter.

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\(^1\)1994 3 All ER 79
\(^2\)R v Great Western Trains Co Ltd 27 July 1999
\(^3\)S1
\(^4\)S1(4)(b)
\(^5\)S2(1)
\(^6\)S8
The Construction and Engineering Pre-Action Protocol has applied to all claims against construction professionals since October 2000. Although generally speaking the Protocol has worked well, concerns had been raised about the time it was taking for parties to comply with the procedure and also the costs incurred in the procedure itself. As a result, the Protocol has been revised and the amended Protocol will apply to all disputes commenced after 6 April 2007.

The new Protocol has the following key amendments:

- The time for the defendant’s response, which could previously be extended by agreement to four months, has been reduced to three months.

- The pre-action meeting, which was previously to take place “as soon as possible” is now to take place within 28 days of the defendant’s response.

- The Protocol also has a new clause 1.5 to address the issue of proportionality, which stresses that costs should be proportionate to the complexity of the case and the amount of money at stake. Parties are not expected to marshall and disclose all supporting details and evidence that would be used in litigation.

Clause 1.5 would appear to be intended to counter the problems faced by a defendant who may incur substantial wasted costs in defending allegations that a claimant then does not pursue. It is unlikely that the courts will overrule the decision in Ian McGlinn v Waltham Contractors¹, in which Coulson HHJ held that costs incurred by a defendant at the pre-action protocol stage to persuade a successfully claimant to abandon a claim could not be recovered in any subsequent proceedings, unless the defendant could establish that the claimant’s conduct had been wholly unreasonable. In the circumstances, defendants will clearly be interested to limit their costs of defending a claim at the pre-action protocol stage, so far as is possible.

The Protocol also requires the parties to consider whether some form of alternative dispute resolution is more suitable than litigation. There is, however, an express statement that no party “can or should” be forced to mediate or enter into any form of alternative dispute resolution.

¹ [2005] EWHC 1419 (TCC)

Previous 2007 Construction Updates

If you are interested in receiving a copy of any past edition of the Construction Update, please contact either Alexandra Anderson or Justin Clayden.

January, 2007

That was the year that was

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- Let the Games Commence - JCT v NEC
- Testing times for Architects - A review of Part L