Welcome to Property Matters from the experts at Cobbetts. We hope you enjoy this edition and would welcome your feedback on any issues you would like to see covered in this regular publication.

IN THIS EDITION:
We examine a case concerning the issue of whether or not a builder, who owes his client a contractual duty, also owes a duty of care in the tort of negligence for defects in the building which give rise to purely economic loss.

This case will be of particular interest if you are involved in the building industry or property investment.

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J A Robinson v P E Jones (Contractors) Ltd 2011

Summary
The Court of Appeal attempted to reconcile existing case law concerning the issue of whether or not a builder, who owes his client a contractual duty, also owes a duty of care in the tort of negligence for defects in the building which give rise to purely economic loss.

It was held that although a builder can (in principle) owe concurrent duties in tort and contract, in this case, the tortious duty had been excluded by the terms of the contract.

It was also confirmed that a builder does not, by reason of their contract to construct or complete the building, assume any liability in the tort of negligence for defects in the building which give rise to purely economic loss and, further, that it is possible for a builder to include in their contract a provision excluding a concurrent tortious liability in respect of purely economic loss (which all builders would be well advised to do).

The issue
Prior to this case, there was some considerable confusion as to whether or not a builder might be liable in tort for pure economic loss suffered by the owner of a property, where there was a defect in that property.

The relationship between a builder and a building owner is primarily governed by contract and the parties can, therefore, to some extent, allocate the risk between themselves. It has long been accepted that a builder also owes a duty in tort to the owner (and to others who may foreseeably own or use the property) to take reasonable care to protect him/her from suffering personal injury or damage to other property.

However, prior to this case, it was not so clear whether or not a builder would be responsible to the owner where that person suffered purely economic loss as a result of a defect in the property (for example, where the owner was left out of pocket as a result of being required to repair a defect or the value of the property decreased as a result of a defect).

On the one hand, if no such tortious duty was owed by a builder, there would be circumstances where a third party purchaser would suffer significant loss but would have no contractual remedy as against the builder, such that that loss would be unrecoverable.

On the other hand, if such an extensive duty of care was imposed on builders, then those persons would potentially face an unlimited amount of claims.

Both scenarios are undesirable. Therefore, the courts have struggled to decide where to draw the line and how to do so consistently.
The case law

Notably, in the case of *Murphy v Brentwood DC*, the House of Lords held that the economic losses suffered by the building owner were not recoverable in tort since the builder did not owe them a duty of care to protect them from such loss.

In contrast, in *Henderson v Merrett Syndicates*, the House of Lords held that managing agents did owe a duty of care in tort to carry out their functions with reasonable care and skill which extended to cover pure economic loss. That case was decided on the basis that there was a tortuous duty where there was an assumption of responsibility by a professional.

A similar doctrine was applied in the case of *Hedley Byrne v Heller Corporation*, where it was held that bankers would have been liable for economic loss caused by giving a negligent reference, but for an express disclaimer of responsibility. That finding of liability was based upon a special relationship between the parties flowing from an assumption of responsibility.

Assumption of responsibility

It does not necessarily follow, from a public policy point of view, that the same duty of care imposed on professionals should also be imposed on builders.

Contractual obligations are negotiated by the parties and then enforced by the law because the performance of contracts is vital to the functioning of society. Tortious duties are imposed by law (without any need for agreement between the parties) because society demands certain standards of conduct.

It is understandable that professional persons are taken to assume responsibility for economic loss to their clients. Typically they give advice, prepare reports, draw up accounts, produce plans and so forth. They expect their clients and possibly others to act in reliance on their work or product, often with financial consequences. The same cannot necessarily be said of other contracting parties working outside of professional retainers. Not every contracting party assumes responsibilities co-extensive with contractual obligations.

The facts

In 1991, PE Jones (a builder) agreed to build, off-plan, and sell a house to Robinson (the owner). Completion and transfer took place in 1992.

In 2004, the fires at the property were serviced. One fire failed the inspection and was disconnected. Further investigations revealed that the flames to the fires had not been constructed in accordance with building regulations in force at the time the property was built or in line with good construction practice.

Claim for pure economic loss

Robinson, therefore, commenced proceedings against PE Jones for the costs of the remedial works (£35,000), claiming, amongst other things, that the builder was in breach of contract and in breach of a duty of care in tort.

Due to limitation issues, by the time of the hearing it was accepted that the only claim that was not time barred was that of breach of a duty in tort. The case, therefore, gave the court the perfect opportunity to consider that issue in isolation.

The decision

The judge in the Manchester Technology and Construction Court decided two preliminary issues of relevance here:

- Did the defendant owe a duty of care in tort in relation to the economic loss?
- Did the defendant owe a duty of care to the claimant on the facts of this case?

On the first issue, the judge confirmed that “in principle a builder can owe a duty of care in tort to his client, concurrent with his duty in contract, in relation to economic loss”

In relation to the second issue, the judge concluded that the answer was no. That was because the conditions in the contract in this case successfully excluded liability in tort.

Permission to appeal was granted and the case was transferred to the Court of Appeal.

The Appeal

The Court of Appeal carried out an extensive review of the authorities with detailed analysis of *Murphy v Brentwood, Henderson v Merrett Syndicates* and *Hedley Byrne v Heller Corporation*.

Lord Justice Jackson confirmed that, having reviewed those cases, the relationship between (a) the manufacturer of a product or the builder of a building and (b) the immediate client was primarily governed by the contract between those parties. Subject to the provision of the Unfair Contract Terms Act 1977 in consumer contracts, the parties were free to allocate risk under that contract as they saw fit.

Lord Justice Jackson further held that, provided there was no assumption of responsibility, the law of tort
imposes a different and more limited duty on the manufacturer or builder.

That duty was to take reasonable care to protect the client against suffering personal injury or damage to other property. That duty extends not just to the first owner but to others who may foreseeably own or use it.

Lord Justice Jackson confirmed that an approach to the extent of tortious liability relating to a building contract which limited obligations to only those in respect of personal injury or damage to property was too restrictive.

He held that it was necessary to look at the relationship and dealings between the parties, in order to ascertain whether the contractor or sub-contractor “assumed responsibility” so as to give rise to a duty for economic loss.

In this case, Lord Justice Jackson found nothing which suggested there was such an assumption of responsibility. The defendant’s warranties of quality, and the claimant’s remedies, were set out in the contract. The parties were not in a professional relationship where they were paying for advice to be given.

The clauses of the contract which limited liability put the question of liability in tort beyond doubt in Lord Justice Jackson’s mind. The parties had contracted to limit the liability of the defendant to two years. For the law of tort to then impose a duty of care in tort far exceeding that would be inconsistent with the scheme of the contract.

Practical Points

This case has clarified the legal position to some extent at least. In particular, it has now been established that:

- A builder can owe a home owner a concurrent duty in tort and contract.

- It should not be regarded as settled law that a builder or seller of a building does, by reason of the contract to construct or complete the building, assume any liability in the tort of negligence for purely economic loss.

- A builder will owe a duty of care in respect of damage to property or personal injury.

- It is possible to include provisions in a contract which expressly exclude a concurrent liability in tort in respect of economic loss.

- Such exclusion provision may also expressly disavow any “assumption of responsibility”. Builders are, therefore, advised to ensure that such provisions are included in their contracts, in order to avoid any doubt that any such responsibility has been assumed.