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DISPUTE RESOLUTION

Appraising Contractors' tortious liability under the tort of negligence.

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Introduction

In the recent consolidated cases of *Paul and another v Royal Wolverhampton NHS Trust, Polmear and another v Royal Cornwall Hospitals NHS Trust and Purchase v Ahmed,* the Supreme Court of the UK has held that a Contractor owes a duty of care to an Employer in relation to building defects-arising from design, construction or both. This type of duty is usually parallel to a contractual duty that the contractor will perform its works with due skill and care. The existence of this parallel duty of care may be vital in cases where limitation periods are concerned. As such, even when defects occur almost six years after the completion date which would ordinarily be statute barred under claims in contract in the UK and in Uganda, claims in tort can be brought forward. This was established in the case of *Dutton v Bognor Regis UDC* where claims that were previously time barred by limitation were allowed.

However, it should be noted that claims in tort for negligence, negligent advice or negligent misrepresentation are open

for some standard forms of contract, for instance the FIDIC forms of contract where Sub-clause 20.4 of the 1999 FIDIC forms of contract allows for disputes in connection with, or arising out of the Contract or the execution of the Works. *Ashville Investments v Elmer Contractors Ltd* is authority for the proposition that a clause which covers disputes arising under the contract but also includes the words 'in connection with' should be given a wide interpretation and will cover related claims for rectification, negligent misstatement, and the like.

The Negligence Equation

For a successful claim in the tort of negligence, the claimant-often the Employer, must show: (1) that the Contractor owed them a duty of care; (2) that there was a breach of that duty; and (3) this breach resulted in recoverable damage. It is important for all these components of this negligence equation to be satisfied in order for such a claim to succeed.

While considering the first limb of this negligence equation, we consider the leading case of *Donoghue v Stevenson* where it was held that a manufacturer of goods owed a duty of care to their final consumer. This case established the 'neighbour principle' which determines whether a duty of care is owed by the defendant in any given situation. In his obiter, Lord Atkin defined a neighbour in the law as a "person who is so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." Consequently, the requirements of foreseeability and proximity set out in the neighbour principle form the basis of finding duty of care. The fundamental concept of the neighbour principle underwent reformulation in *Caparo Industries v Dickman*. In this case, there was introduction of the consideration of whether the existence of a duty would be fair, just and reasonable. With this, *Caparo* introduced a third requirement that extended beyond the two earlier criteria that were set by *Donoghue*.

In the appraisal of negligence, it is important to examine both negligent actions and negligent advice. Appraising negligent advice has particular application on design and build projects. When determining the duty of care for negligent misstatements, reference is made to the case of *Hedley Byrne v Heller* where it was held that a duty of care could exist concerning a statement leading to pure economic loss, if the parties were in a 'special relationship'. Such a special relationship arises, in part, when one party exercises skill and judgement and the other party acts in reliance of this skill and judgement

Given that the Contractor is a neighbor to the Employer, the Contractor often owes the Employer a duty of care for both negligent acts and negligent advice in some cases.

Breach of Duty

After confirming the existence of a duty of care, the next step in proving negligence involves demonstrating a breach of that duty. To ascertain breach of duty of care, it is necessary first to identify the standard of care and then determine if this standard was met in the given circumstances. The standard of care, as established in *Blyth v Birmingham Waterworks,* is that of the 'reasonable man'. This is a legal abstraction which represents an average person who was further described by *Greer LJ in Hall v Brooklands Auto-Racing Club as 'a man on the Clapham omnibus.'*

However, if the defendant presents themselves as possessing specific professional skills, the applicable standard of care must be determined by comparing them with others in the same profession. In *Bolam v Friern Hospital Management Committee,* it was held that the 'test is the standard of the ordinary skilled man exercising and professing to have that special skill. For the context of a Contractor on a project, the Contractor holds themselves out to the Employer as possessing particular professional skills to execute a design and build project or simply a build project and therefore this is the standard of care to which they must adhere.

The legal burden to prove breach of duty is on the Employer in this case and this must be established on the balance of probabilities. The Employer can rely on the maxim of *res ipsa loquitur.* With this, in the absence of convincing evidence to the contrary, the court will give the Employer the benefit of doubt by inferring negligence from what is known. This was shown in *Scott v London & St. Katherine Docks* where it was held that a claimant will be assisted by res ipsa loquitur if the thing causing damage is under the control of the defendant or someone for whose negligence the defendant is responsible and that the accident is such as would not normally occur without negligence.

When examining a Contractor's liability to the Employer, further reference is made to *Gee v Metropolitan Railway Co* where the train doors were presumed to have been the sole responsibility of the train company and therefore it was liable. Where structural failure/defects are due to design and construction solely done by Contractor, and without any evidence to the contrary, the Employer can be assisted by the maxim of *res ipsa loquitur.* As such, where the standard of care is not reached in the respective duty stations, it can be said that there is a breach of duty.

Did the breach of Duty result in loss?

After establishing that there was breach of duty, the next key question would be whether or not the breach of duty resulted in loss. The general test used by the courts to determine the factual causation is the "but for" test, where the key question is whether, but for the defendant's breach of duty, the loss or damage would have occurred. For instance, Lord Denning stated in *Cork v Kirby Maclean Ltd* that "*...if the damage would not have happened but for a particular fault, then that fault is the cause of the damage; if it would have happened just the same, fault or no fault, the fault is not the cause of the damage.*"

The two types of damage under consideration are physical damage and pure economic loss. In *Spartan Steel v Martin,* it was held that financial loss not directly stemming from physical damage is too remote to be compensable in negligence. As such, the law of negligence concerns actual damage, usually in the form of physical injury to persons or property.

The courts have adopted different approaches to pure economic loss resulting from a negligent action and pure economic loss caused by negligent advice. This can be shown in *Murphy v Brentwood* where it was held that the loss described as physical damage due to the negligent act was in fact pure economic loss and was not recoverable. As such, pure economic loss arising from a negligent act is not recoverable. As such, Employers cannot claim for pure economic loss resulting from Contractor's negligent acts.

In the case of *Henderson v Merrett,* it was held that when one party undertakes to provide professional or quasi- professional services for another, this commitment, if relied upon by the person on whose behalf these services are performed, may be adequate to establish a duty of care in tort, irrespective of the contractual relationship between the parties. According to *Henderson,* the existence of contractual relationships between the parties did not exclude the possibility of a duty of care in negligence. Moreover, the special relationship extended beyond advice to also include the provision of services.

In *Hedley Byrne,* it was held that a duty of care could exist concerning a statement leading to pure economic loss if the parties were in a special relationship such as that one discussed above in *Henderson*. In contrast to pure economic loss arising from a negligent act, pure economic loss arising from negligent advice is recoverable. Consider a design and build project where the Contractor recommends

the use of a wall of contiguous piles which is later discovered to have been under-designed for their length and load bearing requirements. It can be considered that the Contractor provided negligent advice to the Employer thereby entitling the Employer to claim for pure economic loss resulting from this negligent advice.

Damage suffered

The final limb of the negligence equation involves determining the extent of the damage suffered by the claimant which should be attributable to the defendant. In the *Wagon Mound (No.1)* case, it was held that the appropriate test for remoteness is reasonable foreseeability of the kind or type of damage suffered by the claimant. Applying the *Wagon Mound* test in *Hughes v Lord Advocate*, it was held that it is only the type of damage which must be reasonably foreseeable and not the manner in which it occurs or its extent. Where there is physical damage due to a breach of duty of care and it is reasonably foreseeable that the Employer would suffer this loss as a result of the Contractor's negligence, this limb which is essential in proving negligence is satisfied.

Conclusion

In conclusion, Contractors can be liable to Employers for negligent acts and negligent advice. As such, Contractors have to be aware of these liabilities which may not necessarily be "under the contract" and with which claims can be forwarded beyond the limitation period.

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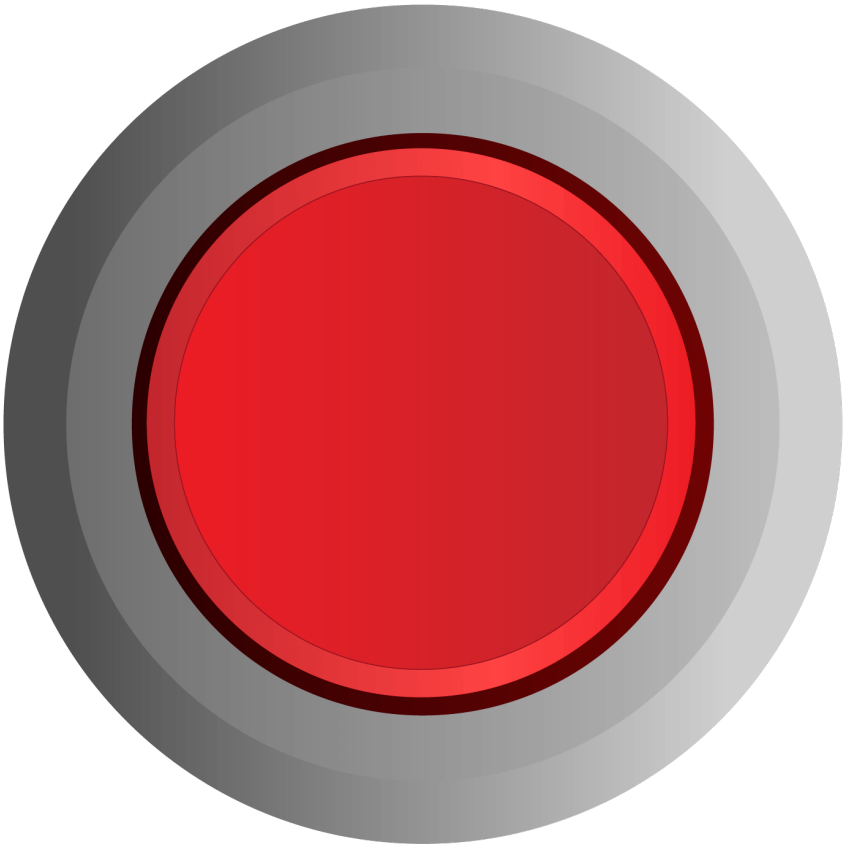

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CONTRACT MANAGEMENT

Liquidated Damages under 1999 FIDIC forms of Contract.

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Introduction

Often you are in a meeting between Employers and Contractors or main contractors and sub-contractors and you hear threats to levy liquidated damages in case the Contractor cannot complete the project within the assigned Time for Completion. But what exactly are liquidated damages? How can Employers successfully levy liquidated damages? What can be a Contractor's defence towards levying of liquidated damages?

In order to understand the concept of Liquidated damages, it is important to understand the concept of time on construction projects.

Time

Time is an important aspect of performance on a construction project. Therefore, once a Contractor commits itself to a date for completion, it runs the risks associated with non-completion by that date (assuming the Employer is not responsible for causing the delay) unless the contract makes provision otherwise. It should not be forgotten that a Contractor not only has to complete the works by the agreed date but also has until that date in which to complete the Works. Subject to Sub-Clause 1.1.3.3 *[Time for Completion]* means the time for completing the Works

or a Section (as the case may be) under Sub-Clause 8.2, as stated in the Appendix to Tender or the Particular Conditions (with any extension under Sub-clause 8.4 *[Extension of Time for Completion]*), calculated from the commencement date.

The Contractor complies with the requirements for Time for Completion if he completes the Works within Time for Completion until the issue of the Taking Over Certificate and failure to comply with Time for Completion will usually lead to entitlement of delay damages pursuant to Sub-clause 8.7. These damages accrue on a daily basis for each day of delay.

The effect of provision of delay damages as to time for completion was set out in *Percy Bilton Ltd v. Greater London Council*[1]. The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer.

Time of the Essence

Time of the essence means that a failure by one party to meet the requirements as to time entitles the other party to elect not to perform their remaining obligations and sue for damages. In concluding whether time (for completion of the works) is of the essence for a particular contract, account has to be taken of any extension of time and liquidated and ascertained damages provisions within the contract. Time remains only of the essence if and when the contract provides for time extension claims for those events attributable to the employer, which cause delay and disruption. Failure to provide such claims leads to time at large, which will mean that the Employer loses his entitlement to delay damages.

Time at Large

Time becomes at large when the obligation under a contract to complete by a specified date has been lost. The consequence of time becoming at large is that an Employer is unable to levy liquidated damages and the Employer has no definite/ fixed date from which to calculate any amount due. The Employer's only course of action then, is to sue for unliquidated and unascertained damages in the event of the contractor still failing to complete the works in a reasonable time.

Time usually becomes at large when a contractor has been prevented from completing the works by the contractually specified date. This prevention must be through the fault or act of prevention of the Employer and there must be no provision in the contract to address the situation, as was held in *Freeman v Hensler*[2].
Alternatively, if there is an extension of time provision in the contract, time could become at large when the contractual terms dealing with extensions of time either make no provision for the delaying event/act or are not administered correctly.

[1] *[1982] 1 WLR 794.*

[2] *[1900] 64 JP 260.*

Extensions of Time

Most-if not all-standard forms of construction contract make express provision to establish a revised completion date in specified circumstances. An extension of time provision achieves the following:

- retains a specific date for completion;
- preserves the Employer's right to liquidated and ascertained damages following acts of prevention for which he/she is responsible;
- under certain contracts, Contractors are given relief from events which would normally be at their risk e.g. weather/ strikes.

It is for this reason that Sub-Clause 8.4 provides for extension of Time for Completion not only in the event of additional or changed work but also in the event of acts of unlawful prevention and subject to further determination by the Engineer. Apart from Sub-Clause 8.4 various other Sub-Clauses provide for extension of Time for Completion.

Completion

Given the contractor has a duty to complete by a given date, what is it that amounts to completion? In the case of *Jarvis & Sons v Westminster Corporation*[3] completion was defined as *"completion for all practical purposes, that is to say for the purpose of allowing the Employers to take possession of the works and use them as intended."* Completion is important as it affects liquidated and ascertained damages, and payment to a contractor.

A Contractor's obligation to complete the work which he has agreed to carry out within the time required by the contract is one of the most important obligations under almost every construction contract. This is because the Contractor's obligation of timely completion is inextricably linked to his liability for delay damages under Sub-Clause 8.7 in the 1999 FIDIC forms of Contract. These delay damages are expressly stated to be the only damages due from the Contractor for his failure to comply with Sub-Clause 8.2. The Contractor's obligations under Sub-Clause 8.2 must be read together with Sub-Clause 8.7, which sets out the consequences if the Contractor fails to comply with Sub-Clause 8.2, and Sub-Clause 10.1 which deals with the issue of Taking-Over Certificates.

Taking-over marks the stage at which the Works are handed back to the Employer for use. It is related to the Employer's entitlement to delay damages because once the Employer has the right to use the

[3] *[1987] 36 BLR 48.*

Works, he, in principle, ceases to suffer losses due to the delay of the Contractor in completing the Works, for which damage the delay damages are the only damages payable.

Liquidated Damages

Liquidated and ascertained damages are no more than a planned provision in the contract by the parties to cover an eventuality, namely late completion by the Contractor. A liquidated damages clause imposes an obligation upon one party to a contract to pay to the other a fixed sum of money in the event of the parties' breach.

At common law, it was originally regarded from the case of *Dunlop Pneumatic Tyres Company v New Garage and Motor Company Ltd*[4] that such a clause must fix a genuine pre-estimate of the loss that would be suffered by the aggrieved party in the event of breach. With that, defendants would move to show that the sum is not a genuine pre-estimate of loss and there would always be a risk that the courts would regard it as an invalid penalty. Contractors often used this as a defence against Employers who tried to levy liquidated damages against them.

In the case of *Cavendish v Makdessi*[5], the Supreme Court in the UK clarified on this issue and opined that the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract. Consequently, there is now a higher threshold for establishing a clause as being an unenforceable penalty.

In order for the liquidated damages to be enforceable, the figure for liquidated damages must be fixed or determinable as was held in *Arnold & Co Ltd. v AG of Hong Kong*[5]. There must be a definite date from which liquidated damages can run as was held in *Miller v London County Council*[6]. Furthermore, an enforceable liquidated damages clause provides an exhaustive remedy as was held in *Cellulose Acetate Silk Co Ltd. v Widnes Foundry (1925) Ltd*[7]. If there is a liquidated damages clause it does not matter whether the employer's loss is actually greater or smaller. The Employer can recover the liquidated and ascertained damages whether he can prove he has suffered a loss or not as was held in *Clydebank Engineering & Shipping Co v Castaneda and Others*[9].

Conclusion

In conclusion, Contractors can be liable to liquidated damages when they do not complete the projects in time. Employers have to pay attention to the drafting of these delay damages clauses such that they are not stipulated as penalties. Contract administrators should ensure that they comply with Extension of Time provisions in the Contract to prevent a Time at large situation which would inhibit an Employer from levying liquidated damages.

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4 *[1914] AC 79 p86-88.*
5 *[2015] UKSC 67.*
6 *[1989] 47 BLR 129.*
7 *[1934] 151 LT 425.*
8 *[1931] 2 KB.*
9 *[1905] AC 6.*

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