Author

Saleem Khalid

Professional Liability Update

Construction Negligence : an overiew of 2017

The end of the year lends itself to a time of reflection, and similarly to case-law reviews. As I pick which professional – from social workers to solicitors – to focus upon, I return to that reliable source of litigation: Construction. 2017 has been another year which illustrated that there is still uncertainty in this field/ minefield but, perhaps with the benefit of hindsight, the leading cases had predictable outcomes. I concentrate upon two such cases.

Persimmon Homes Ltd v Ove Arup and Partners Ltd (2017) EWCA Civ 373

The appellant development consortium appealed against a decision that the respondent engineers were exempt from liability for unexpected asbestos found on a construction site. An exclusion clause seeking to preclude liability for any claim in relation to asbestos was interpreted by the Court of Appeal in the context of the respondent's failure to advise that the site was contaminated. The consortium contended that the clause only excluded liability where the contractor had caused the presence of asbestos.

The Court held that it would be nonsensical for the parties to agree that the respondents were not liable if asbestos was moved from one part of the site to another, but were liable if it was merely left in place.

The decision is of particular import because the Court confirmed that, concerning commerical contracts negotiated between parties of equal bargaining power, the contra proferentem rule now had a very limited role. Exemption clauses (as opposed to indemnity clauses) were no longer to be treated in a quasi-moral sense: the parties are simply free to agree as to how risks should be allocated.

Riva Properties Ltd & Ors v Foster + Partners Ltd [2017] EWHC 2574 (TCC)

The Defendant architect practice created a design for a hotel near Heathrow which would cost c.£195m. The difficulty with that is that the Claimants 'only' had £75m. Accordingly, the Defendant reassured them that with the appropriate engineering, the project could be completed for £100m (the Claimants' increased maximum budget). Sadly, however, the project plainly could not be constructed for that amount, hence the Claimants claimed for their wasted fees (a mere £4m) and also the lost profits for the hotel.

The Defendant did its best during the trial to dismantle the Claimants' case and had even denied the existence of any budget. This conduct did not seem to impress the judge. Fraser J found that the RIBA requirements should have led the Defendant firm to note the obvious budgetary constraint. Interestingly, the judge held that the lack of Quantity Surveyor for a period did not extinguish the Defendant's liability, drawing a distinction between the employer's budget and the costs of construction.

Therefore, the Claimants were entitled to have

the fees sum returned. The loss of profits argument failed due to factual causation reasons including the global financial crisis. Nevertheless, the judgment shows that if architects do not design with express cost constraints in mind then they are creating their own misfortune.

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