Case Analysis: Burgess v Lejonvarn

*In this article, **David Sheard** discusses the recent High Court decision in Burgess v Lejonvarn, in which he acted for the Defendant.*

Introduction

Recently, Judge Martin Bowdery QC handed down judgment following the final hearing in this long-running, and fairly unique, professional negligence claim (*Burgess v Lejonvarn*).[1] Previously, the claim had been the subject of a preliminary issues hearing at which it was determined that, whilst the parties had not entered into any contract, Mrs Lejonvarn owed the Claimants a duty of care in tort to carry out those services which she did provide with reasonable skill and care.[2] In this article, I will consider the determination of the preliminary issues which formed the back-drop to the final trial, before concentrating on some of the salient aspects of Judge Bowdery QC's final judgment.

Background to the Claim

In early 2012, the Claimants had decided that they wanted to re-landscape their garden. They obtained a design for the garden from a renowned landscaper, Mark Enright, together with a quote for implementing it. That quote (being for over £150,000) was more than the Claimants were willing to pay. In the Defendant, however, they had a friend with experience and contacts in the building industry. In particular, they had previously carried out at least one significant refurbishment project with Hardcore, a builder who often worked with the Defendant.

As such, the Claimants asked the Defendant whether she thought the project could be delivered by Hardcore for less than Mark Enright had quoted. This set in motion a chain of events that would sadly lead to a complete breakdown in the parties' friendship, and a protracted legal battle.

Hardcore was asked by the Defendant to price the job, and duly provided a quotation of £78,500. Given that various aspects of the design remained uncertain, however, the price was not fixed or all-inclusive. Whilst Hardcore could not provide the Claimants with a fixed price for the project, the Defendant suggested that a reasonable budget for completing the works with Hardcore would be £130,000. The Claimants decided that they wanted to proceed with Hardcore on that basis, and shortly thereafter works got underway.

The garden was set on a steep slope, and the first part of the project required significant groundworks and the construction of a set of retaining walls. Hardcore therefore engaged a specialist subcontractor for these works. The work proceeded relatively smoothly until, about 6 weeks into the project, the parties had an almighty falling out. For whatever reason, the Claimants assumed that the budget for the project was £78,500, whereas the Defendant understood it to be £130,000. Believing that costs were overrunning, the Claimants called any involvement of Hardcore and the Defendant in the project to a halt.

Nevertheless, the Claimants then continued to try and complete the project by working directly with the specialist subcontractor. This, unfortunately, did not have a happy ending: after paying a large sum of money over a period of a further two months, the Claimants became concerned with the quality of some of the work being carried out. In the end, Mark Enright was therefore hired to remedy any defective work and to complete the project, at significant cost. All in, the Claimants paid some £360,000 for the finished product, significantly more than Mark Enright's original quote, albeit only a small portion of that expenditure (around £60,000) had been incurred whilst the Defendant had any involvement in the project.

The Claimants blamed the Defendant for their overspend, and so started proceedings against her. They alleged that she had contracted with them to perform a wide range of architectural services in connection with the work or, alternatively, that she had in fact provided those services and owed the Claimants a duty to carry them out with reasonable skill and care. Broadly speaking, the areas of alleged breach concerned advice in relation to the initial budget, the absence of detailed design drawings for the works, an alleged failure to identify defects in the works which should have been apparent on inspection, and the instruction of payments exceeding the value of work carried out by Hardcore by the time they (alongside the Defendant) were ordered off site.

> *"There was no contractual relationship between the parties for a whole host of reasons, not least that there had been no offer and acceptance, no intention to create legal relations and no consideration."*

The Preliminary Issues

Given the fundamental disagreement between the parties both as to the existence (or otherwise) of any contract, and as to what the Defendant's involvement in the project had been, Edwards Stuart J

1 [2018] EWHC 3166 (TCC)

2 see the first instance judgment at [2016] EWHC 40 (TCC), as clarified by the Court of Appeal: [2017] EWCA Civ 254

ordered that there be a preliminary issue tried to determine: (i) whether any, and if so what, contract had been entered into; and (ii) whether the Defendant owed the Claimants a duty of care and, if so, what the nature and extent of that duty was.

These issues were determined at First Instance by Judge Alexander Nissen QC.[3] There was no contractual relationship between the parties for a whole host of reasons, not least that there had been no offer and acceptance, no intention to create legal relations and no consideration. It was concluded, however, that the Defendant had agreed to provide a range of architectural services and was, to some extent at least, performing those services during the period in which she was involved with the project. As such, a duty of care in tort arose.

On the issue of inspection, for example, Judge Nissen QC concluded that the Defendant provided the service of *"[attending] site at regular intervals to project manage the Garden Project and to direct, inspect and supervise the contractor's work, its timing and its progress"*[4] and that she owed the Claimants a duty to exercise reasonable skill and care in doing so.

Judge Nissen QC's judgment on the duty of care issue was then the subject of an appeal.[5] The appeal was dismissed, albeit with a qualification. Whilst the nature of the Defendant's involvement in the project was such that she owed a duty of care to the Claimants, that duty did not import positive obligations to carry out particular services. Rather, the relevant obligation was to take reasonable skill and care insofar as a service was in fact carried out. As Hamblen LJ said, the relevant duty was *"to exercise reasonable skill and care in the provision of professional services as architect and project manager* ***when she performed those services"*** (emphasis added). There was, for example, no duty *"to inspect"*, only a duty to exercise reasonable skill and care insofar as an inspection was in fact carried out. This set the backdrop for the final hearing, to determine in detail what the Defendant actually did during the course of her involvement with the project, and whether she acted in a way that was negligent whilst doing what she did.

The Final Judgment

As a starting point, it is notable that despite the judgment of the Court of Appeal, the parties remained in dispute as to what the relevant duty of care previously defined actually required. For example, the Claimants maintained that irrespective of the fact that there was no retainer to define any services that the Defendant was to provide, if she was carrying out (in general terms) the broader service of 'periodic inspection/supervision' during the relevant period, a failure to attend site *at all* on any given occasion should be classified as a negligent omission.

There were, however, various difficulties with this argument:

- First, it was inconsistent with the Court of Appeal finding that a duty of care would only arise when the service was performed. Where no inspection took place, it would be artificial to classify this as the negligent performance of the service of inspection. Rather, on days when the Defendant was not on site, she was not providing the 'service of inspection' at all.

- Second, even if individual 'inspections' were to have taken place, the Defendant could not following each one have been subject to any positive duty to inspect in future, since there was no contract requiring her to do so. To the extent that she did then carry out an 'inspection' at some point thereafter, it is difficult to see why this should have generated a duty to have inspected on another occasion in the past.

- Third, whilst it is clear that in circumstances in which there has been an assumption of responsibility, liability

3 [2016] EWHC 40 TCC
4 at [194]
5 [2017] EWCA Civ 254

"It is crucial, in relation to each individual defect, to consider why any reasonably competent architect would have identified it on inspection, and required its correction."

can arise for negligent omissions as well as negligent acts (see e.g. *Henderson v Merrett Syndicate*),[6] this needs to be squared with the equally fundamental principle that the law does not recognise the enforceability of a gratuitous promise (*The Zephy*).[7] Clearly, where there has been an assumption of responsibility to achieve a specific result, the resulting duty of care can be breached by a failure to do anything to achieve that result (as with, for example, the failure to take any steps to issue a claim form having agreed to do so). That is very different from a more general requirement to 'carry out inspections' over a protracted period.

- Fourth, the Claimants' contention could have had far-reaching implications for professionals of all kinds. Take, for example, an architect not appointed to inspect, but who agrees to carry out an inspection. Presumably this could not create the 'duty to inspect' capable of breach by omission in the manner contended for by the Claimants. But what if the architect were to carry out two inspections, or three, or four? At what point would they be considered to be carrying out a 'service' of periodic inspection, and so be branded 'negligent' for not inspecting on any other occasion? This could have introduced great uncertainty.

In any event, the Claimants' contention was rejected by Judge Bowdery QC. He made clear that a claim in negligence could lie only if the Defendant had on any given occasion carried out a particular service in a way that no reasonably competent architect would have, and thereby caused damage. Such negligence could be by omission if, for example, an inspection were carried out and a defect not spotted that any reasonably competent architect in the Defendant's position would have identified; but the possibility of breach would only arise if and insofar as the Defendant had actually provided advice or carried out the service in question.

Judge Bowdery then went on to consider each claim on its own merits, dismissing them all in turn. Indeed, in relation to many of the claims, the judge struggled to understand the basis on which they had been pursued.

In relation to the Defendant's 'budget advice', the Claimants contended that the suggested budget of £130,000 was negligent on the basis that the project could not have been completed for less than £188,000. But this did not make sense, in circumstances in which Mark Enright himself had quoted around £150,000 for the job. In addition, given that the budget was built up around a price which Hardcore had given, the Defendant could not be criticised for the way in which the task of preparing the budget was approached.

In relation to the allegedly negligent design, the claim "*lack[ed] credibility and conviction*". This was because, at one point, the Claimants had accepted in terms that such drawings as were produced by the Defendant were not themselves negligent, but that further designs should have been produced. Following the Court of Appeal ruling, however, the Claimants alleged that the drawings which the Defendant produced were actually negligent, in that they did not contain numerous details that detailed design drawings for construction would be expected to contain. In determining whether the drawings had been produced negligently, however, it was necessary to consider the purpose for which they were carried out; and once that was taken into account, there could be no question of negligence on the facts.

In relation to the allegations of negligent inspections, the Claimants had fallen into the classic trap which Coulson J cautioned against in *McGlinn v Waltham Contractors Ltd*,[8] namely to assume that any claim for bad workmanship against the contractor must be reflected in a claim for negligent inspection against an architect. Clearly, that does not follow: it is crucial, in relation to each individual defect, to consider why any reasonably competent architect would have identified it on inspection, and required its correction. Most of the alleged defects were structural issues, but the structural adequacy of the walls in question would have been outside the competence of an average architect.

Finally, the Claimants alleged that the Defendant negligently approved payments in excess of the sums due as the works progressed. This claim was also beset with numerous difficulties, not least the fact that there was no agreement that interim payments had to be made based on a 'measure and value' assessment of the work carried out, and the payments made up until when Hardcore was dismissed from site were well within the anticipated £130,000 budget.

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Conclusion

Whilst turning on its own unique facts, the final result will no doubt be of some comfort to professionals who may have become embroiled in 'friendly favours' for others. It is one thing to establish that a duty of care is owed in such circumstances; without some specific act or piece of advice which can be shown to have been negligent, establishing breach may prove more difficult.

6 [1995] 2 AC 145
7 [1985] 2 Lloyd's Rep 529
8 [2007] 111 Con LR 1