



PROFESSIONALISM: DUTY DOES MATTER

Good morning ladies and gentlemen.

My presentation this morning looks to the current approach to professional indemnity claims handling and the Courts' approach to claims against professionals. I am not going to dwell on professional indemnity insurance Policy coverage issues, although mindful that notification is a key aspect of any Adjusters' investigation process, I will touch upon the notification condition. Overlooked, it could lead to a claim against the Loss Adjuster.

Gone are the days when only professionals such as solicitors, surveyors or accountants needed professional indemnity insurance. Today, clients now have high expectations of their professional advisers whatever their field and are acutely aware of their legal rights. There is no question that any business which provides professional advice, designs or offers similar services to clients needs the protection professional indemnity insurance provides. For example, safety consultants, interior designers, translators and not forgetting employment agencies.

Disappointed clients are now quick to seek recompense of financial loss and there is no doubt that the working life of the most successful professional can be thrown into chaos by the arrival of a professional negligence claim. No matter how spurious the claim may be, time will be invested, fees will be incurred and potential business opportunities lost, as attention is focused on areas other than the core business.



A few headlines which go some way towards 'proving the above point:

<i>Surveyors to cost</i>	<i>Court case over</i>	<i>Safe as houses?</i>	<i>Pre-Action Protocol</i>
<i>Insurers dearly</i>	<i>Broker's failure to</i>		<i>for Construction &</i>
	<i>keep Insured fully</i>		<i>Engineering</i>
	<i>informed</i>		<i>Disputes</i>

How did we then get to where we are today?

Historically, the professional man or woman was in the privileged position of performing their particular skills knowing that the law would not usually impose upon them an obligation to ensure that the desired outcome will be achieved. The express terms of a particular contract between the parties may provide to the contrary, but an implied term as to fitness for purpose did not usually arise. Accordingly, in the absence of express terms to the contrary the contractual duty implied was normally no higher than to use reasonable care and skill when undertaking the particular professional work concerned.

There have however been exceptions to this general rule, notably *Greaves (Contractors) Ltd v. Baynham Meikle & Partners* where the Defendants designed floors for a factory that were not strong enough to withstand the vibration of stacker trucks. The Court of Appeal emphasised that this decision laid down no general principle of law but turned upon the special facts of the case in which an admission had been made in evidence. In that case, the engineer was under a duty to design a



warehouse reasonably fit for its purpose and this was implied in the contract entered into between the parties.

The common law position has been codified in statute under the Supply of Goods and Services Act 1982. Section 13 of the 1982 Act provides that where the supplier of a service is acting in the course of a business there is an implied term that the service will be carried out with reasonable care and skill.

It should be noted that the 1982 Act does not prevent a higher obligation being imposed either expressly or, as in the Baynham Mickle case, where special facts demonstrated this was the common intention of the parties.

There was as those of us with sufficient grey or no hair will know, expanding and at times conflicting liability as a result of case law through the 1990's and more of that soon but overriding the contractual aspects in respect of claims involving property damage are the provisions of the Unfair Contract Terms Act 1977.

I am not going to dwell on the 1977 Act, but it does have relevance in the particular circumstances and, for example, where a private householder engages the services of an architect or engineer, reasonableness and other considerations of this particular statutory instrument towards that party seeking to rely on any exclusion or limitation of liability can be of particular relevance. Surveyors led the way in this area of a professional's duty – the House of Lords in *Smith v. Bush* and *Harris v. Wyre Forest* being noteworthy.

What of the expanding case law therefore? I am sure you have all heard of the *Hedley Byrne* case that dates back approaching 50 years and the more recent cases



of Henderson –v- Merrett Syndicates Ltd and White and Jones, which have impacted on the professional indemnity arena.

Briefly, Hedley Byrne held economic loss caused by negligent misrepresentation was held to arise irrespective of whether a contract existed or not. This led to free availability of choice of cause of action being firmly established.

In Henderson and Merretts, the House of Lords decided that a professional could owe a concurrent liability to a client in both contract and in negligence. This can lead to complications, as limitation periods are different, further the issue of contributory negligence and remoteness of damages aspects are all affected by how the claim is pleaded. If the wrong choice is made, then for that particular professional, duty does matter.

Finally, in White v. Jones the Solicitors were held to owe a duty to the disappointed beneficiary of a will, having failed to draft the will properly on the instructions of the deceased. In many ways an extension of the ‘rule’ established in Hedley Byrne. The House of Lords did say that White was in a ‘special category’ of what perhaps could be said to be the extended liability introduced through the 1990’s.

Moving on, professionals have not been exempt from the amendments to the Civil Procedure Rules and I suspect that you are all aware of the fact that there is a pre-action protocol for construction and engineering disputes that applies to all construction and engineering disputes, including professional negligence claims against architects, engineers and quantity surveyors amongst others.

The protocol mirrors largely the other protocols under the CPR and there is no doubt it does impact on claims handling Adjusters.



As with all protocols, the overriding objective is to encourage the exchange of early and full information about the prospective legal claim and hopefully to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings and in the event that proceedings cannot be avoided, support the efficient management of proceedings in such cases.

In practice, I believe that the pre-action protocol has brought pressure to bear on insurers and investigators alike to achieve costs effective case management. Claims against professionals are notoriously expensive and if there is clear evidence of professional negligence sufficient to establish a legal liability then it is in everyone's interests to seek early resolution.

In cases involving other professionals where there is no recognised protocol then, and I am sure you have all seen this in practice, those advising claimants seek to introduce via the Practice Direction on pre-action conduct an approach in keeping with the 'standard' pre-action protocol time frames. This is becoming increasingly prevalent in my experience in subrogated recoveries being pursued by solicitors instructed by Insurers, not necessarily exclusive to the professional indemnity field, but the principal is the same.

Briefly, insofar as the protocols are concerned, then a detailed letter of claim has to be submitted within 14 calendar days of receipt of the letter of claim; the defendant should acknowledge its receipt in writing and may give the name and address of his Insurer (if any). If there has been no acknowledgement by or on behalf of the defendant within 14 days the claimant would be entitled to commence proceedings without further compliance with the protocol.



Within 28 days from the date of receipt of the letter of claim or such other period as the parties may reasonably agree, but up to a maximum of three months, the defendant shall send a letter of response to the claimant. This letter amongst others should include comment on which claims are accepted and which are rejected and if rejected, the basis of the rejection.

If the claimant receives no response within the period of 28 days, the claimant is entitled to commence proceedings without further compliance with the protocol.

The protocol also provides for a pre-action meeting this is not to be confused with other means of alternative dispute resolutions such as mediation or adjudication. More of that later insofar as the claims handling aspects are concerned.

However, under the protocol within 28 days after receipt by the claimant of the defendant's letter of response or after receipt by the defendant of the claimant's letter of response to a counterclaim, if there is one, the parties should normally meet. This meeting is for the parties to agree what are the main issues in the case and to identify any areas of disagreement and the 'bottom line' namely whether litigation is unavoidable.

There can be more than one meeting prior to the litigation process commencing.

Whilst generally everything said at a pre-action meeting should be treated *without prejudice* there are exceptions; one of which is: any agreements concluded between the parties at the meeting, also the fact of whether alternative means of resolving a dispute were considered or agreed.



Generally, if a professional negligence claim is litigated the initial action of the court is to request the parties adopt ADR methods. On occasions, it has been known for the parties to be sent back to ADR before embarking on the Court process.

So what does this all mean for Adjusters? What do our Principals require? Do we comply with our professional duty?

In my experience, there are three main objectives:

Early and imaginative resolution of cases Accurate and early reserving

At all times seeking to *reduce defence costs*.

That is not to say that Adjusters should not lose sight of Policy liability issues and as I said at the outset whilst I will not be dwelling on policy liability issues during this presentation, there is no doubt that the initial investigation should take account of actual or potential claim notification conditions.

It is a requirement of all professional indemnity insurances that the Insured must notify all claims and potential claims as soon as they are aware of the problem. In turn no admissions must be made to anyone and the Insured must cooperate fully with the professional indemnity insurer given the insurer has the entitlement to take over the conduct of the claim.

In a recent case before the Court of Appeal involving HLB Kidsons, the court decided that if the Insured became aware of circumstances during the policy period but failed to give notice to Insurers “as soon as practicable” there would be no cover for the claim. In other words, proper notice was a condition precedent to liability. Kidson also considered what it actually means for an Insurer to be “aware” of circumstances



that may give rise to a claim. This is an all too familiar question presented Insured's considering whether or not to notify circumstances as their professional indemnity policy nears expiry. The Court of Appeal found this to be a twofold requirement namely that the Insured has an awareness of circumstances, coupled with a degree of crystal ball gazing as to whether the circumstances will give rise to a claim. Using that analysis, the Court of Appeal suggested that where an Insured tries to notify a circumstance, which is too vague or remote to be reasonably capable of being regarded as a matter that might give rise to a claim an Insurer would be entitled to refuse to accept it as a notification. There were other aspects surrounding the Kidsons' case that probably influenced the Court of Appeal, but the relevant point arising is that the Kidson case does not represent a new approach to the construction of conditions precedent. Simple rule: if in doubt notify!

Returning to claims handling issues. Underwriters/Insurers require a proactive not a reactive approach to defending claims. The merits of the claimant's allegations should be assessed as soon as practicable and in any event if this is a construction dispute then the provisions of the preaction protocol will be 'ticking'. I would also point out at this stage that there are more stringent reporting requirements to claims bought under the adjudication provisions of the Housing Grants Construction & Regeneration Act 1996. Another subject in itself.

I believe that it is true to say that if liability is likely then Insurers will wish to settle the claim as quickly as possible without incurring further significant costs.

When submitting the preliminary report, a case strategy heading/conclusion is an essential tool to assist insurers in their approach to the claim submission.



It may well be appropriate to meet with the claimant's solicitors so as to gauge their expectations and explore early means of resolving the case.

There is no doubt that alternative dispute resolution is a feature of professional indemnity claims. Mediation is generally considered preferable to litigation, albeit there are costs associated with mediation but if successful these will be fraction of litigation costs even where there are serious issues on liability.

It is vital that the mediator appointed has the right skills and experience for the dispute. Indeed, skill at managing the process is generally more important than knowledge of the law in any particular area. A decision maker should be present on both sides with the necessary authority to settle on the day of the dispute.

In attending mediation there must be a pre-determined strategy. Whilst it would not be possible to know exactly how the claimant will be approaching the negotiations, there must be a plan in mind for your approach.

In any event, a position paper will have been submitted prior to the mediation and therefore any opening statement should be concise and the key points stressed, as opposed to generalisation and/or repetition of the position paper. Highlight the key features of your case.

The effect of mediation in resolving disputes should not be overlooked in professional disputes particularly in construction disputes where there is generally a claim and counter claim under consideration.

Quantum assessment should be ongoing – a given - and insurers will frown upon an upward creeping reserve. The general view is that reserves should be set to



reasonably reflect the most likely outcome of the claim. Claim increases can at times be difficult to explain to Insurers.

I will not go into the whys and wherefores of Part 36 in this presentation, but clearly they are a useful tool to protect your client's position not only on quantum aspects of the case, but equally legal liability considerations.

Underpinning all of these aspects is the fact that duty does matter insofar as the investigating adjuster is concerned. It would be particularly ironic were an adjuster to fail in his duties towards his insurer client in respect of investigating and handling a professional indemnity claim enquiry.

At this stage, therefore, before commenting on specific case law identifying specific failures to exercise reasonable skill and care, let us consider an architect's professional indemnity enquiry. In carrying out the investigation, what areas do you think should be addressed in order to present a meaningful preliminary report, together with strategy recommendations to your client?

Architect's Questionnaire

1. Title of Firm
2. Name of Client
3. Claimant
4. Reference Number of Project/Job Involved
5. Location and type of project/job



6. Terms and conditions of construction contract
7. Total contract value
8. Total value of the part of the contract for which the architect is responsible.
9. Services provided and precise terms of engagement
10. Total amount of gross fees paid or due to be paid
11. Amount of gross fees received
12. Date problems first arose
13. Date the architect first became aware of circumstances likely to give rise to a claim.
14. Date and details of any allegations which have been made in writing to the architect
15. Does the architect consider he/she is in any way liable.
16. If yes give reasons
17. Do you intend incurring with insurers consent legal costs in recovering outstanding fees.
18. Date when responsibilities to claimant commenced.
19. If possible estimate costs of remedials plus other relevant additional costs.
20. Were any specialist consultants used?



21. If yes details of duties and how and by whom they were appointed.
22. Resume of facts which have led to current situation.

Moving onto the pitfalls.

The first case I would like to draw attention to is Ground Gilbey & Anor. –v- Jardine Lloyd Thompson UK, a brokers professional negligence case that ensued over the brokers' failure to keep the insured fully informed. In Ground Gilbey the insured were the owners of Camden Market and a claim under the policy arose due to fire damage caused by a portable gas heater. Use of these heaters had been an ongoing problem and risk improvement requirements were issued in both the 2005 and 2006 policies requiring the removal of all such heaters due to severe fire risk. The brokers forwarded the 2006 risk improvements to the insured stating that the portable gas heaters needed to be removed immediately.

However, although the heaters in question had been prohibited since the inception of the 2005 policy, the prohibition was not being complied with. The insured whilst understanding the prohibition and issuing appropriate notices banning the heaters had also made it clear to their brokers that it was difficult to enforce as traders required some form of heating in winter. The Insured also indicated that it would be helpful if the insurers could agree a safer alternative heating method.

At 2007 renewal a *survey condition clause* was introduced as an endorsement to the policy stating that cover was conditional on compliance with all requested risk improvements within stipulated timescales. The brokers did not draw the *survey condition clause* at the 2007 renewal to the insured's attention. During the 2007



policy year a further survey took place, resulting in the issuing of a further risk improvement and this would now be caught by the *survey condition clause* requiring the immediate removal of all portable gas heaters.

The brokers did not disclose the 2007 risk improvement requirement to the insured and it was admitted at trial by the brokers that they were in breach of duty in that regard. Indeed, it was also the case that the insurers raised the question of alternative heating and the brokers too did not convey this to the Insured.

A fire took place in February 2008. Insurers sought to rely on a breach of the *survey condition clause* and following a period of negotiation the insured accepted a payment amounting to approximately 70% of the estimated claim value, seeking the shortfall from their brokers.

The insured was successful at trial.

Whilst recognising that the *survey condition clause* was not unusual or onerous the brokers were aware of the overall and ongoing concern with regard to the use of portable gas heaters and therefore should have drawn the survey condition to the insured's attention and explained its specific relevance. The court commented that the brokers had failed to draw the potential affect of the risk improvement to the insured's attention and in turn obtained instructions. In short, the failure to advise the insured had denied them the opportunity to enter into a constructive and detailed dialogue with their insurer regarding portable gas heaters. It was no defence that although the policy had ultimately responded, the insured had to negotiate a reduced settlement against a background of the 2007 risk improvement having been ignored and the brokers should not have exposed the insured to the risk that its rights against insurers were as such compromised.



What are the lessons to be learned in respect of an insurance brokers' duty? Firstly, it is important to have a continual awareness of the facts on the ground of whether the policy terms and conditions can be complied with in practice. If not, brokers are under a duty to work with the insured and the insurer to try and find an acceptable compromise.

Secondly, brokers should keep in mind that although a particular term or condition may not of itself be unusual or onerous, the surrounding facts and circumstances may require that such a term or condition should nonetheless be specifically drawn to the insured's attention and explained. The brokers had full knowledge of the concerns regarding the historic heaters and this aspect should have been acted upon, perhaps not an unsurprising outcome in all the circumstances.

Thirdly, brokers should not wait until renewal to address any issues as to the terms or scope of the cover.

Fourthly, if the insured is left in a position where its rights against insurers in the event of a claim are doubtful as a result of something the broker has failed to address, brokers can expect to be pursued for any shortfall.

The decision in *Ground Gilbey* was restated in a subsequent case before the Queens Bench Division involving *Jones v. amongst others, MS Plc trading as Miles Smith Insurance Brokers (2010)*. In that case, without going into too much detail, it was held that the insurer broker had to satisfy itself that its client understood the need for disclosure of information to the insurer. That usually required a specific oral or written exchange on the matter both at the time of the original policy being provided and at the time of its renewal.



At the outset, under headlines, I made reference to '*surveyors to cost insurers dearly*'. The case I was alluding to was *Farley v. Skinner* a 2002 case before the House of Lords. In *Farley and Skinner*, Mr Skinner had been instructed to carry out a survey on a property 50 miles from Gatwick airport. When instructing his surveyor, the claimant specifically asked whether the property would be affected by aircraft noise. He made it clear that he did not want to buy a property on a flight path.

In his report, the surveyor said he thought it unlikely that the property would suffer from noise pollution although he did allow that some planes would cross the area depending on the direction of the wind and positioning of flight paths.

Notwithstanding this qualification, the claimant purchased the property. However, 'surprise! Surprise!' immediately upon moving in, it became apparent that the property was seriously affected by aircraft noise. Whilst the claimant continued to live there a claim was brought against the surveyor based on allegations of negligent advice.

At first instance the claimant succeeded the court accepting that he would not have purchased the property had he known of the noise. An award of £10,000 was given for the discomfort caused to the claimant.

The award was subsequently overturned in the Court of Appeal, but in turn upheld by the House of Lords. In reaching their judgment, the House of Lords referred to the Court of Appeal case of *Watts –v- Morrow* (1991) where it was held that a contract breaker was not in general liable for distress, frustration, anxiety, displeasure, vexation, tension or aggravation caused by his breach of contract. Importantly, however, there were two exceptions to this rule:



1. *“Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead.*

2. *.....damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.”*

The issue was could the claimant’s contract with the defendant’s surveyor be one for pleasure? The claimant had made it clear that aircraft noise was very important to him and it was accepted that this was a major part of the contract. The defendant sought to argue that the entire contract must be of that type, not just part of the contract. However, in *Farley –v- Skinner* the House of Lords held that it was sufficient only that a major or important object of the contract was to give pleasure as was the case here.

Whilst this decision concerns property surveyors, it is true for other professionals such as architects, structural engineers, valuers, who will all have to consider the purpose behind their instructions and the *Farley –v- Skinner* case could indeed reach beyond the construction professional sphere.

Having ruled in the claimant’s favour on the first exception, the House of Lords then went on to consider the effect of the second exception. Namely, did the claimant suffer physical inconvenience or discomfort such as to entitle him to damages for the defendant’s breach? Previous authority had drawn distinctions between mere annoyance or disappointment on the one hand and actual physical inconvenience and discomfort on the other.



If the cause was disappointment, then no damages would be recoverable even if a physical condition resulted. If the cause was a sensory experience then subject to the rules concerning remoteness, damages could be recovered. In the claimant's case, the aircraft noise was clearly sensory in nature so his claim succeeded.

Given that this was a House of Lords' decision, then clearly a precedent has been set for claims of this nature. It widened the scope for claims against professionals in respect of distress and inconvenience resulting from breach of contract.

The only crumb of comfort from this case insofar as Insurers are concerned is that the House of Lords commented that the award of £10,000 was high. Nonetheless, it was upheld but the House of Lords emphasised that awards in this area should be restrained and developments such as this should not contribute to the creation of a society bent on litigation. This case was heard in 2002 – we have seen a significant rise I would submit in both claim levels and heads of claim in the past eight years across all liability disciplines. Should the House of Lords have decided differently?

In *Costain Ltd v. Charles Haswell & Partners Ltd*, a 2009 consulting engineers' case before the Queens Bench Division Technology & Construction Court, the court held that where a consulting engineers' design for foundation works had been defective so that a civil engineering contractor had had to abandon the proposed scheme and follow a different foundation design, the contractor was entitled to damages but only in respect of sums arising out of the consultant's negligent advice. The contractor was not entitled to recover sums in respect of prolongation costs or for costs incurred by it arising out of the delay caused to a third party.

In this case, having considered the various foundation design options, the defendant recommended the construction of conventional foundations after surcharging the soil



following ground treatment works. As the works progressed, the defendant produced a settlement analysis report which concluded that on the basis of cone penetration tests, the likely differential movements between structures was at a level outside the settlement tolerances specified in the tender document. The defendant consulting engineers then advised that the most appropriate foundation solution was piling and provided new designs for piled foundations that the claimant carried out. It was the damages arising out of the revised foundation works scheme that the claimant sought.

The court held that the claimant was entitled to recover a sum in respect of a drainage blanket of granular materials laid as part of the ground treatment works and a sum for additional earthworks testing where both had been required as a result of the defendant's negligent advice. They were also entitled to recover a sum for the cost of piling although in a lesser amount to that being claimed as although the claimant had never recovered payment for piling from the tenderer (since it was not anticipated that piling would be carried out) had the defendant advised that a piling solution was necessary, such costs would have arisen although the claimant would have included the costs for piled foundations in its tender so compensation for such a sum was appropriate.

The court held that the claimant was not entitled to recover sums in respect of prolongation costs or for costs incurred by the claimant arising out of the delay caused to a third party who carried out works on the site following the claimant's completion of the foundation work.



An interesting case, which I thought necessary to bring to your attention, is that involving Robert Mckie v. Swindon College a 2011 case before the Queens Bench Division concerning liability for careless talk about ex-employees.

In this case, the High Court held that employers can be liable for negligent misstatements about ex-employees, even if those statements are not contained in a reference.

The claimant had left his employment with Swindon College in November 2002. At that time he received an excellent reference. At trial, the claimant produced a number of witnesses who testified as to his capacities and qualities during his years with the defendant.

In May 2008 the claimant had commenced a post at the University of Bath. Part of his job there involved liaising with and visiting colleges, including the defendant, his ex-employer.

On 5th June 2008, an email was sent from Robert Rowe the defendant's Human Resources Manager to his equivalent at Bath University. This email said that the defendant would be unable to accept the claimant on his premises or delivering to its students as it had "*very real safeguarding concerns*" and there had been "*serious staff relationship problems*" during his employment by the defendant.

At trial, none of the evidence called by the defendant justified the contents of the email and in short it was fallacious and untrue.

Under cross-examination, Mr Rowe had agreed that it was inevitable that the email that was sent would have an impact on the claimant's employment. The judge said that in such a situation he would have expected at the very least that prior to sending



the email there would be a formal meeting or discussion, a formal examination of the personnel record and a formal recording of the processes that led to the taking of the decision. In short, the sending of the email flouted element standards of fairness, diligence, proper enquiry and natural justice and the procedure adopted had been slapdash and sloppy.

The case had arisen because as a result of the email from Swindon College the claimant had been summarily dismissed and he had no remedy against Bath University in unfair dismissal due to his length of service.

Going to the heart of the title of this presentation: *Professionalism: Duty does Matter* the Judge considered whether the claim fell within the principles under Hedley Byrne which provide that there could be liability for negligent misstatement to a party causing that party loss. However, because in this case the information was provided to Bath University, as opposed to the Claimant employee, and Bath University had suffered no loss, Hedley Byrne did not assist the claimant.

The infamous Spring v. Guardian Assurance case of 1995 was then considered. In that case, an employer had given a reference in respect of a former employee and it was held that the employer owed that employee a duty to take reasonable care in its preparation and would be liable to him in negligence if he failed to do so and the employee thereby suffered economic damage.

Again, because the Swindon College case was not a reference situation, the Judge did not consider that he could use the Guardian case as an existing authority.

The McKie case is perhaps an examination question all of its own, because the court then went on to consider Caparo Industries v. Dickman & Ors. a 1990 case at the



heart of expanding duties of care. In light of the evidence from the defendant accepting that it realised that the email might have an impact upon the claimant's employment, the Court considered the damage suffered by the claimant was foreseeable.

And despite the passing of six years since the claimant had been employed by the defendant, as the defendant had chosen to rely upon and communicate information purportedly derived from the time when the claimant had worked for them, there was a sufficiently proximate relationship. Accordingly, following *Caparo* it was fair, just and reasonable in the circumstances to impose a duty of care upon the defendant.

Clearly, as a result of this decision, employers should be wary about any statements they make about ex-employees to anyone who might foreseeably act upon that statement, causing the ex-employee loss. They should ensure that they have checked facts, using a fair process and should document this process.

The purpose for which the statement was given does not seem to be relevant to potential liability. Even the passing of several years appears to be no bar to a duty of care arising if the employer has chosen to act upon historical information. Finally, whilst this case concerned a communication made in writing, I suspect there would be no reason why the principle cannot be extended to cover verbal communications.

The safest option for employers may be to ensure that the only communications made to new employers about ex-employees are as part of a formal reference process.

Duty did clearly matter in this case.



Finally, I would like to draw attention to the case of *Robinson v. P E Jones (Contractors) Ltd* 2011, a case considered by the Court of Appeal.

Whilst not strictly professional negligence, it does highlight differences as between responsibilities in law for contractors when compared to professionals.

Robinson is an important decision for anyone involved in building defect claims particularly when those defects are only discovered many years after the construction took place. In such circumstances, when a contractual claim has become time barred, claimants have previously sought to rely upon the more generous time periods afforded to claims in negligence.

A frequent point of contention is whether a contractor owes its client a concurrent duty of care in tort to carry out its work with reasonable skill and care so as to avoid causing a purely economic loss, i.e. costs incurred in rectifying a defect within the building works as distinct from causing injury or damage to “other property”. This issue has been the subject of conflicting decisions in the Technology and Construction Court and *Robinson* through the Court of Appeal has sought, possibly not wholly successfully, to resolve the issues.

Briefly, the facts in *Robinson* are that the claimant agreed to purchase a house which the defendant had built. The contract restricted the builder’s liabilities in both extent and duration to those provided for by the NHBC agreement, namely 10 years. 12 years after completion, the claimant discovered that a chimney flue was defective and had not been constructed in accordance with good building practice with the result that combustion products were not being properly drawn into the chimney flue. The issue was that the flue was simply defective and always had been; there was no other damage and/or personal injury suffered.



The contractual claim was time barred and Robinson claimed in negligence so that he could avail himself of the more generous time limits for bringing a claim as provided for by section 14 of the Limitation Act 1980. At first instance, the court held 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 the economic loss, i.e. the costs of rectifying the defective house. However, on the facts of this case, the contract excluded any tortious duty of care and that exclusion satisfied the test of reasonableness under the Unfair Contract Terms Act 1977 and the claim was dismissed.

On appeal the decision at first instance was upheld; namely that the contractual exclusion of liability precluded any tortious duties arising. Nonetheless, the Court of Appeal went onto address in detail the conflicting judgments of the Technology and Construction Court as to whether a builder owes a duty of care in tort concurrent with a contractual duty, to avoid causing purely economic losses.

Following *Murphy v. Brentwood*, it has become trite law that a duty of care in negligence to avoid causing damage to the building itself does not generally arise, given this is an irrecoverable pure economic loss reflecting the costs required to correct the defective products supplied. However, in relation to professional services, including design, the law has taken a different path from *Hedley Byrne* in 1964, to *Henderson v. Merrett Syndicates*, and established that the party providing a service could owe a duty of care in respect of pure economic losses where there had been an assumption of responsibility. Accordingly, in the field of construction law, a gap has opened between errors of design on the one hand and errors of workmanship on the other. In many respects, it may be argued that there is a heightened duty in respect of errors in design.



In attempting to bring some certainty to the situation, the Court of Appeal held that in the absence of an assumption of responsibility and commenting this would require something more than the simple presence of a contractual relationship, no such duty of care in tort is owed by a builder to the purchaser in relation to economic losses because otherwise this would mean the wholesale sub-ordination of the law of tort to the law of contract.

However, because of the Court of Appeal's choice of words, it remains to be seen what 'additional circumstances' may now be required to establish an assumption of responsibility. This is likely to be fertile ground for future litigation. Further, *Robinson* was decided against the background of the NHBC Agreement, all other liabilities being excluded.

A final point, and which is indicative of how we continue to see cases coming before the courts, is that *Robinson* did not consider the Court of Appeal's judgment of *Barclays Bank and Fairclough (1995)* where the Court of Appeal held that a sub-sub-contractor did owe a sub-contractor a concurrent duty of care in tort to avoid causing economic loss. In that case, it was noted: *"a skilled contractor undertaking maintenance work to a building assumes a responsibility which invites reliance no less than any other professional advisor does in undertaking his work. The nature of the responsibility is the same though it will differ in extent."*

Whilst it may not be easy to reconcile the difference between professionals on the one hand, who owe a concurrent duty of care and skilled contractors who following *Robinson* do not, both involve skilled work and both know their clients will rely upon them to carry out such work with reasonable skill and care. If they do not, economic loss is likely to result.



In that context, and when considering professionalism, duty does matter.

One final comment on the Robinson case; there remains uncertainty as to the position of a design and build contractor and whether a duty of care would be owed in relation to design errors analogous to a professional's duty. My personal view is that it should, albeit you may have a situation where, if a claim concerns jointly defective design and defective workmanship issues, absent any specific contractual obligations, certain aspects of such losses could be recoverable, equally, others not. Again, opportunity for yet more litigation.

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