

RELEASES

Court of Appeal finds undertaking not to sue binding in respect of latent damage - *Priory Caring Services Ltd v Capita Property Services Ltd* [11.3.10]

After a fire caused severe damage to Priory's hotel in 1998, Capita were commissioned to supervise its repair and refurbishment.

In February 2005, Priory discovered that the refurbished hotel had been disastrously affected by damp penetration, which they ascribed to the negligence of the surveyor employed by Capita during the period 1998-2000.

In their Defence, Capita attempted to rely on an agreement between the parties on 10 March 2003, in which Priory provided an undertaking not to issue proceedings against Capita, in respect of their involvement as surveyors in relation to the Priory Hotel.

This agreement was made in exchange for witness services provided by a Capita director to assist Priory in separate but related arbitration proceedings. These revealed the negligence by the now former Capita surveyor who had dealt with the refurbishment. Priory agreed to the release of their rights so that the Capita director's evidence could be used to discredit the surveyor as a witness and assist with the arbitration.

Capita submitted that this agreement barred Priory's claim. At first instance, the trial Judge agreed that the release covered the current proceedings and struck out the claim.

Decision

On appeal, Priory maintained that the release was limited to those claims of which it was aware at the time the agreement was made. It asserted that, in accordance with the cautionary principle established in *BCCI v Ali* [2001], without express indication, future rights outside the contemplation of the parties at the time of agreement should not be extinguished.

Dismissing the appeal, the Court of Appeal held that, on the evidence and from the language of the letter itself, the primary focus of the release had been Capita's concern about its surveyor's negligence in their earlier performance of the original subject matter of the retainer.

As for what the parties knew or had in their contemplation, they knew there were doubts about the surveyor's competence and plainly contemplated that his errors could lead to claims against Capita. As the surveyor's negligence was expressly and specifically in contemplation, the fact that the damp penetration did not emerge

for another two years could not take it outside the scope of the undertaking.

Comment

In this case, there was a close connection between the content of the agreement and the cause of the subsequent damage. Accordingly, the court had no difficulty finding that Priory had notice of the questionable competence of Capita's surveyor and the potential for future claims.

A factor which clearly weighed heavily in the court's judgment was that the parties had acted with their "eyes open" and with the benefit of legal advice. This decision reaffirms the courts' reluctance to interfere with such commercial negotiations, regardless of the arguably inequitable nature of the end result.

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