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Construction matters

A domestic scrap

If a litigation party unreasonably rejects mediation (Alternative Dispute Resolution) he may find his costs recovery docked to reflect the court's disapproval of him. Just take a look at Burchell v Bullard (2005). This was the classic 'domestic' building case – the construction of two large extensions to the home of a Mr and Mrs Bullard. Mr Burchell was the builder. The parties fell out over the non-payment of the third stage payment of £13,540. Mr and Mrs Bullard alleged that there were defects in Mr Burchell's work.

Mr Burchell consulted his lawyers. They suggested mediation and, as Lord Justice Ward remarked much later in the Court of Appeal "[they] wrote sensibly suggesting that to avoid litigation the matter be referred for alternate dispute resolution (ADR) through 'a qualified construction mediator'". The sorry response from the respondents' chartered building surveyor was that "the matters complained of are technically complex and as such mediation is not an appropriate route to settle matters."

It all ended in a 5-day trial. Mr Burchell claimed £18,318. Mr and Mrs Bullard counterclaimed over £100,000. Following adjustments for VAT and interest Mr Burchell received the princely sum of £5,025.

What about the costs? Simple – the defendants were to pay the claimant's costs on the claim with the claimant paying the defendants' on the counterclaim. Unfair said Mr Burchell.

Yes, agreed Lord Justice Ward.

- The claimant recovered slightly more than his original claim. He was not guilty of exaggeration.
- The defendants exaggerated their counterclaim.
- The defendants had been more muddled in their case management (particularly experts) than had the claimant.
- Some review of the parties' willingness to pursue particular issues was necessary.
- Had there been any admissible offers or payments into court?
- Could mediation have played a useful role and were the defendants unreasonable in rejecting mediation?

This type of building dispute cried out for mediation:

"...it seems to me, first, that a small building dispute is par excellence the kind of dispute which, as the recorder found, lends itself to ADR.

The lawyers too had their knuckles wrapped. It seems they had ignored the 'Constriction' Pre-action Protocol:

"...The [legal] profession can no longer with impunity shrug aside reasonable requests to mediate...."

So what was the outcome? Looking at costs in the round Lord Justice Ward allowed the claimant 60% of the costs of the proceedings.

Contract terms explained

Traditionally consultants sought to exclude the recovery of consequential loss. Even lawyers descended into a flutter over the meaning of consequential loss. What is it? – see Deepak Fertilisers and Petrochemicals Corporation -v- ICI Chemicals and Polymers Ltd and Others (1999). The litigation related to Deepak's methanol plant in India where the methanol converter exploded in October 1992. The plant was severely damaged. There were specific exclusions relating to loss of anticipated profit and "indirect or consequential damage". The Court of Appeal held:

"The direct and natural result of the destruction of the plant was that Deepak was left without a methanol plant, the reconstruction of which would cost money and take time, losing for Deepak any methanol production in the meantime. Wasted overheads incurred during the reconstruction of the plant, as well as profits lost during that period, are no more remote as losses than the cost of reconstruction. Lost profits cannot be recovered because they are excluded in terms, not because they are too remote."

Judicial wobbles over the meaning of consequential loss led many consultants to seek to limit their liability to the "reasonable costs of repair, renewal and / or replacement." The BPF warranties are a prime example.

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Some time back the Construction Industry Council put out a guidance note, which cranked up the consultants' approach a gear or two. If capping liability was good for computer consultants, then why not for construction professionals too? Consultant insurers are increasingly keen to cap the insured's liability for financial losses, in part through net contribution clauses but also through other exclusions. They may seek to limit liability to the value of the professional indemnity insurance or to a particular amount – see SFA / 99, clause 6.2. Any limitation must be read subject to the Unfair Contract Terms Act 1977. Liability for personal injury or death cannot be excluded and other losses can only be excluded to the extent the clause meets the test of reasonableness under section 11 (4).

Faulty Towers

Lawyers talk about limitation periods. Claimants need time to assess if they have a good case. However, it is unfair to land potential defendants with claims made years after the relevant event, when memories have faded and witnesses are no longer available.

The law has different rules for contract and negligence. Contract claims must be started within six years of the date of the breach of contract if the contract is a 'simple' one, i.e. just based on consideration (the price for the job) or 12 years if the parties execute the contract as a deed. A consultant or contractor may commit more than one breach. He may carry out defective work ('breach 1'), attempt to remedy identified defects inadequately ('breach 2') and later fail again to review his earlier work adequately ('breach 3'). Each of those breaches will have occurred at a different point in time.

Sometimes claimants sue in negligence. Here, the limitation period is ordinarily 6 years from the date on which the claimant suffered damage. This can be unfair. You have a factory chimney but fail to inspect it for damage. Unbeknown to you it has suffered cracking – Pirelli General Cable Works v Oscar Faber & Partners (1983) – and you miss the boat. Pirelli led to the Latent Damage Act 1986, which allowed the start of the limitation period to be delayed. A claimant had a choice – (a) the usual 6 years from the date of damage or (b) in certain circumstances 3 years from the date of discoverability, i.e. the date on which the claimant could reasonably have known he had suffered damage.

The Court of Appeal looked at limitation periods in negligence in Abbott and Another v Will Gannon & Smith Ltd (2005). The claimants' hotel had a large bay window, which had structural defects. In May 1995, the claimants employed the defendant structural engineers to put it right. In March 1997 a builder completed work to the defendant's design but in late 1999 the claimants noticed that the lintel over the bay window had moved and cracked the surrounding structure. A claim form was issued on the 15th September 2003, alleging breach of contract and negligence against the structural engineers. The contract claim was time barred. The judge held, following Pirelli, that the limitation period began to run when physical damage first occurred. The defendant structural engineers appealed. A later House of Lords decision, Murphy v Brentwood DC (1991), had impliedly overturned Pirelli. The defendant alleged that the claimants had suffered pure economic loss which was irrecoverable under the Murphy v Brentwood decision.

No, said the Court of Appeal. Pirelli was still good law. Even if that was not the case, the defective design would only cause loss "when it manifested itself in some way which would affect the value of the building, measured either by the cost of repairs or depreciation in market value."

It is alarming that Abbott trod the expensive path from Torquay to the Court of Appeal.

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