

ARCHITECT'S LIABILITY TO OWNERS

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In two recent English cases, the High Court and the Court of Appeal had reason to consider the relationship between architects and property owners in tort and in negligence.

Tesco Stores Ltd v Costain Construction Ltd & Ors [2003] EWHC 1487

Tesco engaged an architect to design a new supermarket, and then engaged Costain by letter of intent to build it. The letter of intent referred to Tesco's standard terms, which included provision for Costain to be responsible for the work of the architect. This is a very similar arrangement to the form of *novation* preferred in many large construction contracts in New Zealand. Unfortunately, no formal contract was signed.

A fire broke out during work to extend the store, and it became apparent that the fire prevention measures specified by the architect were inadequate. Tesco brought proceedings against Costain and the architect to recover compensation for the damage caused by the fire. There were difficulties with the case, from a limitation perspective.

On the issue of liability, Tesco's claims against the builder included:

- (1) a contract had been formed which included liability for the architect, and the traditional requirements of *offer and acceptance* were not necessary in light of the conduct of the parties and the fact that the store had been completed,
- (2) the contractor was estopped by convention from denying the existence of the contract, and
- (3) the contractor owed a duty of care in negligence for the work of the architect (in addition to its own) and that duty extended to not causing economic loss.

The court held, unusually, that the notions of offer and acceptance were of the highest importance in determining whether or not a contract had been made and what its terms were, whereas conduct might have little or no relevance to the issue. The fact that the supermarket had been completed prior to being damaged made it hard to deny that legal relations had been created. However, no contract was held to exist on Tesco's terms. It followed that Costain was not estopped from denying a contract on Tesco's terms, as such a contract did not exist.

On the third point, the court agreed that a party to a contract did not owe a duty of care in tort for work it had not undertaken itself. However, the court observed, that a party to a contract might assume a wide variety of obligations in relation to the performance by others as a matter of contract, and the concept of negligence was not really meaningful in that context. Applying settled principles, the court held that a builder who undertook by contract to perform a service for another upon terms (express or implied) that the service would be performed with reasonable skill and care, owed a duty of care to the other parties that extended to not causing economic loss.

The reasoning in this case is difficult, and the comments on contract formation must be read in the context of the facts of the case. Shortly after this case, the English Court of Appeal determined in November 2003 (in *Harvey Shopfitters Ltd v ADI* [2003] EWCA Civ 1757) that contractual documents must be viewed in the entire context, and that the existence of a letter of intent that envisages the execution of formal documentation does not preclude a court from finding the existence of a contract on specified terms.

On the interface of tort and contract, however, the determination that duties in contract will prevail is most helpful.

Sahib Foods Ltd & Anor v Paskin Kyriakides Sands [2003] EWCA Civ 1832

In the second case, Sahib were leaseholders of a site at which they operated a factory. The second claimant, the Co-Op, was the beneficial owner of the freehold. The architect had not been engaged under any formal contract, but had carried out design work on the leasehold premises.

At the end of a very long day, one of Sahib's employees forgot to turn off the gas under a *bratt pan* (apparently used for caramelising onions), the oil reached flash point and the entire factory burnt down, resulting in losses of £27 million. The fire was caused by the negligence of Sahib's employee.

The case turned upon whether the spread of the fire was due to the culpable negligence of the architect in breach of a duty to Sahib and the Co-Op. Standard EPS panels, which are not fire resistant and contain polystyrene, were fitted in the room where the fire started. Such panels would apparently have been acceptable if only 2 mm of oil had been used in the bratt pan, whereas up to 10 or 12 mm was in fact used, unbeknownst to the architect.

The architect denied any contractual relationship with Sahib, as he had been engaged by a shareholder, rather than the company itself. The judge at first instance noted that in strict company law there was an irregularity in the procedures, but as the architect regarded Sahib as the client and he provided the drawing to Sahib for review, the judge was satisfied that the architect was retained by Sahib. He also observed that, even if there had been no such contract, he "*would have owed duties of care in tort to Sahib as the occupiers of the premises and the operators of the business for which the works were being designed and done*".

In relation to the Co-Op, the architect was also found to owe a duty of care as "*beneficial owners in respect of latent defects in the building of which there was no reasonable possibility of inspection*". On the evidence provided (none was lead by the Co-Op), the judge found that the duty was irrelevant in this case.

The judge held that the issue of whether or not the architect had breached his duty to Sahib depended on the facts. He found that the architect knew of the risk of spread of the fire, and should have guarded against the consequences of Sahib's negligence, notwithstanding that the architect had complied with statutory requirements.

On the issue of contributory negligence, the architect was wholly responsible for any physical and consequential loss to Sahib resulting from the failure to contain the fire within the room in which it started.

On appeal, the Court of Appeal agreed that, before specifying EPS non-fire rated panelling, it was incumbent on the architect to satisfy himself that the cooking operations in the room were such that there was no significant risk of the spread of fire. A proper risk assessment would have revealed the amount of oil actually used, and the true level of risk.

In the event, the Court of Appeal found that Sahib had contributed to the spread of the fire, and increased its proportion of liability for the losses.

At a practical level, the case underlines the importance of carrying out proper risk assessments. It also illustrates the ease with which a court will find duties of care to all affected parties, and will overlook technical difficulties of form in contract procedures.