2022 IN REVIEW

Caytons
Changing Perceptions

INTRODUCTION

As we return to the office after the festive period, we reflect on some of the more notable legal developments in the year which has just passed.

This note looks at some of the themes which arose.

SCOPE OF PROFESSIONAL DUTIES

There were several cases in which the courts rejected calls to fix professionals with expansive duties. The caselaw of 2022 again showed little support for the decisive shift in favour of claimants which some read into *Manchester Building Society v Grant Thornton* [2021] UKSC 20.

In *Radia v Marks* [2022] EWHC 145 (QB), the Claimant was unable to pin the blame for his defeat in the Employment Tribunal on the medico-legal expert. He lost in the tribunal because it did not find him credible. The Judge was satisfied that it was not within the scope of the Defendant's duty to protect him from an adverse finding on credibility.

In *Aurium Real Estate v Mischcon de Reya* [2022] EWHC 1253 (Ch) and *Spire Property Development v Withers* [2022] EWCA Civ 970, property developers failed to make it the solicitors' fault that their schemes had, respectively, foundered and become more expensive to pursue.

The court in *Aurium* refused to fasten the solicitor with a duty to give advice on a fundamentally different subject matter from that identified in its client care letter. It would neither construe the letter loosely nor find that the retainer had subsequently been varied. It rejected the Claimant's formulation of the risk which the duty was meant to guard against, in part, because it depended on a number of commercial factors about which the solicitor was not asked to advise.

Spire Property illustrated the challenges faced by claimants contending for an assumption of duty. Withers acted in the purchase of the development site. Spire contacted them after the transaction had completed to ask why it had not been picked up that there were high voltage cables running beneath the properties. In the exchange which followed, they explained how wayleaves might be acquired. The Judge accepted that they should have advised that any wayleave was likely to have expired but the Court of Appeal found that he had fallen into error. It was satisfied that no such duty had been assumed.

In reviewing the authorities on solicitors' duties, the court observed that any duty will be limited by reference to what the solicitor has agreed to do and that the court should beware of imposing duties which

go beyond this. Transactional lawyers are required to give advice reasonably incidental to the transaction but claims that a solicitor was obliged to take expensive and burdensome steps are unlikely to find favour. A duty to warn may arise in some circumstances but there needs to be a close and strong nexus between the retainer and the matter upon which it is said the solicitor should have advised.

In *Taylor v Legal and General* (2022) EWHC 2475 (Ch), the Defendant mortgage broker saw off a claim that it was under a duty to advise the Claimant of the risks he was taking in borrowing to fund the off-plan purchase of a unit in a buyer-funded holiday home scheme.

DIRECTORS' DUTIES

The most important case of the year for company directors and their insurers was undoubtedly *BTI 2014 v Sequana* (2022) UKSC 25, which Lady Arden described in her judgment as a *"momentous*" decision. The court concluded that directors must have regard to creditors' interests when a company approaches insolvency and that those interests become paramount when insolvency is irreversible.

BUILDING SAFETY

Ripples from the tragedy at Grenfell Tower continued to spread into 2022. The Building Safety Act received Royal Assent on 28 April 2022. It contains a raft of measures calculated to protect leaseholders from the costs of remediating historical defects, increase the safety of new homes and extend the accountability of those involved in their construction.

This included expanding the scope of the Defective Premises Act 1972 to provide homeowners with a cause of action for defective works to refurbish or convert existing buildings as well as new builds if they cause the building to be unfit for habitation. Claims are subject to a new retrospective limitation period of 30 years for causes of action accruing under section 1 before 28 June 2022 and 15 years for causes of action accruing after 28 June 2022.

With effect from 28 June 2022, the Act also brought into force section 38 of the Building Act 1984 which provides a statutory cause of action for physical damage arising from a breach of Building Regulations. This provision does not have retrospective effect, but a prospective 15-year limitation period will apply in relation to causes of action accruing after 28 June 2022.

These new causes of action came into force exactly a week after the final hearing took place in Phase 2 of the Grenfell Enquiry. This in turn came exactly a week after judgment was handed down in the first cladding case to come before the TCC. In *Martlet Homes v Mulalley* (2022) EWHC 1813, the Defendant design build contractor, admitted that there had been workmanship errors and that some remedial works were needed. But it denied that it was a breach to specify EPS insulation panels. It further denied that Martlet was entitled to recover the costs of the wholesale replacement of the cladding system and of implementing a 'waking watch' scheme.

The court found for Martlet. Under the Building Contract, Mulalley had accepted an obligation to "*conform with the requirements, directions, recommendations and advice contained in the latest edition of the following publications…Building Research Establishment's Reports, papers, defects action sheets and the like*". A close review of this material led the court to the conclusion that Mulalley should not have specified cladding panels without it being demonstrated that that particular product had passed the fire safety tests specified in the applicable British Standards. It rejected Mulalley's arguments on causation, remoteness and mitigation.

However, as the Judge stressed in the introductory section of his judgment, "*this case turns very much on the specific contractual provisions and the specific fire safety standards applicable to the particular product chosen as well as on the particular cases pleaded and argued and the evidence called".*

In September 2022, the Government announced that, in partnership with SCOR UK and MGAM Limited, it had launched a state backed PI insurance scheme for professionals conducting fire risk appraisals for EWS1 forms.

We were delighted to be appointed to provide the claims handling and legal services for the scheme.

ADJUDICATION

Adjudication under the Housing Grants (Construction & Regeneration) Act 1996 was the subject of a number of decisions last year. Attempts to resist the enforcement of awards failed in *John Graham Construction v Tecnicas Reunidas* [2022] EWHC 155 (TCC) (allegedly exceeding jurisdiction by not having proper regard to an arbitrator's award and answering the wrong question) and *Bilton & Johnson v Three Rivers Property* [2022] EWHC 53 (TCC) (alleged breach of natural justice).

In *Hart Builders v Swiss Cottage Properties* [2022] EWHC 1465 (TCC), the Claimant secured a declaration that the adjudicator had erred in concluding that the substantive question put to him was covered by a settlement under a guarantee bond. The issue then arose as to whether the Claimant could start a fresh adjudication. The Defendant argued that it could not, as the substantive question had already been put to the adjudicator.

The court concluded that it was necessary to look closely at what the adjudicator had decided. Because he had found that the matter was covered by the settlement, he had not made a decision on the substantive question. This left the Claimant free to start again.

In *Abbey Healthcare v Simply Construct* [2022] EWCA Civ 823, the question was whether a collateral warranty executed some years after the works came to an end was a 'construction contract' within the meaning of the 1996 Act. This is a precondition of any right to adjudicate.

The TCC was satisfied that a collateral warranty could in principle qualify. But it distinguished between a warranty given when works are yet to be completed, which the Judge considered would be "*a very strong pointer that the collateral warranty is a construction contract*" and one given after the event, where it was unlikely to be. On this basis, he found that the warranty under consideration did not qualify.

The Court of Appeal reversed the Judge. It rejected his distinction and confirmed that a collateral warranty was capable of being a construction contract even if entered into after the event. It indicated that the question as to whether any given warranty qualifies is one of construction. However, the Supreme Court has now granted permission to appeal and it remains to be seen what it makes of the matter.

TAX AVOIDANCE SCHEMES

HMRC's well publicised run of success in unravelling tax avoidance schemes prompted a spate of claims against professionals.

It may be recalled that, in the 2021 decision of *Knights v Townsend Harrison* [2021] STC 2119, the Commercial Court comprehensively rejected a claim against accountants who had introduced the Claimants to scheme promoters. This was echoed in March 2022 when the Chancery Division gave judgment in *Mcclean v Thornhill* [2022] EWHC 457 (Ch). In that case, participants in a 'film finance' scheme pursued Leading Counsel who had produced opinions for the promoters of the scheme and consented to them being shown to prospective participants. The claim was again rejected on several levels.

The Judge concluded that Mr Thornhill KC had not assumed any duty of care to the Claimants. In any event, he added, a reasonable tax silk could have given the advice contained in his opinions. He distinguished *Barker v Baxendale Walker* [2018] 1 WLR 1905, in which solicitors who had designed a tax avoidance scheme were found to owe a duty to warn that there was a risk of its being challenged. This case, he concluded, was

different because the advice was given to the promoters who were highly sophisticated and knowledgeable about tax avoidance schemes.

The Judge went on to reject the Claimants' case on causation. The argument that the promoters would have abandoned the scheme was, he thought, conceptually confused. It involved mixing and matching the duties owed to the Claimants with what a third party would have done in a counterfactual world. Moreover, he considered it more likely that the promoters would have found another silk willing to give more bullish advice about their scheme.

He also rejected the Claimants' evidence that they would not have participated in the scheme if they had been given the advice contended for. This mirrors the conclusions reached in *Townsend Harrison* and the *Legal and General* case referenced above.

The result appears to have led to the collapse of a similar claim which was being brought against Nicholas Peacock KC by 123 high-net-worth individuals including Wayne Rooney. The Claimants reportedly agreed to pay close to £1m in costs as part of a settlement.

BREACH OF FIDUCIARY DUTY/RECKLESSNESS BY SOLICITORS

One of the more surreal cases of the year was *ENRC v Dechert* (2022) EWHC 1138 (Comm). The Claimant was an international mining conglomerate. It retained Dechert to assist with internal investigations into possible bribery and corruption in its operations in Kazakhstan and the Democratic Republic of Congo. The Partner in charge at Dechert, Mr Gerrard, was a leading specialist in corporate crime and a former police officer.

Damaging material found its way to *The Times* and the SFO, which eventually launched a criminal investigation. ENRC accused Mr Gerrard of leaking the material in order to generate more work for himself. Of the £13m which Dechert had invoiced, ENRC claimed that £11m was for wholly unnecessary work. It maintained that the SFO was liable in the tort of procuring a breach of contract.

This might, at first sight, seem a far-fetched conspiracy theory. But the Judge accepted the thrust of ENRC's case on breach. He found Mr Gerrard to be *"a highly unreliable and at times dishonest witness"* and concluded that, *"His evidence was often inconsistent with the documents or implausible, and on more than one occasion, he was plainly lying"*. He found that Mr Gerrard gave legal advice and conducted himself generally in a manner which went beyond mere negligence and was at least reckless. In turn, he found individuals at the SFO to have been guilty of "*bad faith opportunism*". The necessary elements of procuring a breach of contract were established. Causation and loss were left for a second trial, if needed.

CONTRIBUTION CLAIMS

Percy v Merriman White and Mayall (2022) All ER (D) 77 was an important decision on the mechanics of the Civil Liability (Contribution) Act 1978.

This involved a claim brought against solicitors and a barrister for negligent advice. The solicitors settled with the claimant and pursued the barrister under the 1978 Act. It was uncontroversial that the deeming provision within the Act meant that the barrister could not go behind the settlement and argue that the solicitors had no liability to the Claimant. But the solicitors went further and contended that the barrister was disqualified from arguing that *he* was not liable to the claimant.

The Judge accepted the solicitors' argument, but the Court of Appeal disagreed. It confirmed that a party bringing a contribution claim must prove that the Part 20 Defendant was liable to the claimant.

COLLATERAL ATTACK AND RES JUDICATA

Together with *Allsop v Banner Jones* [2022] Ch 55 and Greene v Davies [2022] 4 WLR 45, *Merriman White and Mayall* was also one of a series of cases in which the Court of Appeal continued to define the contours of the modern law of collateral attack. This built on the previous year's decisions in *PwC v BTI 2014* [2021] EWCA Civ 9 and *Tinkler v Ferguson* [2021] 4 WLR 27.

It is clear from this line of authority that the courts are much more relaxed than they once were about a party to a civil action arguing in later proceedings with a different party that the judge in the earlier action reached the wrong conclusion. It will now be rare for this to be deemed an abusive collateral attack which would justify striking out the claim.

This scenario is to be distinguished from later actions between the same parties, where the *res judicata* principles apply. Cases such as *Union of India v Reliance* [2022] EWHC 1407 (Comm), *National Iranian Oil v Crescent Petroleum* [2022] EWHC 1645 (Comm) and *Margulies v Margulies* [2022] EWHC 2843 (Ch) illustrate that the courts (and arbitrators) will not allow a party to relitigate matters which were or ought to have been determined in earlier proceedings, or indeed at an earlier stage of a split arbitration.

LEGAL COSTS

In *Belsner v CAM* [2022] EWCA Civ 1387, the Court of Appeal rejected arguments that a solicitor owed a fiduciary duty when negotiating the terms of its retainer. The court concluded that the client could not have any reasonable expectation that the solicitors will do other than act in their own interests. There are constraints on solicitors, but they arise from statute and regulatory rules.

RSA v Tughans [2022] EWHC 2589 clarified the circumstances in which a solicitor is entitled to be indemnified by its PI insurers against a claim comprised of its own fees.

The court distinguished between a restitutionary claim for the repayment of costs to which the solicitor was never entitled, such as in the case of charging for work which it did not do, and one for compensatory damages to reflect legal costs properly paid, for instance in litigation pursued on the strength of negligent advice. The policy would, without more, respond in the second scenario but not the first.

Lady Bracknell might have regarded it as a misfortune to lose one appeal against the dismissal of a costs claim. She would have viewed losing two with less sympathy. In *Candey v Bosheh* [2022] EWCA Cov 1103, Candey was unable to persuade the Court of Appeal to depart from the Judge's conclusion that it had no realistic prospect of establishing that it was an implied term of the retainer that the client would act in good faith. In *Candey v Crumpler* [2022] UKSC 35, the last judgment of 2022, the Supreme Court agreed with the courts below that Candy had waived its equitable lien over sums recovered when it renegotiated its retainer and obtained additional security.

Happy New Year!