

Can builders be liable in negligence for mistakes in construction?

The recent Court of Appeal case of *Robinson –v- PE Jones (Contractors) Limited*[1] set out some useful guidance on the debate over whether a building contractor can, or should, be liable for its work under both contract and at the same time in tort so that any defects in the construction process could give rise to claims for both breach of contract and potentially also negligence. The case should come as a relief to builders as confirmation that their liability for structural defects ought to remain limited to the obligations set out in their contract with the purchaser, except in very limited circumstances.

The facts

The case concerned a new build residential property, purchased by Mr Robinson, in December 1991. The property had the benefit of a NHBC warranty and the contract for sale limited the builder's liability for defects to mirror the warranty, both in terms of extent and duration.

In 2004, Mr Robinson discovered faults in the construction of the chimney flues in his house. They were potentially dangerous, but no physical injury was caused. The cost of correcting the chimney construction was approximately £35,000.

Mr Robinson was out of time to make a claim for breach of contract, so instead made his claim in negligence (claims can be made within 3 years from the date the facts giving rise to the claims are known). As there was no personal injury, the claim was for economic loss only (i.e. the cost of the necessary remedial works).

First instance case

In the first instance, the High Court found that whilst it was technically possible for a builder to owe a duty of care to protect a client from suffering economic loss, on the facts, particularly in light of the limitation clauses in the contract, this was not the case here.

The appeal

Mr Robinson appealed, but this was unanimously dismissed by The Court of Appeal. The leading judgment was given by Lord Justice Jackson, previously a well known judge in the Technology and Construction Court, and more recently the author of the extensive review into costs in the civil courts system. The judgment gave some much needed guidance on concurrent liabilities under contract and tort. There have been several cases on either side of the fence for a number of years and the law was in need of clarification.

Lord Justice Jackson found that:

1. Contract and tort are different sources of obligations. Just because there is a contract between parties, it does not necessarily follow that there will be a parallel duty of care in tort.
2. For a duty of care in tort to arise, there must have been some assumption of liability to prevent economic loss (for example, in a retainer from a solicitor or accountant, to provide professional advice).

Lord Justice Jackson commented that even if the contract had not been limited in the manner that it was, there was nothing to show on the facts that a duty of care had arisen.

The case makes it clear that claims for purely economic loss (the cost of remedial works or the reduction in value of a property) are very unlikely to be recoverable as a remedy for the negligent actions of a builder in the construction of a property. Contracting parties are, ultimately, free to negotiate the terms of their obligations to each other, which may include limitations on the extent and timeframe within which claims for defects can be made. Whilst negligence remains the appropriate forum for claims concerning defects that are so serious that they have caused personal injury, the cost of remedial works to fix something that simply has not been built properly remains an issue to be dealt with under contract law.

For further information please contact:



Jane Ryland

Partner

T: +44 (0)1892 506 354

E: jane.ryland@crippslaw.com

Cripps Harries Hall LLP

Wallside House
12 Mount Ephraim Road
Tunbridge Wells
Kent TN1 1EG

T: +44 (0)1892 515 121

F: +44 (0)1892 544 878

E: reception@crippslaw.com

DX: 3954 Tunbridge Wells

www.crippslaw.com

London office: 53 Chandos Place, London WC2N 4HS

T: +44 (0)20 7930 7879

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