

## Inconsistent authorities in the Court of Appeal?

*Robinson v PE Jones (Contractors) Ltd* [2010] EWCA Civ 9 and  
*Barclays Bank plc v Fairclough Building Ltd and others* (1995) 76 BLR 1

### First instance decisions pre *Robinson*

The question whether building contractors owe concurrent duties of care in tort to protect their employers against economic loss has been discussed in a number of first instance decisions of official referees and TCC judges.

In *Storey v Charles Church Developments plc* (1995) 73 ConLR 1 Judge Hicks QC, sitting as an official referee, held that there was such a duty. In *Payne v John Setchell Ltd* [2002] BLR 489 Judge Humphrey Lloyd QC considered that there was not: see paragraph 30. In *Tesco Stores Ltd v Costain Construction Ltd* [2003] EWHC 1487 (TCC) Judge Seymour QC considered that there was such a duty: see paragraph 230. In *Mirant-Asia Pacific Ltd v Ove Arup & Partners International* [2005] PNLR 10 Judge Toulmin CMG QC held that engineers owed concurrent duties of care in contract and tort to protect their clients against economic loss. However, he indicated that contractors might be in a different category: see paragraphs 395 to 397.

### *Robinson*

The issue has now been considered in detail in the well known decision of the Court of Appeal in *Robinson v PE Jones (Contractors) Ltd* [2010] EWCA Civ 9. In short, the claimant house owner claimed damages in respect of alleged defects against the defendant builder from whom he purchased his house. By the time the defects became apparent the limitation period for a claim in contract had expired. The contract contained provisions that were of potential relevance to the existence and scope of a duty of care in tort in respect of economic loss. However, Jackson LJ, who gave the lead judgment, decided that no duty of care was owed on a basis that was not dependent on these terms. He held that absent an assumption of responsibility, one contracting party does not owe the other a duty of care co extensive with his contractual obligations; that whilst there is commonly an assumption of responsibility by a professional viz a viz his client, the same is not true of a contractor and his employer; that this was a straightforward building contract with no indication of any assumption of responsibility; and that accordingly the builder did not owe the employer a duty of care in respect of economic loss.

Jackson LJ's judgment does not indicate in express terms what circumstances may be sufficient to take the relationship between contractor and employer out of the normal run of things so that the former may be found to have assumed a responsibility to the latter. However, reading between the lines, it seems that the message is that absent the contractor taking responsibility to provide a professional service such as the design of the works, such findings will be rare.

### *Barclays Bank*

The earlier decision of the Court of Appeal in *Barclays Bank plc v Fairclough Building Ltd and others* (1995) 76 BLR 1 also considered the existence and scope of a duty of care owed between one party to a building contract to the other, albeit in that case by a sub sub contractor to a sub contractor. In

*Barclays Bank*, Barclays contracted with Fairclough for the cleaning of the corrugated asbestos roofs on two of its warehouses. Fairclough subcontracted the work to Carne who sub sub contracted it to Trendleway. In the course of cleaning the roofs, Trendleway created an asbestos slurry which caused Barclays economic loss. In contribution proceedings between Carne and Trendleway the Court of Appeal had to consider whether Trendleway owed Carne a duty of care in tort in respect of economic loss. Applying the decision in *Henderson*, the Court of Appeal held that Carne did. The reason was that Carne was a specialist contractor providing a service: “A skilled contractor undertaking maintenance work to a building assumes a responsibility which invites reliance no less than the financial or other professional adviser does in undertaking his work” (page 24C)

### Discussion

Although the decision in *Barclays Bank* is not referred to in the judgments of the Court of Appeal in *Robinson*, it is referred to and heavily relied on by the judge at first instance in paragraph 37 of his judgement. The judgment in *Barclays Bank* must, therefore, have been clearly in the minds of the Court of Appeal in *Robinson* albeit not specifically referred to in the judgments.

At first blush, the reasoning in *Barclays Bank* may be argued to be inconsistent with *Robinson*. If a skilled contractor undertaking maintenance work assumes a responsibility which invites reliance, it is difficult to understand why a skilled contractor undertaking building work doesn't. However, it is suggested that the two cases can be reconciled on the footing that the Court of Appeal in *Robinson* did not say a contractor never assumes a responsibility to the employer (Jackson LJ paragraph 82); and that the earlier decision of the Court of Appeal in *Barclays Bank* can be understood as a decision that the particular nature of the work that the contractor agreed to carry out – the provision of a service by a specialist contractor as opposed to the execution of building work – took the case out of the normal run leaving room for a finding that there was an assumption of responsibility.

If that is right, then it leaves the question whether *Barclays Bank* can safely be relied on as authority for the proposition that a building contractor, who provides a specialist service rather than building work as such, will be taken to have assumed a responsibility to his employer. It is respectfully suggested that it cannot be. It is suggested the views of the editors of the Building Law Reports will prove prescient (76 BLR 4) if and when *Barclays* is cited as authority for the proposition that a builder, who provides a specialist service, assumes a responsibility to his employer:

“We would respectfully suggest that the approach of the Court of Appeal is too wide, and that it ought to be treated with considerable care. It should not be enough to rely solely upon the existence of a contract to provide a service (or to do work) to give rise to a duty of care, although the fact that there is a contract and its terms will be material in considering whether or not any duty existed and its extent. Thus we would suggest that the decision of May J in *Nitrigin Eireann Teoranta v Inco Allows* (1991) 60 BLR 65 has not been overruled by *Henderson* and should be decided in the same way today. In that case, the judge was pressed with the argument that a specialist manufacturer of pipework who knew the purpose for which its pipes were needed owed a *Hedley Byrne* duty to its employer. May J had no hesitation in rejecting that argument.”

The views of the editors of the Building Law Reports are bolstered by the fact that May J's decision in *Nitrigin* was relied on by Jackson LJ in his analysis of the law in *Robinson* and by Jackson LJ's

comment (at paragraph 69) that “although *Nitrigin* is a first instance decision, it commands respect because of the force of the reasoning in the judgment. Also it should be noted that the trial judge in *Nitrigin* was a specialist in this field as well as being the then editor of *Keating on Building Contracts*.”

### Conclusion

Where a contractor provides the employer with something in the nature of a professional service (for example, by carrying out the design of part or all of the Works) there will generally be no difficulty in finding an assumption of responsibility in respect of that element of the contractor’s work. Absent something of that sort, it is suggested that the cases where an assumption of responsibility is found will be few and far between. In particular, it is respectfully suggested that if and when the matter falls to be reconsidered in the future, *Barclays Bank* is likely to be held to be one of those cases that turns on its special facts and from which no general propositions can be derived.

Michael Curtis QC