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# Professional Negligence Update

Speaker:  
Vincent Moran QC  
6 July 2016



Case No. 1 

*MW High Tech Projects UK Ltd v HEC GmbH* [2015] EWHC  
152 (TCC)  
158 Con LR 260

- MW – contractor for design and build of waste to energy plant
- HEC – sub-consultant for development of design of process engineering elements of the plant

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## Legal Issues



- Interaction of strict and due care contractual obligations
- Was only obligation to provide a non-negligent end design?
- Was it appropriate for the Court to make any declarations?

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## Nature of Obligation



- HEC had to comply with their general obligation to take reasonable skill and care in design service
- And their specific obligation to design in accordance with the EPC Output Specification and EPC Delivery Plan
- Thus a non-negligent design could be an over-design in breach of contract

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## Availability of Declaration



- Declarations should be granted 'sparingly'
- Key issue is whether the declaration would serve some useful purpose
- The current dispute was not hypothetical and therefore there was utility in making declarations

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## Case 2



*Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146

[2016] 2 WLR 1351; 163 Con LR 53

- Wellesley – employment search/head hunting consultant
- Withers – firm of solicitors

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## Legal Issues



- Test for remoteness of damage where concurrent contract and tort duties
- Application of loss of a chance measure of damages

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## Remoteness of Damage



- Contract: damage of relevant kind not unlikely to result from breach
- Tort: damage must be of a kind that is reasonably foreseeable
- Concurrency: test should be the same + be the contractual one

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## Loss of a Chance



- Does identity of a head of loss depend upon a 'loss of chance'
- Pure loss of a chance: competition
- Other situation: where recoverability depends upon the actions of a third party whose conduct is a critical causal link
- Causation criterion: real and substantial chance of loss of latter
- Quantification: assess chance on facts

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## Case No. 3



*Burgess v Lejonvarn* [2016] EWHC 40, TCC  
[2016] TCLR 3, [2016] Con LR

Mr and Mrs Burgess – the clients

Mrs Lejonvarn – the architect

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## Legal Issues



- (1) Was there a contract?
- (2) Was there a duty of care?
- (3) Was there a distinction between a duty of care in respect of the provision of advice and a duty in respect of supervision?

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## Was there a contract?



- No, for three reasons:
- No offer and acceptance or clarity of terms
- No intention to be bound by a contractual relationship
- No consideration

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## Was there a duty of care?



Yes, despite the lack of contract and the gratuitous nature of the services provided

*Robinson v P.E.Jones (Contractors) Ltd*, Jackson LJ

*Henderson v Merrett Syndicates Ltd*, Lord Goff

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## The test as to whether a duty is owed



- (a) Assumption of responsibility
- (b) Reliance by the recipient
- (c) Is a remedy in law appropriate in all the circumstances

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## Duty in respect of supervision?



- Was there a distinction between a duty of care in respect of advice and a duty in respect of supervision of work?  
No
- Henderson v Merrett citing Hedley Byrne
- Contrast Murphy v Brentwood

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## Postscript



- Permission to appeal has been granted
- Jackson LJ, October 2014 lecture for Tecbar/SCL

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## Case No. 4



Wattret v Thomas Sands Consulting Ltd [2015] EWHC 3455, TCC

[2016] BLR 104, [2016] PNLR 15

Mr and Mrs Wattret: the clients

Thomas Sands: the claims consultants/QSs

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## The legal issue



- Was expert evidence appropriate?
- Contrast a claim against solicitors for mishandling an arbitration claim. See Bown v Gould & Swayne.

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- Yes, but subject to constraints
- Distinguish work of solicitors from work of claims consultants – there may be differences
- Someone from the same professional field is required

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## The constraints



- Identify the specific points for expert evidence by a list which cross refers to the pleadings
- Agree the list between the parties
- In default, the Court will decide

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## Case No. 5



### William Clark Partnership Ltd v Dock St PCT Ltd [2015] EWHC 2923 (TCC)

- Primary Healthcare Centre
- Clark: QS and Project Management
- Dock St: Developer
- Clark's Claim: Fees of £174,500
- Dock's Claim:
  - Abatement/Deduction of Fees
  - Overspend of £700k
  - Adjudication Costs

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## Points of Principle



- **Trigger Point of Payment of Fees**
  - Fixed sum: £300,000 due in accordance with stage payments
- **Can you abate/deduct from Fees?**
  - No abatement – *Multiplex*
  - But may deduct...
- **Recovery of cost overrun**
  - Standard defence of QS: Costs incurred in any event
  - Unnecessary Variations
  - Settlement reached with Contractor

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## Deduction



“I am satisfied that it is open to [the Defendant] to defend itself in relation to a claim for payment ... by contending that all, or some specific part, of those services were either not performed at all or were performed so poorly that they were worthless. [The deduction is] the value of that specific part. ... [The Defendant] may not ... contend that ... the services were performed, but not fully or properly...”

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## Settlement Agreement



“There was a clear breach in failing to provide any detailed analysis of the final account claim. There was a clear loss in that in January Dock Street had to accept a settlement for more than could have been achieved in July 2012. In negotiating... [D] had nothing to put before [C] ... it is a commonsense conclusion that the failure to provide the analysis was a substantial and effective cause of the failure to achieve the same settlement in January 2013. ... [D] was unable to make bricks without straw.”

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## Case No. 6



### Montgomery v Lanarkshire Health Board [2015] UKSC 11

➤ Lord Justice Jackson:

“... many claimants have had their guns trained on *Bolam*.  
... Finally just a month ago, the invaders captured the  
citadel. In *Montgomery* ... the Supreme Court held that  
the majority in *Sidaway* [upholding *Bolam*] was wrong.  
The *Bolam* test did not determine the extent of a doctor’s  
duty to advise.”

(PNBA Lecture 21 April 2015)

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## Case No. 7



### Waterman Transport Ltd v Torchwood Properties Ltd [2015] EWHC 1446, TCC Akenhead J

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## The legal issue



- Should the counterclaim for professional negligence be struck out without a trial?
- Yes, for two reasons.

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- In the absence of expert evidence to support it.
- By reason of the deficiencies in the pleading, Necessary to show why a person is professionally negligent. Getting something wrong is not the same as negligence.

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## Case No. 8



*Mutual Energy Ltd v Starr Underwriting Agents Ltd & Travellers Syndicate Management Ltd* [2016] EWHC 590 (TCC)

- MEL – owners of undersea electricity cable
- Defendants – insurers of cable

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## Legal Issues



- Avoidance of policy for material non-disclosure
- Meaning of “deliberate ... non-disclosure”
- Same or different to “fraudulent”
- Did it cover innocent but intentional non disclosure (insurers), or
- Did it require an element of dishonesty

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## Construction of Contracts



- Summary at [14]
- Wood v Sureterm Direct Ltd [2015] EWCA Civ 839 at [28]-[31]
- Meaning of words used crucial [section 5.2]
- Contractual context [5.3]
- Business common sense [5.4]

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## Meaning of Deliberate



- Must involve dishonesty
- i.e. a deliberate decision not to disclose something that MEL knew should have been disclosed to insurers

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## Case No. 9



Walter Lilly & Co Ltd v Clin [2016] EWHC 357

- Walter Lilly – building contractors
- Mr Clin – owner of property to be renovated
- RBKC – local planning authority

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## Legal Issues



- Responsibility for obtaining planning consent
- Nature and extent of Employer's obligations
- Allocation of risk under the building contract for third party interventions causing delay/loss

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## Planning Obligation



- A limited scope of contractual responsibility on the part of an Employer under a Standard Form JCT Building Contract for obtaining necessary planning and conservation area consents for a residential development in Kensington.
- Employer under a strict obligation to deliver the required information in sufficient time for the planning department to provide any lawfully required planning consents.

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## Allocation of Risk



- The Court rejected the Claimant's case that, as a matter of principle and contract, all risks associated with obtaining planning consent (including delays on the part of the planning department in dealing with the same and any unlawful or capricious steps taken by the local authority that may delay a project) were carried by the Employer.
- This now subject of a proposed appeal

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## Case No. 10



### Cofely v Bingham & Knowles [2016] 1 BLR

- Liability of arbitrators for costs of arbitration claims in Court.

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# Thank you

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