Love thy neighbour...but don't give them any advice!

The first TCC judgment of the year, *Burgess & Burgess vs Lejonvarn* [2016] EWHC 40 (TCC), is of particular interest to both architects and their insurers, as it discusses and distinguishes between a contractual relationship and one that gives rise to an assumption of responsibility in tort.

The defendant provided the claimants, her neighbours and friends, with free architectural and project management services on a project to landscape the claimants' garden. The claimants alleged that the defendant was legally responsible for architectural design, procurement, project management and supervision, budgeting and cost control of the works; and that these services were defective. They sued the defendant both in contract and in tort and claimed damages. The defendant denied that she was legally responsible for the provision of any of these services.

Alexander Nissen QC, sitting as a Deputy High Court Judge, had to decide a number of preliminary issues, including whether the conduct and, mostly email, exchanges between the parties had given rise to a contract for the provision of these services. He also had to decide whether, on the same set of facts, the defendant assumed responsibility for these services and was under a duty of care to the claimants to perform them with reasonable skill and care.

These issues were particularly difficult to resolve because the claimants and the defendant were for many years good friends and neighbours and their email exchanges therefore contained a mixture of social and professional messages. There was also a history of previous dealings between the parties where the defendant had provided Mr Burgess and his company with architectural services on other projects, both on an informal and formal basis.

In his judgment, Nissen QC carefully considered the written, mostly email, exchanges between the parties and their conduct and he concluded that they had not concluded a contract. This was on the basis that he found it impossible to draw out and identify from the emails any clear form of offer or acceptance, whilst he considered that the written discussions were simply too "inchoate" for that purpose. He wasn't satisfied that there was a sufficient consensus about the broad basis upon which the defendant was being retained by the claimants. For example, in the parties' emails, there was no discussion about the duration of the services, nor how they could be terminated, nor any other clauses typically to be expected in a professional's terms of engagement. And the parties never discussed or even mentioned the notion that they would be entering into a contract between themselves. Perhaps most importantly, there was no discussion about remuneration and, as Nissen QC stresses in his judgment, a promise is not binding as a contractual obligation unless it is supported by consideration. In the

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circumstances, Nissen QC concluded that there was a lack of clarity over the terms (if any) upon which the defendant would provide the claimant with professional services, and that it was plain that there was no contract between the parties. The claim in contract therefore failed.

As to the claim in tort, since the losses claimed by the claimants were purely economic losses, in order to succeed with the claim they would have to show that the defendant had assumed responsibility in respect of the services she provided, and that they relied on the defendant to provide these services with reasonable skill and care.

The defendant argued that, if the evidence was not clear enough to prove that a contract was concluded, then it could not be clear enough to prove an "assumption of responsibility" in tort. In other words, if there was a lack of clarity over the terms (if any) upon which services would be provided, then there must also be a lack of clarity over the scope of any duty of care. Nissen QC did not consider this to be a problem, as the nature and scope of the services that the defendant agreed to provide were clear enough, even if the terms (if any) on which those services were to be provided was not clear. The Judge also found that the fact that the services were provided gratuitously did not mean that they were "informal" or "social" in context; they were all provided in a professional context and on a professional footing.

The defendant also argued that the law distinguishes between advice, on the one hand, and the provision of services such as supervision, on the other. The defendant accepted that design work could constitute a form of statement or advice, giving rise to a liability based on the decision in the case of *Hedley Byrne v Heller*, but she argued that the act of supervision could not be treated as "advice" and was a step too far. Nissen QC rejected this submission and held that it was clear from the authorities (particularly *Henderson v Merrett*) that no distinction should be drawn between the provision of advice and the provision of services where a special skill is exercised. The Judge noted that the authorities also show that a duty of care may be found to arise even in circumstances where services are performed gratuitously and in the absence of a contract. However, as identified by Lord Goff in *Henderson*, in the absence of a contract it is important to exercise greater care in distinguishing between social and professional relationships.

Nissen QC noted that, in determining whether a duty of care was owed, the court should not be concerned about the subjective thoughts and intentions of the parties - the question is how they behaved and spoke to each from an objective perspective. He considered that the parties did not conclude a contract for the provision of professional services but that the defendant did agree over a period of time to, and did in fact, provide a series of professional services for the claimants. Whilst the defendant did not agree a fee for the services, she did intend to charge a fee for the later phase of the project and that did not mean that the services were not part of a professional relationship. The scope of the defendant's design and project management services were clearly set out in an email and the defendant admitted in the same email that her responsibility was to work in the claimants' best interests. Nissen QC adopted the terminology of Mr Justice Akenhead in *Galliford Try Infrastructure Ltd v Mott MacDonald Ltd* (2008) 120 Con LR 1 (TCC), and said that "the relationship between the parties was akin to a contractual one even though no contract had been concluded". The claimants were the defendant's "clients", albeit not in a contractual sense, and there was an obvious and sufficient relationship of proximity between them as a result. The defendant was acting as a project manager

and was and/or should have been, well aware that the claimants were relying on her to perform those services properly.

Nissen QC therefore concluded that the defendant assumed responsibility to the claimants for performing professional services relating to their garden project and they specifically relied on her for that purpose. Accordingly, a duty of care existed between them.

This is an interesting judgment as it shows how difficult it is in practice to distinguish between a contractual relationship and a "special relationship", or in the words of Lord Shaw in *Nocton v Lord Ashburton* [1914] AC 932, 972, a relationship which is "equivalent to contract", that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. It also illustrates the risks and consequences of not reducing a contract to writing.

But perhaps, sadly, it also seems to support the age old saying that you should not mix business and pleasure. If you do so you risk destroying your friendship and if there is a dispute it may prove difficult and expensive to determine whether your relationship was social, professional or contractual.

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