Formal borders? Landscaping the Duty of Care in the absence of contract

The Court of Appeal in *Lejonvarn v Burgess* recently considered the circumstances in which a duty of care in tort can arise in the complete absence of a contract or, indeed, any intent to form a contract. Lord Justice Hamblen’s leading Judgment (approving the first instance Technology and Construction Court decision of Mr Nissen QC) confirmed that a duty of care in respect of professional services can be assumed in tort, even where the parties had no intention of forming a contract for the provision of those services. Put briefly, what a party says and does in particular circumstances can be enough to justify the finding of a duty of care in relation to services provided. The case contains some illuminating discussion as to how a duty of care in tort can arise between parties in the absence of any other legal connection between them. It is not new law, but it confirms the application of *Merrett v Henderson*.

Mr & Mrs Burgess were close friends with Mrs Lejonvarn, who was a professional architect. The Burgesses had been generous to Mrs Lejonvarn in a number of respects over the years, which may have in part influenced Mrs Lejonvarn’s decision to provide gratuitous professional services to the Burgesses in respect of a substantial garden project. The Burgesses intended to dig out, alter levels and landscape their garden at a total cost of well in excess of £50,000. Mrs Lejonvarn offered to assist with the project, undertaking a number of services of a professional nature including identifying the proposed contractor (Hardcore Builders Ltd), discussing the scope of work with that contractor and providing quantified estimates for the work. She also attended site at regular intervals to direct, inspect and supervise the contractors’ work, its timing and its progress. In addition she received applications for payment from the contractor and advised the Burgesses as to payment of the contractor.

Unfortunately, after a large amount of initial groundworks had been undertaken, the project faltered over the issue of costs and the quality of workmanship on site. The Burgesses had understood that the cost of the groundworks was to be c£78,000, whereas Mrs Lejonvarn was working to an alleged budget of c£138,000 for those works. The Burgesses brought a claim for damages against Mrs Lejonvarn, alleging negligence in the provision of a
number of architectural services. The Technology and Construction Court was called to rule upon some preliminary issues and found that, whilst there was no contract between the parties, Mrs Lejonvarn did owe the Burgesses a duty of care in tort in relation to various services provided.

Mrs Lejonvarn appealed against this decision, arguing that a duty of care in tort could not arise in the particular circumstances of this case. The Court of Appeal found as follows:

1) This was a case in which the losses claimed were 'pure economic loss'. In other words, the garden works in relation to which Mrs Lejonvarn undertook certain services were themselves allegedly defective in a number of respects. As such, it was 'the thing itself' that was damaged. In line with the decision in Henderson v Merrett, a professional could assume a responsibility to prevent pure economic loss where the relationship is of sufficient proximity and there is reliance upon specialist professional skills. Both those features arose in this case. Whilst the parties did not form a contract and, indeed, had no intention of forming a contract, the relationship was nevertheless on the evidence 'akin to a contract'. The Court found that Mrs Lejonvarn voluntarily tendered "skilled professional services in circumstances where she knew the Burgesses would rely on the proper performance of those services." In these circumstances, there was no need for the three stage test set out in Caparo v Dickman to be fulfilled, namely: i) was the loss reasonably foreseeable? ii) was there sufficient proximity? ii) was it fair, just and reasonable in all the circumstances to impose a duty of care. The assumption of responsibility test effectively subsumed all aspects of that threefold approach.

2) LJ Hamblen expressly stated: "The judge also found that it was not possible to identify an offer and acceptance and that there was no intention to create contractual relations. These are relevant considerations to whether there has been an assumption of responsibility, as the judge recognised, but in my judgement they are not determinative."

3) The factors weighing in favour of finding that Mrs Lejonvarn assumed a duty of care in this instance were as follows:

   - This was not a case of brief ad hoc advice
The services were provided over a relatively lengthy period of time

The services involved significant commercial expenditure on the part of the Burgesses

Neither party saw this as a favour given without legal responsibility (Mrs Lejonvarn used the word ‘professional’ in the description of her role on more than one occasion)

Although there was no consideration, Mrs Lejonvarn did hope the services would lead to further paid work

The losses allegedly sustained were of a type that would be expected to flow from a failure to perform the services competently.

Finally, one important feature of the Court of Appeal’s ruling is the following distinction: there was no duty to provide future services, only duty to ensure that what services were as a matter of fact undertaken were carried out with reasonable skill and care. The duty was to “exercise reasonable skill and care in providing the professional services which Mrs Lejonvarn did in fact provide….she did not have to provide any such services, but to the extent that she did so she owed a duty to exercise reasonable skill and care…”

Having successfully resisted Mrs Lejonvarn’s appeal in relation to preliminary issues, the Burgesses claim will now proceed in the Technology and Construction Court if it is not capable of settlement. As well as cautioning against the risks of becoming professionally involved with friends, the case is a timely reminder that the tort of negligence steps in to impose a duty where otherwise there would be none, where a professional conducts tasks for someone who relies upon their expertise whether any money changes hands or not. As such, professionals should take due note.

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