



## LEGAL BRIEFING

### *Linklaters Business Services (formerly Hackwood Services Company) v (1) Sir Robert McAlpine Ltd (2) Sir Robert McAlpine (Holdings) Ltd (3) How Engineering Services (4) How Group Ltd (5) Southern Insulation (Medway) Ltd* [2010] EWHC 1145 (TCC), The Honourable Mr Justice Akenhead

The basic principle with respect to latent damage was set out by Lord Bridge in the well-known case of *Murphy v Brentwood District Council* (1991): if a builder erects a structure containing a latent defect which results in injury to person or damage to other property, he will be liable in tort. However, if the latent defect merely damages the building itself and can be repaired at a cost, that loss is purely economic loss and cannot be recovered in tort.

Prior to the *Murphy* case however, it was thought that there could be situations where one element of a building could be regarded as distinct from another, so that damage to one part of the structure caused by a hidden defect in another part, might qualify as "other property" and therefore be recoverable in tort. This is known "Complex Structure Theory".

The theory has hardly survived over the past 20 years given the wide acceptance of the House of Lords' decision in *Murphy*. However, the present case suggests that there may be some hope yet. Will we see a revival of the complex structure theory?

#### ***The Facts***

The Claimant ("Linklaters"), a company associated with the well-known solicitors Linklaters LLP, appointed a developer to undertake extensive refurbishment works to their premises at 1 Silk Street, London. The developer engaged Sir Robert McAlpine Ltd (the "Main Contractor") who in turn engaged a specialist mechanical and electrical engineering subcontractor, How Engineering Services ("HES"). HES then entered into a further subcontract with Southern Insulation Ltd ("Southern Insulation") to supply and install the thermal insulation to the vertical chilled water pipework. The refurbishment works were completed in 1996.

In October 2009, Linklaters commenced proceedings against the Main Contractor with respect to a leak found in 2006 in one of the vertical chilled water pipes. Linklaters allege that extensive rust or corrosion occurred as a result of the Main Contractor's failure to apply the thermal insulation and vapour barrier to the pipework. The Main Contractor, in Part 20 proceedings, is seeking indemnities or contributions from HES, and HES of course assert that they are entitled to a contribution from their subcontractor Southern Insulation.

In this application, Southern Insulation sought summary judgement on the grounds that HES have no reasonable prospect of success against Southern Insulation, or alternatively, that the HES contribution claim be struck out as there are no reasonable grounds for the claim. Southern Insulation asserted that, as the loss Linklaters claim to have suffered is pure economic loss, no duty of care exists or extends to cover such loss.

HES argued that the damage caused by Southern Insulation's negligence is damage to work or materials or elements of the building that was not provided by Southern Insulation. As such, this gives rise to an action in tort and therefore HES are entitled to claim a contribution from them.

---

### *The Issue*

Did Southern Insulation owe Linklaters a duty of care in respect of the supply and installation of the thermal insulation to the pipework?

### *The Decision*

Mr Justice Akenhead held that this case was not suitable for striking out or for summary judgement. He found that the earlier cases said to be of binding authority, did not specifically address the extent of any duty of care owed by a subcontractor or supplier who provides an element of the building being constructed. Such cases as *Murphy, D&F Estates v Church Commissioners for England* and *Bellefield Computer v E Turner & Sons* were primarily concerned with whether the overall builder of the whole building owes a duty of care to owners or occupiers of that building with whom it has not been in contract.

The Judge stated:

*"What has not been explored and examined in any great detail is the extent of the duty of care owed by those in the position of subcontractors ... and suppliers whose carelessness in and about providing the work, materials, services or equipment which are incorporated into a building or structure causes consequential damage to other elements of the building. The scope of this duty and where the diving lines are remain to be explored."*

Mr Justice Akenhead therefore found that the points of law raised were ones which might go either way and is area of law which is still developing. Therefore, it will be necessary at trial to establish what happened between all the parties to determine the liability of the Main Contractor, the subcontractor and the sub-subcontractor. Accordingly, Southern Insulation will still be involved in the forthcoming proceedings.

Mr Justice Akenhead gave permission to appeal on the grounds that "it raises interesting and important issues of law upon which the Court of Appeal might well wish to rule."

### *Comment*

As some broad indications as to what may or may not be covered by any duty of care owed by subcontractors, Mr Justice Akenhead referred Lord Jauncey in the case of *Murphy v Brentwood* who held that defects in ancillary equipment such as central heating boilers or electrical installation, that gave rise to damage to other parts of the building, could be recoverable. Furthermore, Lord Jauncey gave support to the limited application of the complex structure theory in the case of a "building where one integral component of the structure was built by a separate contractor and where a defect in such a component had caused damage to other parts of the structure..."

It appears that after nearly 20 years, the case put forward by Lord Jauncey has now found favour in the court. Mr Justice Akenhead's decision has the potential to greatly widen the liability of subcontractors, subject of course to the result of any appeal that may be made.

*Stacy Sinclair  
June 2010*

---