PROPERTY BRIEFING: ARTICLE 1

In this edition of 1 Chancery Lane's Property Briefing Justin Althaus discusses **the consequences, in negligence claims, of whether a contract is present.**

Claimants invariably plead that professional defendants owe them concurrent duties in contract and tort. *Burgess v Lejonvarn [2016] EWHC 40 (TCC)* illustrates that it isn't always so. The case is also, in the words of the judge (Alexander Nissen QC), something of a cautionary tale.

The Burgesses and the Lejonvarns were friends and near neighbours in Highgate, north London. Mrs Lejonvarn described herself to the Burgesses as an architect, but although she had architectural qualifications and worked for a firm of architects she was not herself registered as one in the UK. Prior to the dispute, however, she had been providing Mr Burgess or his company with architectural services through the firm in connection with a number of projects.

In August 2012 the Burgesses had paid an eminent landscape gardener to redesign their garden and quote for its construction. The quote came in at more than the Burgesses were prepared to pay. Mrs Lejonvarn saw the design plans at the Burgesses' London Olympics party. She commented that the price reflected the garden designer's reputation and that the work could actually be done at the half the price.

The Burgesses "took the hint" and asked Mrs Lejonvarn to do the garden herself. She agreed, saying that she would refine the existing design, work up a detailed costing, engage her regular contractors and supervise the work. She said that she wouldn't be charging them through the initial stages of the project.

The Burgesses duly engaged her, the work began, and – of course – the friends fell out. There was a complaint about the standard of Mrs Lejonvarn's supervision, but the principal issue was a 'misunderstanding' as to how much it was now all going to cost: specifically, whether she had provided them with a figure of £78,000 or £130,000.

The court was required to decide a number of preliminary issues, the most important of which were whether Mrs Lejonvarn had entered into a binding contract with the Burgesses, and whether she owed them a duty of care.

In an exhaustive judgment the judge concluded that there was no contract between the parties for two main reasons: (1) there was insufficient consensus between them about the broad basis upon which Mrs Lejonvarn was being retained by the Burgesses; and (2) although there was a clear understanding that she would be paid at later stages in the project, and that the expectation of future payment of fees was in some sense a benefit to her, there was Insufficient consideration to give rise to a legally binding agreement.

On the other hand, the judge was satisfied that Mrs

Lejonvarn had voluntarily assumed responsibility for supervision of the project, and that the circumstances were such that it was appropriate for a tortious remedy to apply in law. A duty of care was therefore owed. Her counsel's attempt to differentiate between design responsibilities, for which there was a preponderance of authority that a duty can be owed (e.g. *Ove Arup v Mirant Asia Pacific* [2004] EWHC 1750), and supervision responsibilities, on which there was no clear authority, was rejected. Henderson v Merrett had extended the Hedley Byrne principle to cover a broad range of circumstances in which "special skill" was being exercised. This was one such circumstance.

Mrs Lejonvarn did not have any professional negligence insurance in place, something the Burgesses did not appear to have realised when they issued proceedings against her. It remains to be seen whether the case proceeds any further.

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