Case No: HT-2019-000235

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2020] EWHC 1982 (TCC)

Rolls Building
Fetter Lane, London, EC4Y 1NL

Date: 24/07/2020

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

RUSHBOND PLC **Claimant**

- and -

THE J S DESIGN PARTNERSHIP LLP **Defendant**

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- -

Geoffrey Brown (instructed by **BLM Solicitors**) for the **Claimant**
Fiona Sinclair QC (instructed by **DWF Law LLP**) for the **Defendant**

Hearing date: 15th June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 24th July 2020 at 10:30am"**

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This claim arises out of a fire that occurred in 2014 at a property owned by the Claimant. An architect employed by the Defendant, accompanied by a structural engineer and a quantity surveyor, carried out an inspection of the property on behalf of a potential purchaser. The Claimant's case is that the architect left the access door unlocked for a period of about one hour whilst they were inside the building. It is not alleged that the visitors started the fire. The Claimant's case is that one or more intruders were able to gain access to the property through the unlocked door and, once inside the building, started the fire. Damages of £6.5 million are claimed in respect of damage caused by the fire.

2. The matter before the Court is the Defendant's application to strike out the claim and/or for summary judgment on the basis that the Statement of Case discloses no reasonable grounds for bringing the claim, the claim has no real prospect of success and there is no other compelling reason for a trial.

Background

3. For the purpose of the Defendant's application, the material facts are not in dispute.

4. The Claimant was the owner of an unoccupied cinema in the centre of Leeds, known as The Majestic. The property was laid out over three storeys and three mezzanine levels, with capacity to seat around 2,500 persons in the main auditorium space. The property was protected by an alarm system and lockable doors, including a side door for which the marketing agents, Pudney Shuttleworth and CBRE, held keys.

5. On 30 September 2014 Mr Jeffrey, of the Defendant architectural firm, visited the property, having been furnished with the key and the code to the alarm by Pudney Shuttleworth. At about 10.15am Mr Jeffrey entered the property by unlocking the side door, using the key, and de-activating the alarm. At about 11.12am, following the inspection, he left the building, re-setting the alarm and locking the door.

6. Shortly before 7.15pm, a fire started on the second floor of the property. The fire spread through the property, causing extensive damage.

Proceedings

7. On 15 July 2019 the Claimant commenced these proceedings, seeking damages against the Defendant in the sum of £6,555,000.

8. At paragraph 16 of the Particulars of Claim, the Claimant pleads that the Defendant owed it a common law duty of care as follows:

> "The Defendants owed a duty of care in tort to the Clamant in relation to the security of the Property during Mr Jeffrey's visit on the above occasion. Such duty arose from them making an unaccompanied visit to the Property. Further or alternatively, it arose from him having disabled the protections in place during and for the purposes of his visit (including, in particular, the lock to the Door)."

9. The breach of duty alleged is that the Defendant, through Mr Jeffrey, failed to exercise proper care for the security of the property during his visit; in particular, by failing to keep the door locked or guarded during his visit.

10. At paragraph 6 of the Statement of Defence, the Defendant denies that it owed to the Claimant a duty of care for a number of reasons, including the following at paragraph 6.2:

> "(a) Mr Jeffrey did not damage the Property, and the Claimant does not allege otherwise.
>
> (b) The third party who, the Claimant alleges, did damage the Property was not under the supervision or control of the Defendant, and the Claimant does not allege otherwise.
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> (c) In those circumstances, the law imposed no positive duty on the Defendant to take care to protect the Claimant's property from harm except and unless the Defendant voluntarily assumed a responsibility to act positively so as to prevent an unidentified third party(ies) harming the Property.
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> (d) The Defendant did not assume any such responsibility.
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> (e) In particular, the facts upon which the Claimant relies do not give rise to such an assumption and the Particulars of Claim disclose no reasonable grounds for the duty alleged:
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> (i) the Claimant relies on the fact that Mr Jeffrey made an unaccompanied visit to the Property. However Mr Jeffrey visited the Property unaccompanied by the Claimant's managing agents not because the Defendant instructed him to do so or because he chose to do so, but solely because each of the Claimant's managing agents expressly allowed and encouraged him to do so;
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> (ii) the Claimant relies on the fact that Mr Jeffrey disabled two protections during and for the purposes of his visit. However Mr Jeffrey necessarily unlocked the Access Door and disarmed the alarm system, thereby disabling two protections at the Property for the duration of his visit, because the visit which each of the Claimant's managing agents expressly allowed and encourage him to make would have been impossible unless Mr Jeffrey had unlocked the Access Door and disarmed the alarm system. It was the Claimant's managing agents which

knowingly provided Mr Jeffrey with the means of disabling those protections. It was the Claimant's managing agents which did not instruct him as to any way in which those protections could safely be maintained during his visit (there was no such way);

(iii) it was reasonably foreseeable that risk of harm to the Property by an unknown third party was (marginally) increased for one hour on the morning of 30 September 2014. However reasonable foreseeability of harm is inadequate to give rise to a duty of care at common law.

(f) Nor do facts other than those upon which the claimant relies permit the conclusion that the Defendant voluntarily assumed responsibility to the Claimant to prevent an unknown third party(ies) from entering and then damaging the Property. In particular, it was not reasonably foreseeable by the Defendant that the Claimant would reasonably rely upon such an assumption of responsibility and the claimant did not so rely…"

11. In its Reply, the Claimant responds to the denial of a duty of care as follows:

"29. It is accepted that Mr Jeffrey did not damage the Property. It is also accepted that the intruder who did damage it was not under his control. But the means of access to the Property used by the intruder was under his control.

30. The disabling of existing protections by Mr Jeffrey did give rise to a duty of care and, indeed, an assumption of responsibility.

31. The Claimant would and did reasonably assume that any visitors to the Property permitted unaccompanied access by the marketing (not managing) agents would take reasonable precautions for the security of the Property, on disabling the existing protections, by locking and/or monitoring the Door, and reasonably relied upon them to do so. That was not dependent on, and did not arise from, it knowing of a particular visit. But in any event, the Claimant was in fact aware of Mr Jeffrey's intended unaccompanied visit, having been notified thereof by Pudney Shuttleworth, and it reasonably assumed he would take such precautions and relied on him to do so. It was also reasonably foreseeable to Mr Jeffrey and the Defendant that it would do so. That there was, admittedly, no direct

> contact between Mr Jeffrey and the Claimant would not and does not negate the above."

The application

12. On 7 May 2020 the Defendant issued its application, seeking an order that the claim be struck out pursuant to CPR 3.4(2)(a) and/or summary judgment be given for the Defendant pursuant to CPR 24.1.

The applicable test

13. CPR 3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court:
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> …
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim …"

14. The test on such an application was helpfully summarised in *Sainsbury's Supermarkets Ltd v Condek Holdings Ltd & Others* [2014] EWHC 2016 (TCC) by Stuart-Smith J:

> "[14] The test to be applied on a strikeout reflects the fact that the question is whether the statement of case itself discloses no reasonable grounds for bringing a claim. So, if the pleaded facts do not disclose any legally recognisable claim against a Defendant, it is liable to be struck out…
>
> [15] For the purposes of these applications I adopt the statement of principle provided by Peter Gibson LJ in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266. There the Defendant had brought applications under both CPR 3.4 and CPR 24. Although the application under CPR 24 permitted the court to take account of evidence, none was relied upon and the applications proceeded on the basis that the facts alleged in the Claimant's pleadings were assumed to be true. At [22]-[23], Peter Gibson LJ said:
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> > "The correct approach is not in doubt: the court must be certain that the claim is bound to fail. Unless it is certain, the case is inappropriate for striking out (see Barrett v Enfield London Borough Council [2001] 2 AC 550 at p. 557 per Lord Browne-Wilkinson)." "

15. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; … and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

16. The test on an application for summary judgment was summarised in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) per Lewison J at [15]:

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001 1 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction

> and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

17. The basis of the application is that the Defendant did not owe a duty of care to protect the Claimant from fire damage caused by the deliberate or careless actions of an unknown third party for whom the Defendant was not responsible.

18. The Court is not invited to determine any issues of fact for the purposes of the application.

19. It is common ground on the pleadings that:

    i) there were no direct dealings between the Claimant and the Defendant;

    ii) the Claimant entrusted the keys to the property to letting agents;

    iii) the letting agents gave the keys to Mr Jeffrey of the Defendant firm, did not to accompany him on his visit and did not instruct him that the door should be locked and/or monitored during his visit;

    iv) during Mr Jeffrey's visit, the side door was unlocked and the alarm system was de-activated;

    v) when Mr Jeffrey left the building, he locked the side door and re-activated the alarm.

20. The Court must consider whether, on the facts as pleaded, the claim is bound to fail, having regard to the applicable legal principles. The issue is confined to a point of law. All the relevant facts are before the Court and the parties have had an opportunity to make full submissions. This indicates that nothing would be gained by delaying a determination of the issue and the Court should decide it. However, the Court must also consider whether there are any potential arguments that could be advanced by the Claimant to extend the ambit of the case law in this area even if the issue of law

would be decided against it and, if so, whether that might be an alternative reason for allowing the case to proceed to trial.

Parties' submissions

21. Ms Sinclair QC, leading counsel for the Defendant, submits that the Defendant did not owe a duty of care to protect the Claimant from fire damage caused by the deliberate or careless actions of an unknown third party for whom the Defendant was not responsible. Ms Sinclair submits that it was not reasonably foreseeable by the Defendant that there would be property damage by fire caused by an intruder if Mr Jeffrey did not lock himself in the building during his visit. The chain of events, whereby the intruder gained entry to the property, concealed himself, remained undetected by the alarm system after the visitors had left, and started the fire, was not probable. Although the Defendant has admitted on the pleadings that it was reasonably foreseeable that there was an increased risk of harm to the property by an unknown third party during the visit, Ms Sinclair correctly submits that mere foreseeability of harm is not sufficient to give rise to a duty of care in tort. Generally, the common law does not impose a positive duty to take care to protect others from harm. There are exceptions to that rule but they do not apply on the assumed facts. The Defendant did not create the danger and there was no assumption of responsibility by the Defendant to the Claimant in this case.

22. Mr Brown, counsel for the Claimant, submits that this is not a pure omissions case because the Defendant disabled the lock and alarm whilst inside the building, thereby creating the danger and/or playing a causative part in the train of events that led to the risk of damage. He relies on the Defendant's admission in its defence that it was reasonably foreseeable that there was risk of an intruder gaining access to the building during the visit. It is not simply a case of failing to prevent a third party causing damage to the property but of the Defendant creating, or permitting the creation of, a source of danger. Even if this were a pure omissions case, the imposition of a duty of care is not limited to cases where there have been direct dealings between the Claimant and the Defendant. The Defendant assumed responsibility for securing the door during the inspection as a visitor with a special level of control over the source of danger. At the very least, it is reasonably arguable that the categories of exception are not closed and in the circumstances of this case there was a duty of care.

Applicable legal principles

23. In *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 Lord Toulson considered the circumstances in which a duty of care in tort would be imposed:

> "[103] From time to time the courts have looked for some universal formula or yardstick, but the quest has been elusive. And from time to time a court has used an expression in explaining its reasons for reaching a particular decision which has then been squashed and squeezed in other cases where it does not fit so aptly. "
>
> [104] Lord Wilberforce's two-stage formula in *Anns* appeared at first to usher in a new era of development in the law of negligence, in which prima facie liability at the first stage was

> drawn very widely but could be negated or cut down by policy considerations at the second stage.
>
> …
>
> [106] Doubts about the *Anns* formula were expressed by the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 and echoed in subsequent English decisions. In *Caparo Plc v Dickman* [1990] 2 AC 605 Lord Bridge (with whom Lords Roskill, Ackner and Oliver of Aylmerton agreed) emphasised the inability of any single general principle to provide a practical test which could be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope. He said, at pp 617-618, that there must be not only foreseeability of damage, but there must also exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood", and the situation should be one in which the court considers it fair, just and reasonable that the court should impose a duty of a given scope on one party for the benefit of the other. He added that the concepts both of "proximity" and "fairness" were not susceptible of any definition which would make them useful as practical tests, but were little more than labels to attach to features of situations which the law recognised as giving rise to a duty of care. Paradoxically, this passage in Lord Bridge's speech has sometimes come to be treated as a blueprint for deciding cases, despite the pains which the author took to make clear that it was not intended to be any such thing.
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> [107] The *Anns* formula was finally disapproved in *Murphy v Brentwood District Council* [1991] AC 398."

24. The Supreme Court provided further clarification of the circumstances in which a duty of care would arise in *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4. Lord Reed stated:

> "[21] The proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson pointed out in his landmark judgment in *Michael v Chief Constable of South Wales Police (Refuge and others intervening)* [2015] UKSC 2; [2015] AC 1732, para 106, that understanding of the case mistakes the whole point of *Caparo*, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities.

…

[25] Lord Bridge [adopted] an incremental approach, based on the use of established authorities to provide guidance as to how novel questions should be decided:

> "I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43-44, where he said: 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories ...'" (p 618)

It was that approach, and not a supposed tripartite test, which Lord Bridge then proceeded to apply to the facts before him.

[26] Applying the approach adopted in *Caparo*, there are many situations in which it has been clearly established that a duty of care is or is not owed: for example, by motorists to other road users, by manufacturers to consumers, by employers to their employees, and by doctors to their patients. As Lord Browne-Wilkinson explained in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 560,

> "Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company ... that decision will apply to all future cases of the same kind".

Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, a fortiori, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty, as Hobhouse LJ recognised in *Perrett v Collins* [1999] PNLR 77, 90-91:

> "It is a truism to say that any case must be decided taking into account the circumstances of the case, but where those

> circumstances comply with established categories of liability, a defendant should not be allowed to seek to escape from liability by appealing to some vaguer concept of justice or fairness; the law cannot be re-made for every case. Indeed, the previous authorities have by necessary implication held that it is fair, just and reasonable that the plaintiff should recover in the situations falling within the principles they have applied."

> [27] It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following *Caparo,* the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable". As Lord Millett observed in *McFarlane v Tayside Health Board* [2000] 2 AC 59, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also "engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper"."

25. Thus, the courts have rejected the use of a universal test to determine the circumstances in which a duty of care will be found to exist. The starting point is for the court to consider whether the circumstances of the case in question have been found to give rise to the existence or non-existence of a duty of care in other cases. In determining whether or not to extend a duty of care to novel situations, the court adopts an incremental basis by analogy with established categories of case where a duty has been found to exist.

26. The general rule is that the common law does not impose liability for negligence in relation to pure omissions, including loss arising through the criminal actions of a third party. In *Michael* Lord Toulson explained:

> "[97] English law does not as a general rule impose liability on a defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T): *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 270 (a Scottish appeal in which a large number of English and Scottish cases were reviewed). The fundamental reason, as Lord Goff explained, is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise

> care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.
>
> [98] The rule is not absolute. Apart from statutory exceptions, there are two well recognised types of situation in which the common law may impose liability for a careless omission.
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> [99] The first is where D was in a position of control over T and should have foreseen the likelihood of T causing damage to somebody in close proximity if D failed to take reasonable care in the exercise of that control…
>
> [100] The second general exception applies where D assumes a positive responsibility to safeguard C under the *Hedley Byrne* principle, as explained by Lord Goff in *Spring v Guardian Assurance Plc*. It is not a new principle. It embraces the relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient. The list is not exhaustive … There has sometimes been a tendency for courts to use the expression "assumption of responsibility" when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially."

27. This general rule was further considered in *Robinson* by Lord Reed:

> "[34] … public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson stated in *Michael,* "the common law does not generally impose liability for pure omissions" (para 97). This "omissions principle" has been helpfully summarised by Tofaris and Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128:"
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> > "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."
>
> …
>
> [37] … public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party: see, for example, *Smith v Littlewoods Organisation Ltd* and

Mitchell v Glasgow City Council. In *Michael,* Lord Toulson explained the point in this way*:*

> "It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else." (para 97).

There are however circumstances where such a duty may be owed, as Tofaris and Steele indicated in the passage quoted above. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied.

…

[69] … 4. The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes. It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm."

28. The exceptions to the general rule that there is generally no liability in negligence for the wrongful acts of third parties have been considered by the courts. In *Smith v Littlewoods Organisation Ltd* [1987] 1 AC 241 (HL), the owner of an empty cinema

building was found to owe no duty of care to the owner of an adjoining property which was burned down when third parties broke in and set fire to the cinema. Having referred to the existence of a general duty to take reasonable care not to cause damage to neighbouring premises, Lord Goff stated at page 270G:

> "But it must not be overlooked that a problem arises when the pursuer is seeking to hold the defender responsible for having failed to prevent a third party from causing damage to the pursuer or his property by the third party's own deliberate wrongdoing. In such a case, it is not possible to invoke a general duty of care; for it is well recognised that there is no general duty of care to prevent third parties from causing such damage."

29. Lord Goff acknowledged that there were exceptions to that general rule at pp.272D and discussed the nature of the exceptions at 272H-273A:

> "… a duty of care may arise from a relationship between the parties, which gives rise to an imposition or assumption of responsibility upon or by the defender, as in *Stansbie v Troman* [1948] 2 KB 48, where such responsibility was held to arise from a contract …
>
> But there is a more general circumstance in which a defender may be held liable in negligence to the pursuer, although the immediate cause of the damage suffered by the pursuer is the deliberate wrongdoing of another. This may occur where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer. The classic example of such a case is, perhaps, Haynes v. Harwood [1935] 1 K.B. 146, where the defendant's carter left a horse-drawn van unattended in a crowded street, and the horses bolted when a boy threw a stone at them. A police officer who suffered injury in stopping the horses before they injured a woman and children was held to be entitled to recover damages from the defendant. There, of course, the defendant's servant had created a source of danger by leaving his horses unattended in a busy street."

30. Lord Goff expressly considered and rejected the imposition of a general duty of care on an occupier to keep his premises secured against intruders who might cause damage to adjacent premises, even where there was a high degree of foresight that such damage might occur: pp.278C and 278G-279A:

> "There is no general duty to prevent third parties from causing damage to others, even though there is a high degree of foresight that they may do so.
>
> …

> Suppose, taking the example I have given of the family going away on holiday and leaving their front door unlocked, it was not a thief but a vandal who took advantage of that fact; and that the vandal, in wrecking the flat, caused damage to the plumbing which resulted in a water leak and consequent damage to the shop below. Are the occupiers of the flat to be held liable in negligence for such damage? I do not think so, even though it may be well known that vandalism is prevalent in the neighbourhood. The reason is the same, that there is no general duty to prevent third parties from causing damage to others, even though there is a high degree of foresight that this may occur. In the example I have given, it cannot be said that the occupiers of the flat have caused or permitted the creation of a source of danger (as in Haynes v. Harwood [1935] 1 K.B. 146, or in the example of the fireworks which I gave earlier) which they ought to have guarded against; nor of course were there any special circumstances giving rise to a duty of care. The practical effect is that it is the owner of the damaged premises (or, in the vast majority of cases, his insurers) who is left with a worthless claim against the vandal, rather than the occupier of the property which the vandal entered (or his insurers) - a conclusion which I find less objectionable than one which may throw an unreasonable burden upon ordinary householders."

31. In *Mitchell v Glasgow City Council* [2009] 1 AC 874, Lord Scott considered further exceptions to the general rule at [40]:

> "The requisite additional feature that transforms what would otherwise be a mere omission, a breach at most of a moral obligation, into a breach of a legal duty to take reasonable steps to safeguard, or to try to safeguard, the person in question from harm or injury may take a wide variety of forms. Sometimes the additional feature may be found in the manner in which the victim came to be at risk of harm or injury. If a defendant has played some causative part in the train of events that have led to the risk of injury, a duty to take reasonable steps to avert or lessen the risk may arise. Sometimes the additional feature may be found in the relationship between the victim and the defendant: (eg. employee/employer or child/parent) or in the relationship between the defendant and the place where the risk arises (eg. a fire on the defendant's land as in *Goldman v Hargrave* [1967] 1 AC 645). Sometimes the additional feature may be found in the assumption by the defendant of responsibility for the person at risk of injury (see *Smith v Littlewoods Organisation Ltd* [1987] AC 241 per Lord Goff of Chieveley at 272). In each case where particular circumstances are relied on as constituting the requisite additional feature alleged to be sufficient to cast upon the defendant the duty to take steps that, if taken, would or might have avoided or

> lessened the injury to the victim, the question for the court will be whether the circumstances were indeed sufficient for that purpose or whether the case remains one of mere omission. "

32. Lord Rodger provided additional illustrations of the exceptions, categorising them as wrongful acts on the part of the defendant:

> "[57] As Lord Goff explained, in some circumstances a defender who provides an opportunity for a third party to harm the pursuer in a foreseeable way must take reasonable care to prevent the harm. If I negligently collide with a cyclist who is knocked unconscious, I must surely take reasonable care to move her from the path of oncoming vehicles. Whether I must also take reasonable care to prevent her belongings from being stolen may be more debatable. Similarly, a decorator who leaves the door of an empty house unlocked is indeed liable if a thief then enters and steals, because the main point, at least, of the decorator's duty to lock the premises is to prevent theft: *Stansbie v Troman* [1948] 2 KB 48. A police authority owes a duty of care to the public at large not to entrust a gun to a probationer officer whose family circumstances might make him volatile and unstable. So the authority was liable to someone whom the officer shot in the course of an incident when he was intent on using the gun to maim his former partner and her boyfriend: *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273.
>
> [58] In all these situations the defender's act which provides the opportunity for the third party to injure the claimant is itself wrongful."

33. In *Stansbie v Troman* [1948] 2 KB 48 a decorator, who left the claimant's front door unlocked when he left the property empty, was held liable for the loss caused by a third party burglar. The basis for the decision was that the decorator owed a contractual duty to the householder to take reasonable care if he left the property unattended during the performance of his work. As explained by Lord Goff in *Smith* (above), the duty in that case was based on an assumption of responsibility through the contract.

34. The imposition of a duty of care based on an assumption of responsibility was explained by Lord Goff in *Henderson v Merrett* [1995] 2 AC 145 (HL) at p.180:

> "We can see that it rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other. On this point, Lord Devlin spoke in particularly clear terms in both passages from his speech which I have quoted above. Further, Lord Morris spoke of that party being possessed of a "special skill" which he undertakes to "apply for the assistance of

> another who relies upon such skill". But the facts of H*edley Byrne* itself, which was concerned with the liability of a banker to the recipient for negligence in the provision of a reference gratuitously supplied, show that the concept of a "special skill" must be understood broadly, certainly broadly enough to include special knowledge. Again, though *Hedley Byrne* was concerned with the provision of information and advice, the example given by Lord Devlin of the relationship between solicitor and client, and his and Lord Morris's statements of principle, show that the principle extends beyond the provision of information and advice to include the performance of other services. It follows, of course, that although, in the case of the provision of information and advice, reliance upon it by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect), nevertheless there may be other circumstances in which there will be the necessary reliance to give rise to the application of the principle. In particular, as cases concerned with solicitor and client demonstrate, where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, he may be held to have relied on the defendant to exercise due skill and care in such conduct."

35. The circumstances that could give rise to an assumption of responsibility were considered further in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL) per Lord Steyn at p.835F:

> "The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff."

36. In cases concerning professional services, where there have been no direct dealings between claimant and defendant, no such assumption of responsibility has been found: *Involnert Management Inc v Aprilgrange Ltd* [2015] 2 Ll.Rep. 289 per Leggatt J (as he then was) at [285] - [292].

37. In *Al-Najar v Cumberland Hotel (London) Ltd* [2019] EWHC 1593 (QB) the court held that the defendant hotel proprietor owed a duty to take reasonable care to protect its visitors against injury caused by the criminal acts of third parties during their stay at the hotel. In finding that a duty of care existed, Dingemans J placed reliance on a line of authority which established an obligation at common law on a hotel proprietor to take reasonable care to prevent damage to a guest from unusual danger which the occupier knows or ought to know of and by reason of the assumption of responsibility test based on the hotel's invitation to guests to stay at the hotel.

Discussion

38. In this case, the Court must determine whether it is satisfied that the claim is bound to fail. That involves consideration of the following issues:

    i) whether, as the Claimant contends, this is not a pure omissions case, or at least arguably it is not an omissions case, because the Defendant created the danger and/or played a causative part in the train of events that led to the risk of damage;

    ii) if it is an omissions case, whether the Defendant assumed a positive responsibility to safeguard the Claimant's property from harm under the *Hedley Byrne* principle.

39. On analysis of the assumed facts, the harm suffered was fire damage to the Claimant's property. That harm was not caused by the Defendant but by a third party unconnected with the Defendant. The danger causing the damage was fire. The Defendant did not create the source of the fire or provide the means by which the fire started. By leaving the door unlocked, the Defendant increased the risk that an intruder might gain entry to the building. Locking the door would have prevented the third party from causing the damage. Failing to lock the door amounted to a failure to prevent that harm. The examples given by Lord Goff in *Smith* (above) are apt in this case. Mr Jeffrey's failure to lock the door during his inspection inside the property may have been the occasion for the third party to gain access to the building but it did not provide the means by which the third party could start a fire and it was not causative of the fire. It follows that this case is a pure omissions case.

40. The assumed facts of this case do not give rise to the imposition of an assumption of responsibility on the basis of which a duty of care might be owed. Relationships in which a duty to take positive action to safeguard the property of another have been found typically include contractual or quasi-contractual arrangements, such as *Stansbie v Troman*, promises and trusts, as indicated by Lord Reed in *Robinson* or circumstances where reliance is placed on the Defendant's skill and expertise, as indicated by Lord Goff in *Merrett.* None of the legally significant features of the earlier authorities in which the courts have found an assumption of responsibility exists in this case. In a commercial context, it is difficult to conceive of circumstances giving rise to an assumption of responsibility where there are no dealings between the parties. As Ms Sinclair put it, there were no exchanges between the parties in this case which crossed the line.

41. Mr Brown seeks to rely on the Defendant's possession of the key as amounting to a special level of control over the source of the danger, which could give rise to an assumption of responsibility. However, the Defendant in this case did not hold itself out as having any special skill or expertise in safeguarding property. The Defendant was not a fire or security expert, was not a lettings or managing agent for the property, and was not entrusted with possession of the property during construction works. Mere possession of the key during an inspection of the property was not sufficient to give the Defendant responsibility for safeguarding the property from fire damage. The absence of any dealings between the Claimant and the Defendant preclude any finding of reliance by the Claimant on the Defendant, or any finding that reliance was objectively reasonable.

42. Mr Brown has drawn attention to the decision of Elizabeth Laing J in *Chief Constable of Essex Police v Transport Arendonk BvBa* [2020] EWHC 212 (QB). The case concerned a claim in negligence against police who, having arrested a lorry driver, left the lorry in a layby without permitting the driver to telephone his employer, following which goods were stolen from the lorry by a third party. Elisabeth Laing J refused to strike out the claim on the grounds that it was arguably not a pure omissions case. However, in that case, on the facts it was arguable that the police action created the danger, that is, an unattended lorry in a public place containing goods. In this case, as set out above, the Defendant did not create the danger.

Conclusion

43. For the reasons set out above, in my judgment the Defendant did not owe a common law duty of care to the Claimant. On that basis, the Statement of Case discloses no reasonable grounds for bringing the claim and the Claimant has no real prospect of succeeding on the claim.

44. There is no other compelling reason why the case or issue should be disposed of at a trial because all the relevant facts are before the Court and the parties have had full opportunity to make submissions. There is no legal hook on which to hang the facts of this case that would justify extending the exceptions to the general rule established by the cases.

45. For the reasons set out above, the Court will make the following orders:

    i) The Statement of Case shall be struck out.

    ii) Summary judgment on the claim is given for the Defendant.

    iii) All consequential or other matters, if not agreed, will be dealt with by the Court at a further hearing to be fixed by the parties.