

Professional Liability Online Seminar Series

Construction Professionals' Negligence

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This webinar will be recorded

20 October 2021

Professional Liability Online Seminar Series

- September 2021 – Solicitors' and Barristers' negligence
- October 2021 – Construction professionals' negligence

COMING UP

- November 2021 – Surveyors' negligence
- December 2021 – Financial advisors' negligence
- January 2022 – Clinical negligence claims

Scope of duty revisited

Manchester Building Society v Grant Thornton [2021] UKSC 20

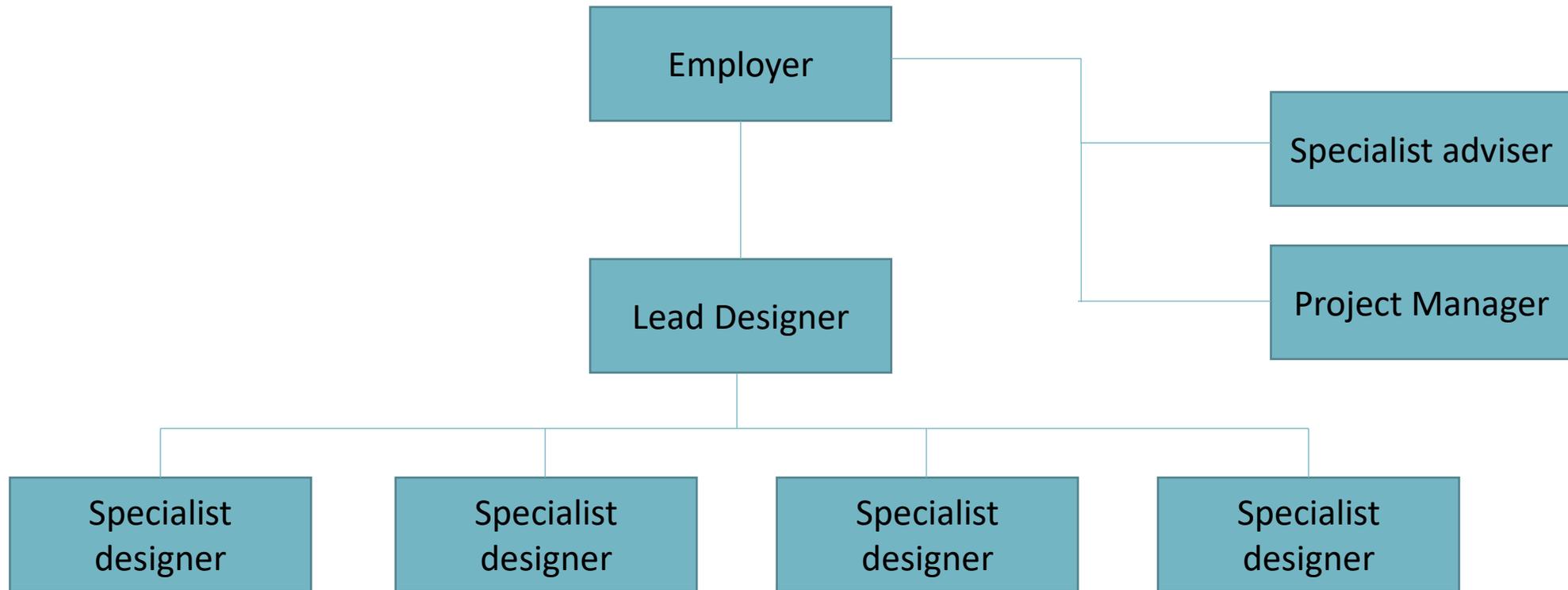
[Financial advisers]

- Purpose of duty
- SAAMCo counterfactual is a cross-check only
- Advice vs Information – no longer binary, but a spectrum

Also: Meadows v Khan [2021] UKSC 21

[Clinical negligence]

Scope of duty revisited – Construction



Possible changes in the construction industry



Picture credit: The Guardian
<https://www.theguardian.com/uk-news/2019/dec/06/too-little-has-been-done-since-the-grenfell-tower-fire>

Designer's duties: Materials and product selection

- Standard
 - Reasonable care and skill
 - Reasonable – per standards ordinarily observed in the profession
- Expert evidence

Grenfell Tower Inquiry - Evidence

- Nature of Inquiry evidence
- Jonathan Sakula - on industry knowledge as to materials and fires
 - Distinction between manufacturers and contractors
 - Reasonable care and skill of façade contractor
 - Knowledge of international cladding fires
 - Knowledge of regulation and statutory guidance

Defence – Following Statutory Guidance

- Followed Statutory Guidance (eg Approved Document B)
- See Building Act 1984 section 7

7.— Compliance or non-compliance with approved documents.

(1) A failure on the part of a person to comply with an approved document does not of itself render him liable to any civil or criminal proceedings; but if, in any proceedings whether civil or criminal, it is alleged that a person has at any time contravened a provision of building regulations —

(a) a failure to comply with a document that at that time was approved for the purposes of that provision may be relied upon as tending to establish liability, and

(b) proof of compliance with such a document may be relied on as tending to negative liability.

Defence – Building Control Certificate

- Building Control signed off the building
- See Building Regulations 2010, regulation 17

(4) A certificate given in accordance with this regulation shall be evidence (but not conclusive evidence) that the requirements specified in the certificate have been complied with.

Building Safety Bill

Defective Premises Act 1972

- New dwellings
- Work must be done
 - in a workmanlike manner
 - with proper materials
 - so that dwelling is fit for habitation

Proposed changes

- Time limit extended from 6 to 15 years
- Extended liability period to have retrospective effect
- Extended beyond “new dwellings” (prospectively)

Building Safety Bill

- Safety framework for “Higher Risk Buildings”
- **Accountable Person (and Principal Accountable Person)**
 - Duty-holder to oversee safety
 - Identified per the Construction (Design and Management) Regulations 2015

Adjudicating Construction Professional Negligence Claims



A Brief History of Adjudication

- Adjudication not originally considered suitable for professional negligence claims
 - ❖ ‘Constructing the Team’, July 1994 (The Latham Report)
 - ❖ Preoccupied with cashflow and payment disputes
 - Prevalence of ‘smash and grab’ adjudications
- **Housing Grants, Construction and Regeneration Act 1996**
 - ❖ Section 104 – Meaning of ‘construction contracts’
 - ❖ Section 105 – Meaning of ‘construction operations’
 - ❖ Hybrid contracts – *C Spencer Ltd v M W High Tech Projects UK Ltd* [2020] EWCA Civ 331

Essential Ingredients of a Professional Negligence Claim

- Expert Evidence
 - ❖ *ACD v Overall* [2012] EWHC 100 (TCC)
 - ❖ *Avondale Exhibitions v Gallagher Insurance Brokers* [2018] EWHC 1311 (QB)
- Proof of causation/full extent of loss
 - ❖ *Russell v Stone (t/a PSP Consultants)* [2019] EWHC 831 (TCC)
- Specialist Adjudicator

Are Professional Negligence Claims Suitable for Adjudication?

- Professional negligence claims are too complicated
 - ❖ Fact- and document-heavy (vs. extreme time pressure)
 - ❖ Legally complex (vs. non-lawyer adjudicators)
 - ❖ *London & Amsterdam Properties v Waterman* [2003] EWHC 3059 (TCC)
- Complexity seldom prevents enforceability
 - ❖ *CIB Properties v Birse Construction* [2005] 1 WLR 2252
 - ❖ *HS Works v Enterprise Managed Services* [2009] BLR 378
 - ❖ *AMEC v Thames Water* [2010] EWHC 419 (TCC)



Professional Negligence Bar Association Adjudication Scheme

- Includes (but not limited to) construction disputes
 - ❖ PNBA Scheme, para 7.4 (Guidance Notes)
 - ❖ Active consideration now required by parties (Pre-Action Protocol for Professional Negligence, para 6.2(i))
- **Consensual**
 - ❖ Refer multiple disputes/parts of a dispute
 - ❖ Recovery of costs (Scheme, para 11.6)
 - ❖ Finality of decision (Scheme, para 12.3)
 - ❖ Confidentiality (Guidance Notes, para 4.7)
- Legal expertise of adjudicators (Guidance Notes, para 4.2)
- *Beattie Passive Norse v Canham Consulting* [2021] EWHC 1116 (TCC)

Tactics of Professional Negligence Adjudications

- Pros

- ❖ Speed of process
- ❖ Reduced costs and costs-neutral (unless otherwise agreed)
- ❖ Can ambush a responding party?

- Cons

- ❖ Non-legally trained adjudicators
- ❖ Professional respondents better able to marshal technical detail and successfully defend claims?
- ❖ Limited time to consider every argument or document
- ❖ Lack of oral evidence



Thank you!

Any questions?

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