

Tinseltime-v-Roberts and Others (13/5/2011)- Liability for Independent Contractor.

The Message: An employer is not generally liable for the unlawful acts of an independent contractor.

The Case: The Court considered which parties the Claimant could sue, and what damages could be recovered, for damage caused to manufacturing equipment by dust during building works

In 2007, work on a road building scheme was being carried out by Roberts in Clywd and this involved the demolition of part of a building called The Old Creamery. A company called Fountain of Youth ("FOY") occupied the other part and used it to manufacture tinsel and Christmas goods.

The project had been commissioned by The Welsh Assembly and had been organised by Denbighshire County Council who had contracted the works to M&JT Davies who, in turn, had sub-contracted part of the works to Roberts. It was claimed that substantial dust entered the tinsel making machinery when Roberts were cutting concrete blocks on the adjacent land to infill openings in the dividing wall between the 2 parts of the building.

FOY assigned its claim for damages for nuisance to Tinseltime before it ceased trading and the Court had to consider whether FOY had had any claim it could assign and, if so, who that claim could be brought against and what damages could be recovered by Tinseltime? Presumably, because of the amount of damages it was claiming, Tinseltime had issued proceedings against The Welsh Assembly and Denbighshire as well as the contractors.

In order to bring a claim for nuisance, a party has to establish that it had a right to occupy the land in question. This normally involves having to establish it had a right to exclusive occupation. FOY had occupied its part of The Old Creamery under a licence that was expressed to be made with "Peter Ridgway, of Fountain of Youth" and the Defendants argued that the licence was with Mr Ridgway, the person who ran FOY, and not with FOY itself. However, having considered the relevant background and terms of a previous licence, the Court held that the licence was intended to have been entered into with FOY, so it did have sufficient interest in the property to bring a claim in nuisance.

Tinseltime argued that that it could sue all the Defendants as they each had a non-delegable duty because of the foreseeable danger that damage to an adjoining property would be caused by the works. It accepted that, unless it controls the works in some way, an employer will not normally be liable for negligence by its contractors but argued the position was different when it came to nuisance.

The Court held the law was no different for claims for nuisance. It held that an employer could only be liable for acts by an independent contractor if it had some control over the works or special circumstances existed. Those special circumstances were limited to exceptionally dangerous works or works to dividing structures. As the works which had caused the dust were not to the dividing structure itself, this exception did not apply. Accordingly, Tinseltime could only sue the contractors and not the employers. It could sue M&JT Davies as Roberts claimed he was a labour only contractor and had been working under their control and instructions.

The Court accepted Tinseltime could claim for costs of repairs to machinery that FOY had incurred but, on analysing the claim for loss of profits of some £1.4 million, it held that FOY's claim was for prospective losses and it had not actually suffered any loss at all before it ceased trading. As it ceased trading for different reasons, it had no claim for loss of profits.