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Pure omissions cases and relevant exceptions

Rushbond Plc v The JS Design Partnership LLP (2021) EWCA Civ 1889

This was a claim in negligence arising out of damage to the claimant/appellant's property, caused by an intruder who, it was said, gained access as a result of a breach of duty by the defendant/respondent. The real issue was whether this was what, at least historically, had been called a "pure omissions" case, or whether it fell into an accepted category of potentially sustainable negligence claims. The High Court Judge below (the judge) concluded that this was a pure omissions case and that none of the relevant exceptions applied. In consequence, she found that there was no duty of care and struck out the claim.

In 2014, the claimant was the owner of a large empty cinema ("the property"). In 2014, it was empty and because it was in a vulnerable position in a city centre, with direct access from numerous doors along the side streets as well as the frontage on a square, the doors were kept permanently locked. In addition, there was a sensor alarm system, and the property was the subject of regular inspections.

The claimant hoped to let the building to a tenant for leisure use. The defendant was instructed by a potential buyer/lessee to advise them as to its suitability.

The defendant's representative advising on the property was an architect, who had been to the property on previous occasions, as a

IN BRIEF

The Court of Appeal overturned a High Court Judge's decision to strike out the claimant's claim on the basis that the defendant had owed no duty of care to the claimant.

The defendant's representative had left the claimant's premises unlocked for a short time during which an intruder entered the premises and subsequently set fire to them.

result of which it was said that he was familiar with the nature and layout of the property and the security protections which were in place, in particular the door locks and the intruder alarm system.

On 30 September 2014 the architect again visited the premises but he did not secure a street door using the snib lock provided. This left the street door unlocked and unlikely even to stay closed. Nobody was watching that door or was within the area where the door was located; the property was large and dark, so there was nothing to stop an intruder from entering the property during the visit and hiding themselves away without being detected. The architect subsequently left the building, resetting the alarm and locking the street door from the outside.

It was the claimant's case that, during the time that the premises were not secured, an intruder entered the property through that unlocked (and possibly open) door and was not detected in the dark. Later that day, a fire was started inside the property and the roof and the interior were destroyed. It was the claimant's case that the fire was started by an intruder.

The Court of Appeal observed that, for this appeal to succeed, it was only necessary for the claimant to show that its claim was arguably *not* one based on 'pure omissions', or if it was, that it arguably fell within one of the exceptions to that rule.

The appellate court held that it was arguable that this was not a claim based on 'pure omissions', for three reasons.

First, standing back from the detail and the authorities, that must be the answer as a matter of general principle.

Secondly, unlike the authorities cited, this was a claim based on the defendant's critical involvement in the activity which gave rise to the loss, so it was not a 'pure omissions' case.

Thirdly, the case fell within a well-recognised line of negligence authorities, where a duty had been found to be owed by a defendant in respect of the security of the claimant's property.

The defendant was a visitor to the claimant's property, present with the claimant's permission. It was fanciful to suggest that, whilst the sole occupant of the property, trusted with the keys, the defendant owed no duty of care to the claimant to take reasonable precautions as to security. The architect, as a visitor at the property, there at his request, owed a duty to take reasonable care not to do or fail to do something which permitted others to burn down the property. Arguably, therefore, on an ordinary application of general principle, all the necessary ingredients of a negligence action were in place here: duty, foreseeability, breach and causation.

In the present case, the defendant was involved directly in the activity which allowed the intruder to enter the property. The defendant had not just provided the opportunity for the intruder to get in but at least arguably the architect was in breach of duty because he positively made things worse. He had rendered a secure building insecure, at least for the duration of his visit. He may or may not have been negligent - that was a question for another day - but it could not be said unequivocally that he did not owe a relevant duty of care because such a duty would be based on 'pure omissions'.

The failure to lock or otherwise guard the street door after entering the property was a central part of the architect's activity that allowed the intruder into the property. It was arguably not a pure

omission in the sense used in the authorities, and was instead an actionable wrong. The judge erred in concluding otherwise.

This case was indistinguishable from *Stansbie v Troman (1948)*. There, the decorator did not lock the door and, as was foreseeable, a third party got into the house and stole property. In the present case, the architect did not lock the street door. The judge was wrong to find that this case did not fall into a recognised category of decided cases where a relevant duty had been found.

The claimant argued in the alternative that, even if this was a case of pure omissions, at least two of the exceptions applied, namely what was called the 'creation of danger' exception and/or the 'assumption/imposition of responsibility' exception.

It was unnecessary to consider those arguments in detail because of the court's view that this was, at least arguably, not a 'pure omissions' case. Furthermore, it would be artificial to do so in circumstances where the exceptions pre-supposed the opposite. Accordingly, the appellate court simply observed that it must be open to the claimant at trial to argue that, if for example the evidence demonstrated that this was a 'pure omissions' case after all, it did fall within one of both of these exceptions. No concluded view as to the likely outcome of such arguments was expressed but the judgment went on to make a number of brief observations.

If at trial in this case, the judge accepted that the defendant negligently caused or permitted a source of danger to be created when the street door was left unlocked and/or open then, even if this was a case of 'pure omissions', it would still be arguable that there was a duty under the 'creation of danger' exception.

It was also arguable in the present case that the defendant, at its own request present as a licensee inside the claimant's property, owed the claimant a duty of care because it had assumed a responsibility, at least for the hour of the visit, to take reasonable care in respect of the security of the property. On the claimant's case, all that had to be done was to lock the street door. That did not require any specialist skills.

During the course of argument, a point was raised by reference to *Meadows v Kahn (2021),* namely that the scope of the duty in any given case must focus on the risk of harm. The defendant submitted that property damage was outside the scope of any duty owed by the defendant. Any duty that was owed was to prevent access by a third party, but that such a duty did not extend to what the third party might do once they had gained access, no matter how foreseeable that action might be. That was not an argument she pursued before the judge.

The Court of Appeal found that submission unpersuasive, certainly for the purposes of a strike-out application. Any distinction between preventing access on its own, and preventing foreseeable events after access had been obtained, was much too rigid, certainly on a strike-out application. In all the circumstances, it could not be right to conclude at this stage that the defendant owed a duty of care to prevent an intruder gaining access, but that after that, no matter what the intruder did, or how foreseeable it was, there was no liability.

The full judgment may be found at: Rushbond Plc v The JS Design Partnership LLP [2021] EWCA Civ 1889 (14 December 2021) (bailii.org)

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