INTRODUCTION

The common law of Canada follows and is broadly consistent with that of England and Wales. The same principles and policies are applicable in the field of damages for negligence and for breach of contract. In *Globalnet Management Solutions Inc v Cornerstone CBS Building Solutions Ltd*, the well-respected Court of Appeal of British Colombia addressed a not uncommon problem, namely what happens when it has been established that the defendant was in breach of contract and negligent for serious construction defects but the claimant or plaintiff who has paid for the necessary repairs had no obligation to carry them out. The policy was spelt out in clear terms: wrongdoers should be held responsible for their conduct and persons in the position of the claimant should be compensated for the costs which they incurred in remedying such misconduct. The claiming company had employed the builders to build the house which was then transferred to trusts set up in effect for the main shareholders; when the defects came to be remedied, the claiming company paid for the remedial works. The defendant's position was undermined because both claiming company and the trusts in question sued and both had a right to sue, one or other having at the very least sold the house at an undervalue to the trusts, reflecting the defects or, alternatively purchased the house at full price at an overvaluation not reflecting the defects.

In *Swansea Stadium Management Company Ltd v City and County of Swansea*, Mrs Justice O'Farrell in the TCC was concerned with an issue of limitation in circumstances in which the building of a football stadium was completed on 31 March 2005. A collateral warranty was provided by the developer and contractor to the leasehold owner and operator of the football stadium in late April 2005, after the lease was signed on 22 April 2005. Proceedings in respect of alleged defects were brought by the leasehold owner against the developer and contractor for breach of the collateral warranty. The contractor applied to strike out the claim and seek summary judgment on the grounds of limitation, because proceedings were started more than 6 years after the work was completed and any breach must have occurred on or before completion. The judge decided that, in accordance with usual practice, it was an appropriate case for summary judgment because the limitation defence was bound to succeed, given the date of practical completion and because the collateral warranty, when considered in context, was intended to have retrospective effect going back at least to practical completion. Time had therefore run out on 31 March 2012.

Mrs Justice Jefford in *Hodgson v National House Building Council* also had to address a summary judgment application, this time in connection with a settlement agreement which was said to have led to the settlement of all or some of the claims which were the subject matter of the proceedings. Mr Hodgson's house had the benefit of an NHBC policy which provided for cover by the NHBC in relation to certain types of defect. He had commenced several arbitrations against the builder who had ultimately become insolvent and a settlement agreement had been reached with the NHBC. Although Mr Hodgson had later sold the house before any remedial work had been carried out, the judge held that it was however arguable that under the settlement agreement he might still be able to recover the remedial work costs. However, she analysed the defects listed in the Scott Schedule and was able to determine that some of them stood no prospect of success. Although this exercise on a summary judgment application might be described as "cruel and unusual punishment" for the judge, it was a useful exercise and, in the long run, is likely to shorten the eventual proceedings.

Whilst the subject of Japanese knotweed is usually of more interest to gardeners or people buying or selling property, the Court of Appeal decision in *Network Rail Infrastructure Ltd v Williams* addressed this horticultural problem in the context of the tort of nuisance; nuisance can affect developers and builders as they plan for and proceed with construction works. Two neighbouring house owners brought proceedings against Network Rail in respect of the spread of Japanese knotweed from its land onto their land. This was

a nuisance not simply because it had the potential to reduce the capital value of the houses but because it carried the risk of future physical damage to the buildings and also in effect contaminated the soil on their land. Thus, it was a classic example of an interference with the amenity value of the house owners' land and therefore it fell within the category of nuisance.

Governments often seem to set up public enquiries to look into disasters or into projects which have gone wrong. In the UK, the Inquiries Act 2005 provides relatively wide powers for the Inquiry in question to procure evidence, including the disclosure of relevant documents. In a motion involving *Bilfinger Construction UK Ltd* in relation to the Edinburgh Tram Inquiry (set up to consider overruns on time for delivery and of cost on this project), a member of the joint venture responsible for the design and construction of the project sought relief in respect of internal monthly reporting documentation, which, although disclosed on a restricted basis within the Inquiry, was required by the Inquiry to be more readily available on the grounds of public interest. On appeal, the Inner House of the Court of Session in effect upheld the Inquiry's decision to require wider publication, saying it was not concerned with the merits of the decision as such but more whether it was legal on the grounds of fairness and rationality. The case casts important light on this area of practice, not least because many of such enquiries are concerned with construction projects which have gone wrong. The Grenfell inquiry is one such.

Atkin Chambers
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