

# No easy escape from negligence trial for fire engineer (*Avantage (Cheshire) v (5) WSP UK Limited*)

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**Construction analysis:** The defendant fire engineering designer on a PFI project for a residential care home sought summary judgment to dismiss a negligence claim following the destruction of the building by fire on the grounds that: it was not in contract with any of the claimants; it had no duty in tort for economic loss; it had issued disclaimers with respect to liability to third parties; there had been no assumption of responsibility; disclosure was not likely to change that picture so the application was not premature; and, even if negligence were proved, it had caused no loss. The judge dismissed the application for summary judgment because the matter needed to be tried and the claim met the established test to go forward. The application to strike out the claim in tort where no loss had been suffered succeeded—that is probably the most significant feature of the case. Written by James Davison, barrister, 3PB Barristers.

*Avantage (Cheshire) Limited and others v GB Building Solutions Limited (In Administration) and others* [\[2022\] EWHC 171 \(TCC\)](#)

## What are the practical implications of this case?

For litigators:

- the judgment is a useful example of the application of the summary Judgment test in a complex construction professional negligence case
- the judgment suggests a reluctance to let the Defendant escape the litigation before the facts had been determined at trial
- the complexity of the matters to be considered was probably a factor mitigating against the application
- the measure of success achieved might have justified the effort on a claim of this size

For engineers and consultants:

- make sure that you maintain evidence of the acceptance of your own terms and conditions (the defendant, WSP, could not prove its terms were accepted by Gleeson: see para [124 (x)])
- make sure you state and maintain your caveats and disclaimers (see para [78]—the judge noted the disclaimers were not produced in later submissions from WSP that made their way to the ultimate employer)
- when the scope of services is varied or extended make sure that it is communicated that the terms and conditions and disclaimers are expressly stated to apply to the extended services

Further, this was a matter where the claimants did not have any contemporaneous involvement in the design or construction of the home. For employers in a similar position there are risks in taking over operational projects so:

- do your due diligence when completing projects or acquiring operating PFI projects
- get your collateral warranties, and
- make sure appointments and warranties are executed and made under seal

## What was the background?

A PFI care home burned down in 2019. The claimants (the PFI operator, freeholder and leaseholder, respectively) sought recovery alleged losses of £32m from the project team.

The main contractor (a Gleeson Company) was in administration. The claimants were not in contract with Gleeson's subcontracted fire safety engineer, WSP UK Limited (the fifth defendant).

WSP applied for summary judgment on the negligence claim and if unsuccessful asked for the claim of alleged negligent design of escape route planning to be struck out.

The application for summary judgment was unsuccessful but the application for strike out succeeded because even if duty and breach were proved at trial there was no loss: there having been no loss of life, and any alleged failure having had no impact on the course of the fire (see paras [129]–[134] and para [132] in particular).

That last point is of critical relevance as it restates the essential requirement of damage to make out the tort of negligence: even in respect of instances of designers who allegedly fail to provide escape routes to multi occupancy residential buildings designed to be occupied by vulnerable people.

The court heard argument over the course of a whole day, was presented with a 49-page skeleton argument by WSP itself and was referred to 25 cases in the course of argument. The parties were required to produce additional written argument after the hearing.

To deal properly with the matter the learned judge produced a cogent judgment of more than 134 paragraphs which concluded she was being asked to conduct a mini trial (para [31]) and that many of the matters turned on disputed facts that needed to be resolved at trial and because the claimants prospects of success at trial were not fanciful in an area of law which is not as settled as might be supposed.

### What did the court decide?

The court decided it could not give summary judgment and, in those areas where it found it might, that it was not inclined to do because the trial judge would be better placed to give a proper judgment and it did not want to make 'isolated findings' (see para [99] and paras [116]–[117]). The report reads like a judgment after full trial as the court was compelled to review:

- the formulation of duty of care in cases of economic loss
- the assumption of responsibility by an alleged tortfeasor (sequential instructions for professional work)
- physical damage
- negligence not causing any alleged loss
- the interaction with the court's order for disclosure (paras [118][125])
- notable authorities and sources considered included:
  - *Rushbond PLC v The JS Design Partnership LLP* [2021] EWHC Civ 1889 (LJ Coulson: 'at least arguable' is a relatively low threshold)
  - *Arrowhead Capital Finance Limited v KPMG LLP* [\[2012\] EWHC 1801 \(Comm\)](#) (liability and generally expected terms of a commercial consultancy contract and relevance to duty)
  - *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 (Lewinson J's, Court of Appeal approved, seven core principles for Summary Judgment)
  - *Aquilla WSA Aviation Opportunities II Ltd v. Onur Air Tasimacilik AS* [\[2018\] EWHC 519 \(Comm\)](#) (Cockerill J 'The object of the rule is to winnow out cases that are not fit for trial')
  - *Robinson v. Chief Constable* [\[2018\] AC 736](#) (relevance of assumption of damage is cases of physical damage)
  - *Galiford Try Infrastructure Limited v Mott Macdonald* [\[2008\] EWHC 1570 \(TCC\)](#) (relationship of duty of care and facts and the facts need to be tried)
  - *Keating* para [7]–[020] being limited to cases of instructions (see para [114]).

**Case details:**

- Court: Technology and Construction Court (QBD), Business and Property Courts of England and Wales, High Court of Justice
- Judge: Mrs Justice Joanna Smith DBE
- Date of judgment: 31 January 2022

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