Neutral Citation Number: [2021] EWCA Civ 1889

Case No: A1/2020/1471

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES TECHNOLOGY AND CONSTRUCTION COURT (QBD)
MRS JUSTICE O'FARRELL
[2020] EWHC 1982 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 December 2021

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE COULSON
and
LORD JUSTICE STUART-SMITH

- -

Between :

Rushbond PLC	**Appellant**
- and -	
The JS Design Partnership LLP	**Respondent**

- -
- -

Ben Elkington QC & Geoffrey Brown (instructed by **BLM Solicitors**) for the **Appellant**
Fiona Sinclair QC & Gideon Shirazi (instructed by **BWF Law LLP**) for the **Respondent**

Hearing Date : 17 November 2021

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Approved Judgment

LORD JUSTICE COULSON :

1 INTRODUCTION

1. This is a claim in negligence arising out of damage to the appellant's property, caused by an intruder who, it is said, gained access as a result of a breach of duty by the respondent. The real issue is whether this is what, at least historically, has been called a "pure omissions" case, or whether it falls into an accepted category of potentially sustainable negligence claims. O'Farrell J ("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.

2. To address the issues, I set out the claim as presented in Section 2 and deal with the application to strike out and the judgment below in Section 3. I set out the relevant law as succinctly as possible in Section 4, conscious as I am that this material has been traversed in a number of recent cases. After a preliminary observation in Section 5, I address at Section 6 the key question as to whether this is arguably not a claim based on pure omissions, and instead a claim which fits within existing case law. I address other matters of law in Section 7 and there is a short summary of my conclusions in Section 8. I am extremely grateful to both leading counsel for the excellence of their written and their oral submissions.

2 THE CLAIM AS PRESENTED

3. As noted above, this appeal arises out of the respondent's application to strike out the claim. There has therefore been no trial. So instead of being able to identify the facts as found by the judge, it is necessary for this court to consider the factual basis for the claim as presented in the appellant's pleadings. The practical difficulty with that, as was illustrated during the course of argument on appeal, is that both sides sought to emphasise particular elements of the pleaded facts to the exclusion of others (what might not unfairly be called 'spinning' the facts to present their respective arguments in the best possible light), and even to argue about what the pleadings actually said. None of that is of any great assistance to the court in trying to arrive at an answer to the underlying issue. Accordingly, what is set out below is what seems to me to be the critical factual material presented by the appellant in support of its claim and which, for the purposes of this appeal, must be treated as being correct[1].

4. In 2014, the appellant was the owner of a large empty cinema, the Majestic, in the centre of Leeds ("the property"). The property is situated on City Square. Its imposing bulk will be familiar to anyone coming out of the station and walking up into the centre of the city. It is a large building, built during the cinema boom of the 1920's and 1930's. Loosely triangular in shape, it fronts onto the Square and is then bounded on each side by two side streets. In 2014, the property was laid out over three floors and three mezzanine levels, with a main auditorium space that had the capacity to sit 2,500 people.

[1] All of the matters set out in this part of the judgment are, I think, expressly pleaded, but if any have been missed, the appellant would, in the circumstances, be entitled to permission to amend the statement of case so as to rectify the omission.

5. Sadly, by 2014, it was empty. Because it was in a vulnerable position in the city centre, with direct access from numerous doors along the side streets as well as the frontage on the Square, the doors were kept permanently locked. In addition, there was a sensor alarm system, and the property was the subject of regular inspections.

6. The appellant hoped to let the building to a tenant for leisure use. To achieve that, they instructed marketing agents, Pudney Shuttleworth ("PS"). PS were contacted by Burning Night Limited ("BNL"), who were interested either in acquiring the property outright or taking a long lease. The respondent was in turn instructed by BNL to advise them as to its suitability for leisure use.

7. The representative of the respondent firm advising BNL about the property was an architect, Mr Jeffrey. Mr Jeffrey had been to the property before the relevant visit on 30 September 2014. On those previous occasions he had been accompanied by PS. In consequence, it is 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.

8. Although there were numerous potential points of access into the property, only one door was ever used by PS (and, for the relevant visit on 30 September, by Mr Jeffrey). That was a small door part of the way down Quebec Street, the street running down the righthand side of the property ("the Quebec Street door"). It was conveniently located immediately next to the control board of the alarm system which would have to be deactivated on entry.

9. By reason of his previous visits with PS, it is the appellant's case that Mr Jeffrey would or should have been aware of their practice when entering through the Quebec Street door. That was first to unlock that door and disable the intruder alarm system. Then PS would ensure that the Quebec Street door was locked again, and remained locked for the duration of the visit. Locking the door was achieved using an internal snib lock: it was not necessary to use the key to relock the door. It is also said that, if the snib lock was not used, not only was it possible for anyone to walk in off Quebec Street simply by opening the unlocked door, but also that the door was prone to swing open in any event. In other words, the snib lock was necessary just to keep the door shut.

10. On or before 30 September 2014, the respondent contacted PS asking for permission for Mr Jeffrey, together with an engineer and a quantity surveyor, to visit the property. PS had no-one available to accompany Mr Jeffrey to the property. Despite that, the respondent wanted the visit to go ahead, so PS agreed that Mr Jeffrey could make an unchaperoned visit. He was given the keys to the property and the code for the intruder alarm. Mr Jeffrey therefore attended the appellant's property on 30 September 2014 at his own request, with the consent of PS. It is the appellant's case that the respondent owed the appellant a duty of care to take reasonable precautions as to security whilst he was at the appellant's property.

11. Mr Jeffrey unlocked the Quebec Street door and deactivated the intruder alarm. However, unlike the PS representative on his previous visits, he did not secure the Quebec Street door using the snib lock. Mr Jeffrey and his colleagues then went off to inspect the six stories of the property. This left the Quebec 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.

12. The visit lasted for about an hour. It appears that Mr Jeffrey and his colleagues spent most of that time in areas far away from the Quebec Street door. It is the appellant's case that, during that time, an intruder entered the property through that unlocked (and possibly open) door and was not detected in the dark. Mr Jeffrey and his colleagues then left, resetting the alarm and locking the Quebec Street door from the outside. Later that day, a fire was started inside the property and the roof and the interior were destroyed. It is the appellant's case that the fire was started by an intruder. The claim in negligence against the respondent is for damages put at around £6.5m. Fortunately, the external shell was largely saved and has been incorporated into a new building on the site.

13. Whilst the claim is denied, it should be noted that the respondent accepts, at least in part, certain ingredients of the appellant's claim in negligence. Thus, at paragraph 3.7(a) of the defence, it is accepted that, as an empty property, "the property was at risk of entry and damage by intruders to the extent that such entry was not deterred by locked doors and the alarm system." At paragraph 3.8, it is admitted that this risk was generally foreseeable, and thus foreseeable by Mr Jeffrey. Perhaps most important of all, at paragraph 6.2(e)(iii), the respondent pleads:

> "It was reasonably foreseeable that risk of harm to the Property by an unknown third party was (marginally) increased for one hour on the morning of 30 September 2014. However reasonable foreseeability of harm is inadequate to give rise to a duty of care at common law."

14. The second sentence of the passage set out above – with Lord Hope's qualification that it is foreseeability "of itself" which does not give rise to a duty - is indubitably correct as a matter of law. The issue identified in the first sentence (namely the extent to which the risk of harm was increased by the relevant events) will be a matter for the trial, if we conclude that there was an arguable duty. But the respondent's acceptance that there was an increase in the risk of harm during Mr Jeffrey's visit seems to me to be significant. That is because that increase in the risk of harm can only have been caused by Mr Jeffrey, who disabled the alarm and did not lock the Quebec Street door before he went to inspect other parts of the property.

3 THE APPLICATION TO STRIKE OUT AND THE JUDGMENT BELOW

15. On 7 May 2020, the respondent applied to strike out the claim. The supporting witness statement did not refer in terms to the claim being one for "pure omissions". However the statement did say that the duty alleged "is one to protect the appellant from harm caused by a third party, whose conduct the respondent was not responsible for and that, in the absence of any contract between the appellant and the respondent, there was no basis for the alleged duty of care".

16. The hearing took place before the judge on 15 June 2020. Her judgment at [2020] EWHC 1982 (TCC) was handed down just over a month later on 24 July 2020.

17. Having identified the parties submissions at [21]-[22], the judge then set out at some length what she called the applicable legal principles from [23]-[37]. I will not repeat any of that here as I shall summarise the applicable law in the next section of this judgment. By contrast, the judge's reasoning in arriving at her conclusion was quite short. She said:

> "38. In this case, the Court must determine whether it is satisfied that the claim is bound to fail. That involves consideration of the following issues:
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> i) whether, as the Claimant contends, this is not a pure omissions case, or at least arguably it is not an omissions case, because the Defendant created the danger and/or played a causative part in the train of events that led to the risk of damage;
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> ii) if it is an omissions case, whether the Defendant assumed a positive responsibility to safeguard the Claimant's property from harm under the *Hedley Byrne* principle.
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> 39. On analysis of the assumed facts, the harm suffered was fire damage to the Claimant's property. That harm was not caused by the Defendant but by a third party unconnected with the Defendant. The danger causing the damage was fire. The Defendant did not create the source of the fire or provide the means by which the fire started. By leaving the door unlocked, the Defendant increased the risk that an intruder might gain entry to the building. Locking the door would have prevented the third party from causing the damage. Failing to lock the door amounted to a failure to prevent that harm. The examples given by Lord Goff in *Smith* (above) are apt in this case. Mr Jeffrey's failure to lock the door during his inspection inside the property may have been the occasion for the third party to gain access to the building but it did not provide the means by which the third party could start a fire and it was not causative of the fire. It follows that this case is a pure omissions case.
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> 40. The assumed facts of this case do not give rise to the imposition of an assumption of responsibility on the basis of which a duty of care might be owed. Relationships in which a duty to take positive action to safeguard the property of another have been found typically include contractual or quasi-contractual arrangements, such as *Stansbie v Troman*, promises and trusts, as indicated by Lord Reed in *Robinson* or circumstances where reliance is placed on the Defendant's skill and expertise, as indicated by Lord Goff in *Merrett.* None of the legally significant features of the earlier authorities in which the courts have found an assumption of responsibility exists in this case. In a commercial context, it is difficult to conceive of circumstances giving rise to an assumption of responsibility where there are no dealings between the parties. As Ms Sinclair put it, there were no exchanges between the parties in this case which crossed the line.
>
> 41. Mr Brown seeks to rely on the Defendant's possession of the key as amounting to a special level of control over the source of the danger, which could give rise to an assumption of responsibility. However, the Defendant in this case did not hold itself out as having any special skill or expertise in

> safeguarding property. The Defendant was not a fire or security expert, was not a lettings or managing agent for the property, and was not entrusted with possession of the property during construction works. Mere possession of the key during an inspection of the property was not sufficient to give the Defendant responsibility for safeguarding the property from fire damage. The absence of any dealings between the Claimant and the Defendant preclude any finding of reliance by the Claimant on the Defendant, or any finding that reliance was objectively reasonable."

18. Accordingly, having found that this was a pure omissions case, and that none of the relevant exceptions applied, the judge struck out the claim.

4 THE LAW

19. On an analysis of the submissions of leading counsel on this appeal, I consider that there are two strands within the authorities which fall to be considered. The first strand is the general run of cases which could be labelled as having given rise to the "pure omissions" principle. The second strand are the particular cases concerned with a failure to keep property secure.

4.1 The 'Pure Omission' Cases

20. The starting point is *Smith v Littlewoods* [1987] 1 A.C.241. In that case, which was also concerned with an empty cinema, the defendant owners had done little work to the cinema and nothing to secure its safety. A fire was deliberately started by children or teenagers and the cinema burnt down. The fire also caused serious damage to adjacent property. The owners of the adjacent property sued the defender for damages in negligence.

21. Lord Goff posed the question raised by the case at 271 B-C:

> "Why does the law not recognise a general duty of care to prevent others from suffering loss or damage caused by the deliberate wrong doing of third parties? The fundamental reason is that the common law does not impose liability for what are called pure omissions."

Lord Goff then went on to identify two exceptions to that principle, namely where the relationship between the parties gives rise to an imposition or assumption of responsibility, or where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and spark off the danger, thereby causing damage to the defendant's neighbours. At 279D-F Lord Goff made the oft-repeated observation that the problem posed by these and other cases could not be solved simply through the mechanism of foreseeability.

22. On the facts, the House of Lords concluded that the owners did not owe a duty of care to adjoining occupiers. They said that such a duty would be rare; and that because the owners did not know about the previous acts of vandalism and the cinema was not obviously a fire risk, they were not required to take positive steps to prevent the entry of vandals.

23. *Stovin v Wise* [1996] A.C.923 was a case where a defendant to a road traffic claim settled with the plaintiff, and then pursued the council as a third party, alleging negligence in failing to take steps to make a particular road junction less dangerous. The House of Lords, by a majority, found that the council owed no duty of care. In his speech, Lord Hoffmann was anxious to stress that the 'pure omissions' cases were exactly that: cases where the defendant had done nothing at all that was of relevance to the claim. That was a different situation to the ordinary kind of omissions which form part of most negligence claims. Lord Hoffmann said:

> "A similar point was made by Lord Diplock in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1060. There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is· doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties (like Mrs. Wise [the defendant]) or natural causes. One can put the matter in political, moral or economic terms. In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect.
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> …
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> Of course it is true that the conditions necessary to bring about an event always consist of a combination of acts and omissions. Mr. Stovin's accident was caused by the fact that Mrs. Wise drove out into Station Road and omitted to keep a proper look-out. *But this does not mean that the distinction between acts and omissions is meaningless or illogical. One must have regard to the purpose of the distinction as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity.* To hold the defendant liable for an act, rather than an omission, it is therefore necessary to be able to say, according to common sense principles of causation, that the damage was caused by something which the defendant did. If I am driving at 50 miles an hour and fail to apply the brakes, the motorist with whom I collide can plausibly say that the damage was caused by my driving into him at 50 miles an hour. But Mr. Stovîn's injuries were not caused by the negotiations between the council and British Rail or anything else which the council did. So far as the council was held responsible, it was because it had done nothing to improve the-visibility at the junction" (Emphasis supplied).

24. In *Mitchell & Anr v Glasgow City Council* [2009] UKHL 11: [2009] 1AC874, D & M were both local authority tenants. D had mental health issues and had threatened to kill M on a regular basis. Without informing M, the local authority summoned D to a meeting in which he was warned the continued anti-social behaviour could result in

his eviction. About an hour after the meeting, D attacked M, who subsequently died. The claim against the local authority was based on the events surrounding the meeting. The claim was rejected, the House of Lords concluding that there was nothing to show that the local authority had made itself responsible for protecting M from the criminal acts of D.

25. In his judgment in *Mitchell*, Lord Hope reiterated at [15] that foreseeability of harm was not of itself enough for the imposition of a duty of care; that the law does not normally impose a positive duty on a person to protect others; and that the law does not impose a duty to prevent a person from being harmed by the criminal acts of a third party based simply upon foreseeability.

26. In his judgment in *Mitchell*, Lord Scott said:

> "39. It is a feature of the common law both of England and Wales and of Scotland that liability in negligence is not imposed for what is sometimes described as a "mere" omission (see eg. Salmond & Heuston on the Law of Torts 21st Ed. (1996), p.219). Lord Atkin in *Donoghue v Stevenson* [1952] AC 562 referred at 580 to the duty to "…take reasonable care to avoid acts *or omissions* which you can reasonably foresee would be likely to injure your neighbour" (emphasis added). Yet it is accepted in both jurisdictions that the Pharisee who passed by the injured man on the other side of the road would not, by his failure to offer any assistance, have incurred any legal liability. A legal duty to take positive steps to prevent harm or injury to another requires the presence of some feature, additional to reasonable foreseeability that a failure to do so is likely to result in the person in question suffering harm or injury. The Pharisee, both in England and Wales and in Scotland would have been in breach of no more than a moral obligation.
>
> 40. The requisite additional feature that transforms what would otherwise be a mere omission, a breach at most of a moral obligation, into a breach of a legal duty to take reasonable steps to safeguard, or to try to safeguard, the person in question from harm or injury may take a wide variety of forms. Sometimes the additional feature may be found in the manner in which the victim came to be at risk of harm or injury. If a defendant has played some causative part in the train of events that have led to the risk of injury, a duty to take reasonable steps to avert or lessen the risk may arise. Sometimes the additional feature may be found in the relationship between the victim and the defendant: (eg. employee/employer or child/parent) or in the relationship between the defendant and the place where the risk arises (eg. a fire on the defendant's land as in *Goldman v Hargrave*]1967] 1AC 645 Sometimes the additional feature may be found in the assumption by the defendant of responsibility for the person at risk of injury (see *Smith v Littlewoods Organisation Ltd* [1987] AC 241 per Lord Goff of Chieveley at 272). In each case where particular circumstances are relied on as constituting the requisite additional feature alleged to be sufficient to cast upon the defendant the duty to take steps that, if taken, would or might have avoided or lessened the injury to the victim, the question for the court

> will be whether the circumstances were indeed sufficient for that purpose or whether the case remains one of mere omission."

27. In the same case, Lord Rodger talked about the possibility of liability if the defender "provides an opportunity for a third party to harm the pursuer in a foreseeable way must take reasonable care to prevent the harm" [57]. He called this a situation where "the defender's act which provides the opportunity for the third party to injure the claimant is itself wrongful" [58].

28. In *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736, the defendant's police officers caused foreseeable injury to an elderly passer-by while attempting to arrest a suspect on the street. The Supreme Court found there was a reasonably foreseeable risk of injury and that police officers owed a duty of care towards pedestrians, including the claimant, in the immediate vicinity when the arrest had been attempted. Lord Reed said:

> "69. …
> 4.The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance. The central point is that the law of negligence generally imposes duties not to cause harm to other people or their property: it does not generally impose duties to provide them with benefits (including the prevention of harm caused by other agencies). Duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes. It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm.
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> …
>
> 70 Returning, then, to the second of the issues identified in para 20 above, it follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human

> agency, as in the *Dorset Yacht* case [1970] AC roo4 and *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility."

29. Following on from what he had said in *Robinson*, in *N & Anr v Poole Borough Council* [2019] UKSC 25; [2020] AC 780, Lord Reed reiterated at [28] that the label "pure omissions" was potentially unhelpful. He put it another way:

> "28. Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm: see, for example, *Sheppard v Glossop Corpn* [1921] 3 KB 132 and *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply. As in the case of private individuals, however, a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as for example where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm: see, for example, *Dorset Yacht Co Ltd v Home Office*, as explained in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057, para 39."

30. Although on this topic both leading counsel referred to the decision of this court in *Hamida Begum v Maran (UK) Limited* [2021] EWCA Civ 326, I consider that the judgments in that case were doing little more than applying the principles to be derived from the Supreme Court decisions cited in the previous paragraphs. It adds nothing new.

4.2 Keeping Property Secure

31. As I have said, there is a second (related and overlapping) line of authority concerned with the duty to take reasonable steps to keep property secure. Within that strand of cases, there is a significant difference of approach between those situations, on the one hand, where the defendant is carrying out some activity, in the course of which he has failed to keep the claimant's property secure and the claimant has suffered loss as a result and, on the other, those cases where the defendant has done nothing whatsoever with its own property, which has then been misused in some way by third parties, causing loss to the owners of adjoining property. Liability has been readily found in the first type of case, but not in the second.

32. The best-known example of the first type of case is *Stansbie v Troman* [1948] 2K.B. 48. In that case, a decorator was left alone in a house, with the permission of the householder's wife, carrying out his work. When he left the house to obtain wallpaper, he did not lock the door, which could then be opened by a mere turn of the

handle. During the decorator's absence a thief entered the house this way and stole property. The householder claimed the value of the stolen property from the decorator. The claim was upheld by the judge at first instance and by the Court of Appeal.

33. In giving the principal judgment, Tucker LJ said:

> "I agree that the duty must be within the scope of the contractual relationship between these two persons, but I think that contractual relationship did impose a duty on the plaintiff decorator to take reasonable care with regard to the state of the premises if he left them during the performance of his work. That, I think, was the measure of the duty…
>
> Mr Brown [counsel for the decorator] referred to *Weld Blundell v Stevens* [1920] A.C. 956 and in particular to the following passage in the speech of Lord Sumner (at 986): 'In general (apart from special contracts and relations and the maxim respondent superior) even though A is in fault he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B them becomes a new and independent cause.'
>
> I do not think that Lord Sumner would have intended that very general statement to apply to the facts of the case such as the present where, as the judge points out, the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened The reason why the decorator owed a duty to the householder to leave the premises in a reasonably secure state was because otherwise thieves or dishonest persons might gain access to them; It seems to me that if the decorator was, as I think he was, negligent in leaving the house in this condition, it was as a direct result of his negligence that the thief entered by the front door, which was left unlocked, and stole these valuable goods."

34. It is interesting to note that both Lord Mackay and Lord Goff approved (and even widened the ambit of) *Stansbie v Troman* in their respective speeches in *Smith v Littlewoods.* Thus, Lord Mackay said at 264H-265C:

> "There was in that case no special relationship between the decorator and the thief. Although there was a contract between the decorator and the plaintiff. I should have thought that on the same facts, a guest of the plaintiffs who had left property in the house, if it had been stolen, might also have succeeded in recovering damages in respect of that theft from the decorator. That case is proceeded on the basis that the decorator was liable because it was 'as a direct result of his negligence that the thief entered by the front door'. I think it could be said that the purpose of the security arrangements at the door of the house

> was to prevent unlawful intrusion, that a reasonable man, in the decorator's position, would have secured the door, and that on analysis, his reasons for doing so would have been to prevent the consequence which he ought reasonable to have foreseen of unauthorised intrusion and theft from the house whose door it was. "

35. Lord Goff, at 272D-F said:

> "That there are special circumstances in which a defender may be held responsible in law for injuries suffered by the pursuer through a third party's deliberate wrong doing is not in doubt. For example, a duty of care may arise from a relationship between the parties, which gives rise to an imposition or assumption of responsibility upon or by the defender, as in *Stansbie v Troman* where such responsibility was held to arise from a contract. In that case a decorator, left alone on the premises by the householders wife, was held liable when he went out leaving the door on the latch, and a thief entered the house and stole property. Such responsibility might well be held to exist in other cases where there is no contract, as for example where a person left alone in a house has entered as a licensee of the occupier."

36. Another example of the first type of case referred to in paragraph 31 above is *Dove v Banham Patent Locks Limited* [1983] 1WLR 1436. There the defendant failed to install a security door properly. Many years later, when the property was owned by subsequent purchasers with no contractual relationship with the defendant, a burglar broke in through the defective door and stole valuable items. It was found that the defendant owed a duty of care to the subsequent purchasers to carry out the security work properly and that they were in breach of that duty.

37. The second type of case referred to in paragraph 31 above primarily concern the situation where the insecure property gave rise, not to a claim by the owner of the property in question, but instead to a claim against that owner by owners of adjoining properties. *Smith v Littlewoods* is perhaps the best example of that. For instance, at 278G-H, Lord Goff, in explaining why there was no duty, postulates the example of a vandal entering a flat and damaging the plumbing, resulting in a water leak which caused damage to the shop below. He did not think that the flat owners owed a duty to the shop owners, even if it was well-known that vandalism was prevalent in the neighbourhood. He used that specific example because the claim in *Smith v Littlewoods* was against the property owner who had done nothing, brought by the owner of an adjoining property.

38. *P.Perl (Exporters) Limited v Camden London Borough Council* [1984] 1QB 343 was, like *Smith v Littlewoods*, another case where the defendant owner did nothing. It owned an insecure property where unauthorised persons were often seen and where burglaries had taken place. One weekend, intruders entered the defendant's property and knocked a hole through the party wall with the plaintiff's basement and stole the plaintiff's property. The claim in negligence was rejected by the Court of Appeal. Oliver LJ said at 352G-353B:

> "The defendants have, of course, done nothing; so the case is one, not of an act, but of an omission. They simply omitted to keep and maintain an effective lock on the front door giving access to no. 144 and they similarly omitted to keep and maintain effective internal barriers such as would or might have prevented trespassers obtaining access to the rear wall of the plaintiffs' store-room. It cannot be asserted that those omissions, by themselves, caused any injury to anyone. They merely enabled some unknown third party over whom the defendants had no control to effect an unlawful entry upon the· defendants' premises and thence to effect an equally unlawful entry upon the plaintiffs' premises. It would, in fact, be more accurate to say that the omissions failed to impede such an entry rather than that they enabled it to take place, for it is by no means certain that even an effective lock on the outer door would have prevented an incursion by a really determined gang of thieves. Thus the assertion that the defendants are liable for the damage which the plaintiffs sustained rests upon the proposition that the breaking into the plaintiffs' premises was the natural and probable consequence of the defendants' failure to secure their own premises from invasion. "

39. *Topp v London Country Bus (South West) Limited* [1993] 1WLR 976 is rather harder to categorise. There, the defendants' mini bus was parked with the key in the ignition switch, unlocked and unattended, at a bus stop outside a pub. Some nine hours later, while being driven without authority on a public road by an unidentified third party, the bus knocked down and killed the plaintiff's wife. The claim was dismissed at first instance and the appeal was dismissed. It was held that, even if the defendants had been at fault, they were not responsible in law for the injury, which was caused by the voluntary act of the third party who was a complete stranger to the defendants. Dillon LJ rejected the submission that leaving the bus unlocked with the key in the ignition created a special risk and a special category, relying, amongst others, on *Perl*.

40. Whilst the result in *Topp* may be unexceptionable, it is a little difficult to square with *Haynes v Harwood* (examined in greater detail below). It is a difficult case which should not be regarded as establishing any particular principle. Speaking entirely for myself, I consider that the critical thing in *Topp* was that, whilst the burglar stealing from the unattended house in *Stansbie v Troman* and *Dove* was the foreseeable consequence of the defendant's default, it was entirely unforeseeable in *Topp* that a third party would not only steal the bus, but drive it so badly many hours after it had been taken that the plaintiff's wife was knocked down and killed.

5 PRELIMINARY OBSERVATION

41. As mentioned during the course of argument, a number of cases have reached this court recently where the principal issue as to the duty of care arises on an application to strike out, rather than following a trial. I have already made the point that this can lead to squabbles about and the 'spinning' of the contents of the pleadings, neither of which help to illuminate the real point of the appeal.

42. Furthermore, appeals from decisions either allowing or refusing applications to strike out mean that, ultimately, all this court can decide is whether or not the claim in question is arguable. That is a relatively low threshold. If the claim is found to be arguable, it is usually then inappropriate for the court to go on to consider any other

issues in too much detail, because of the risk of making findings that may constrain the trial judge in the future. Thus in this case, as in *Begum*, the question is not 'is there a duty of care?', but simply 'is the alleged duty of care arguable?'.

43. None of that is to be taken as a criticism of the current practice whereby a defendant who has a good prospect of demonstrating that there is no arguable duty of care can seek to strike out the whole claim. But it is perhaps a gentle warning against more speculative applications.

6 IS IT ARGUABLE THAT THIS IS NOT A CLAIM BASED ON 'PURE OMISSIONS'?

44. As explained, for this appeal to succeed, it is only necessary for the appellant to show that its claim is arguably *not* one based on 'pure omissions', or if it is, that it arguably falls within one of the exceptions to that rule. In my view, it is arguable that this is not a claim based on 'pure omissions'. That is for three reasons. First, I consider that, standing back from the detail and the authorities, that must be the answer as a matter of general principle. Secondly, I consider that, unlike the authorities set out in Section 4.1 above, this is a claim based on the respondent's critical involvement in the activity which gave rise to the loss, so it is not a 'pure omissions' case. Thirdly, I consider that the case falls within a well-recognised line of negligence authorities, noted in Section 4.2 above, where a duty has been found to be owed by a defendant in respect of the security of the claimant's property. I elaborate those three reasons below.

6.1 General Principles

45. The respondent was a visitor to the appellant's property, present with the appellant's permission. In my view, it is fanciful to suggest that, whilst the sole occupant of the property, trusted with the keys, the respondent owed no duty of care to the claimant to take reasonable precautions as to security. On an application of the ordinary principles of negligence if, for example, during his visit Mr Jeffrey had carelessly tossed away a burning cigarette end which caused a fire that burned down the property, he would arguably be liable in negligence for the consequences.

46. On that basis, the respondent's position on the strike-out can only be that, whilst Mr Jeffrey owed the appellant a duty to take reasonable care not to burn down the property himself, it is not even arguable that Mr Jeffrey – 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 instead. I consider that such a position is untenable.

47. The respondent's difficulties on this straightforward application of general principle were revealed towards the end of Ms Sinclair QC's submissions when, in answer to a question from my Lord, she agreed that, if PS had said to Mr Jeffrey when they handed over the keys "don't forget to lock the door", and he failed to do so, there would arguably have been a relevant duty and a breach. I cannot accept that PS' failure expressly to remind Mr Jeffrey to do something which, on the appellant's case, was so obvious, can make the critical difference on an application to strike out. It seems to me therefore that, arguably, on an ordinary application of general principle, all the necessary ingredients of a negligence action were in place here: duty, foreseeability, breach and causation.

6.2 Involvement in the Relevant Events

48. As noted in Section 4.1 above, 'pure omissions' cases are ones where the defendant did nothing, or certainly nothing of any legal relevance to the claim. So in *Mitchell*, the defendant council had no particular involvement with the neighbour who was killed; they were simply his landlords. And as for the second type of case concerned with the security of property (Section 4.2 above), both *Smith v Littlewoods* and *Perl v Camden* are examples of cases where the defendant property owner did nothing, simply owned a property which intruders got into, and so did not owe a duty of care to adjoining owners.

49. As the authorities make plain, that situation is to be contrasted with those cases where the defendant was involved in a particular activity, and it was the negligent carrying out of that activity that gave rise to the claim: see Lord Hoffmann's distinction in *Stovin v Wise*. The best example in Section 4.1 above is the *Robinson* case, where it was the defendant's officers who chose to arrest the criminal on the street, and thereby caused personal injury to the passer by.

50. In my view, in the present case, the respondent was involved directly in the activity which allowed the intruder to enter the property. Mr Jeffrey unlocked the Quebec Street door and deactivated the alarm. Once inside, Mr Jeffrey chose not to lock that door with the snib lock, or to take any other precaution in the vicinity of the door. He left it unlocked/open, and unguarded. On the pleaded case, it was therefore because of Mr Jeffrey's acts and omissions that the Quebec Street door was unlocked, and possibly had even swung open, during the course of his hour long visit to other parts of this large property. On the Appellant's case taken at its highest, it was that, and that alone, which allowed the intruder inside.

51. On that basis, the respondent had not just provided the opportunity for the intruder to get in (as per Lord Rodger in *Mitchell)*. In the words of *Robinson* and *N v Poole*, it is at least arguable that Mr Jeffrey 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 is a question for another day - but it cannot be said unequivocally that he did not owe a relevant duty of care because such a duty would be based on 'pure omissions'.

52. That brings us back to Lord Hoffmann in *Stovin v Wise*. Negligence claims like this are often focussed on an omission, in the sense of something which the defendant failed to do. In this case, it was Mr Jeffrey's decision not to lock the Quebec Street door once he and his colleagues were inside. But that was part of a series of acts and omissions arising out of his visit: deactivating the alarm, not locking the door; leaving the area of the door unguarded etc. It should not be taken as the appellant's sole complaint, which is how the judge appears to approach it at [39].

53. Moreover, this sort of semantic bickering – can it be presented as a positive act or only an omission? - is not what the rule in relation to 'pure omissions' is all about. All negligence claims involve acts (things done which should not have been done) and/or omissions (things which ought to have been done which have not been done). As Lord Hoffman made clear, that is unexceptionable. It does not mean that a claim like this one, where the failure to do something (locking the door) was part of the

activity undertaken by the tortfeasor that gave rise to the loss, can be said to be a claim based on 'pure omissions'.

54. I consider that the failure to lock or otherwise guard the Quebec Street door after entering the property was a central part of Mr Jeffrey'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. I consider that the judge erred in concluding otherwise.

6.3 The Case Fits Within a Recognised Line of Authority

55. In my judgment, this case falls within the first type to which I have referred in Section 4.2 (paragraph 31) above. Indeed, in its relevant particulars, I consider that it is indistinguishable from *Stansbie v Troman*. 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, Mr Jeffrey did not lock the Quebec Street door and, as the appellant has pleaded was foreseeable, a third party got into the property and started a fire.

56. The judge took a different view because she said at [40] that *Stansbie v Troman* was based on the contractual relationship between the householder and the decorator. In my view, that is not a correct reading of the case. As Lord Mackay and Lord Goff both explained in *Smith v Littlewoods,* it made no difference that there was a contract between the householder and the decorator. Their Lordships say expressly that a claim could have been made by a guest staying in the house (where there would have been no contract). What mattered was that the decorator was in the house as a licensee. So too, in the present case, was Mr Jeffrey.

57. Ms Sinclair endeavoured to distinguish *Stansbie v Troman* on the basis that, in that case, the decorator failed to lock the door when he went out, whilst in the present case, Mr Jeffrey failed to lock the door when he was still on the inside of the property. But in my view, on the facts of this case, that is not a proper distinction at all. True it is that Mr Jeffrey remained on the inside of the property, but it was so big and dark, and divided into so many different areas, that the mere fact that Mr Jeffrey was somewhere within the property at the time of the illegal entry is irrelevant: just like the decorator in *Stansbie v Troman*, he had rendered the property insecure, and a third party took advantage of that state of affairs.

58. The judge suggested at [39] that this case was also indistinguishable from *Smith v Littlewoods* and *Perl v Camden*, a submission which Ms Sinclair repeated to us. She said that there was nothing in the judgments in those cases to suggest that the fact that they were claims by adjoining owners against the defendant property owner, rather than claims made by the claimant property owner against the person who rendered that property insecure, made any difference to the outcome.

59. For the reasons I have already given, I do not agree. The whole point about *Smith v Littlewoods* is that it was a claim against the owner of the cinema by the owners of the neighbouring properties, which had suffered damage as a result of the fire in the cinema. That explains Lord Goff's whole approach: see his example of the vandal damaging the plumbing which I cite at paragraph 37 above. *Perl* was a similar claim: the defendant had left its property alone and that property had then been the unwitting vehicle for the intruders to get into the claimant's neighbouring property. They are

both cases where the property owner did nothing with his own property, and the law imposed no duty on him to do anything. This case is very different: it is all about damage to the appellant's own property and the extent to which the respondent owed a duty to the appellant to take reasonable steps to secure that property, in circumstances where, at the respondent's request, the respondent was allowed into the property and, on these assumptions, was in breach of that duty.

60. During the course of argument, my Lord asked whether the appeal was concerned with the respondent's potential liability for the conduct of third parties. Leading counsel confirmed that, at least for the purposes of the strike out application, they did not put their arguments on that basis. That was understandable for at least four reasons.

61. First, in *Stansbie v Troman*, the fact that the burglary had been carried out by a third party was nothing to the point: it was the risk that such an event would happen that gave rise to the duty of care. The same is true of the earlier case of *Haynes v Harwood* [1935] 1 K.B. 146 where the risk that the horses would be startled gave rise to the duty.

62. Secondly, I suspect that the question of the respondent's potential liability for third parties did not arise on this appeal because of the respondent's fair acceptance that, not only was the agreed risk that vagrants could break into the property foreseeable, but that the decision not to lock the Quebec Street door increased that foreseeable risk: see paragraph 13 above.

63. Thirdly, I would observe that empty city centre properties are a magnet for vagrants, and that in winter, once inside, one of the first things that a vagrant will do is to build a fire. Whether or not there is in fact liability on the part of the respondent for the acts of third parties will be determined at the trial, but I consider that that is another reason why the existence of a duty in this case is at least arguable.

64. Fourthly, if what happened was within the scope of the foreseeable risk created by the alleged negligence, there will be liability, even if the precise manner in which the damage occurred was not foreseeable: see *Jolley v Sutton LBC* [2001] 1 W.L.R. 1082. That may be an apt description of what happened here: access by a vagrant and resulting property damage may have been foreseeable, so that, even if the burning of the property to the ground was not foreseeable, it will arguably not matter.

65. That last point also touches on the question of causation. During the course of her submissions, Ms Sinclair made a number of references to causation and how there was no sufficient causative link in this case between the duty and the damage. That was a point the judge emphasised in the passages that I have cited at paragraph 17 above. I do not think it appropriate to get too far into an analysis of causation at this stage. The strike out is based on there being no duty of care. It is not based on there being no sufficient causative connection between the alleged breach and the alleged loss, assuming the pleaded duty is found to exist.

66. Accordingly, for these reasons, I conclude that, with great respect to her, 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.

7 OTHER LEGAL ARGUMENTS

7.1 The Exceptions

67. Understandably, part of the hearing of this appeal was taken up with Mr Elkington QC's alternative arguments that, even if this was a case of pure omissions, at least two of the exceptions applied, namely what is called the 'creation of danger' exception and/or the 'assumption/imposition of responsibility' exception.

68. It is unnecessary to consider those arguments in detail because of my 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-suppose the opposite. I am also conscious that, because this is a judgment on an interlocutory application, there is a risk of imposing potential constraints on the trial judge by deciding issues on appeal which do not need to be decided.

69. Accordingly, I would simply say that it must be open to Mr Elkington at trial to argue that, if for example the evidence demonstrates that this is a 'pure omissions' case after all, it does fall within one of both of these exceptions. I express no concluded view as to the likely outcome of such arguments but, since the boundaries between 'pure omissions' cases and the exceptions to them are perhaps rather more fluid than we may like, I address each exception very briefly.

7.1 (a) Creation of Danger

70. In *Haynes v Harwood* (a case referred to in passing during argument but not otherwise cited) the defendant's servant had left his horse-drawn van unattended in a crowded street. The horses bolted when a boy threw a stone at them and a police officer suffered injury in stopping the horses before they injured a woman and child. It was held that there was a breach of the relevant duty owed by the carter to the police officer because the throwing of the stone (or indeed any sudden noise or movement) were reasonably foreseeable. The defendant's servant should have guarded against that risk by taking appropriate precautions.

71. In *Smith v Littlewoods* at 273, Lord Goff described *Haynes v Harwood* as a classic case of the defendant negligently causing or permitting to be created a source of danger, where it was reasonably foreseeable that third parties may interfere with it and, sparking off the danger, cause damage to the claimant. If at trial in this case, the judge accepts that the respondent negligently caused or permitted a source of danger to be created when the Quebec 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.

72. To put this point another way, the judge said that the failure to lock the door "may have been the occasion for the third party to gain access to the building but it did not provide the means by which the third party could start a fire and it was not causative of the fire" [39]. But 'providing the occasion' is no different to Lord Rodger's 'providing the opportunity' in *Mitchell*, which he said may give rise to the 'creation of danger' exception. And arguably that did provide the means by which the intruder started the fire, because it let him get into the large empty property.

7.1 (b) Assumption of Responsibility

73. Although I consider that *Stansbie v Troman* was not really a case of 'pure omissions' at all, to the extent that it was classified as such in *Smith v Littlewoods* at 272, it seems to me that it is arguable in the present case that the respondent, at its own request present as a licensee inside the appellant's property, owed the appellant 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. I do not agree with the judge's analysis at [40]: to the extent that it matters, there were dealings between the parties prior to and at the time of the visit. Nor do I agree with her observation at [41] that, for this exception to apply, it somehow required the respondent to hold itself out as having a special skill or expertise in safeguarding property. On the appellant's case, all that had to be done was to lock the Quebec Street door. That did not require any specialist skills.

7.2 Meadows v Kahn

74. Thus far it has been unnecessary to refer to the recent Supreme Court authorities which have considered the essential ingredients of a claim in negligence: *Meadows v Kahn* [2021] UKSC 21; [2021] 3 WLR 147, and its sister case *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; [2021] 3 WLR 81. That is primarily because those two cases focused upon what used to be called the *SAAMCO* principle (which does not arise here), and because (as Ms Sinclair accepted) the suggested six-point test is aimed at alleged duties which fall outside the established categories of negligence cases. The present case is not a novel claim to which the six-point plan might be applied: instead, it is a recognised type of claim, well-covered in the authorities to which I have already referred, some of which the Supreme Court themselves cite in their judgment at [37].

75. During the course of argument, the only point raised by reference to *Meadows v Kahn* was Ms Sinclair's submission that the scope of the duty in any given case must focus on the risk of harm. That found a direct translation in *Meadows v Kahn*, where the defendant had given negligent advice about the prospects of the claimant's child having haemophilia, but had never given any advice about the autism with which sadly the child had also been born. Accordingly, the Supreme Court found that the claimant could recover the initial costs associated with the child's haemophilia, but – because it was outside the scope of any duty owed - not the costs associated with his autism. On one view, that is a straightforward application of the *SAAMCO* principle.

76. It was not entirely clear how Ms Sinclair translated what the Supreme Court said about the scope of duty and the risk of harm to the present appeal. At one point she seemed to be arguing that the relevant harm in the present case was what she called "fire damage" and that that was not within the scope of any duty owed by the respondent. However, she subsequently appeared to accept that this was too narrow a proposition, and that the damage in the present case could properly be described as property damage. That is therefore how I shall refer to it.

77. Ms Sinclair submitted that property damage was outside the scope of any duty owed by the respondent. She said that 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.

78. I found that submission unpersuasive, certainly for the purposes of a strike-out application. If I leave my keys with a neighbour, so that he can come and water my plants whilst I am away, and in doing so he leaves the front door open and a vagrant enters, builds a fire and burns my house down, it is arguable that my neighbour owed me a duty of care to take reasonable precautions as to security, and that such a duty extended not only to taking reasonable steps to prevent the vagrant from coming into the house, but to the likely harm that an intruder might do once they got inside. I consider that any distinction between preventing access on its own, and preventing foreseeable events after access has been obtained, is much too rigid, certainly on a strike-out application. There is also the *Jolley v Sutton* principle (paragraph 65 above) which also tells against the respondent. In all the circumstances, it cannot be right to conclude at this stage that the respondent 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.

8 CONCLUSIONS

79. For the reasons that I have set out, I consider that it is arguable that this is not a case of 'pure omissions' and is in any event a case which fits within a line of authority which potentially renders the respondent liable for the consequences of their failure to take reasonable steps to ensure that the appellant's property was properly protected during Mr Jeffrey's visit. If my Lady and my Lord agree, I would allow this appeal.

LORD JUSTICE STUART-SMITH

80. I agree.

LADY JUSTICE ASPLIN

81. I also agree.