



## LEGAL BRIEFING

### *Aldgate Construction Company Ltd v Unibar Plumbing and Heating Ltd*

[2010] EWHC 1063 (TCC), Mr Justice Ramsey

#### *The Facts*

This case relates to the damages flowing from a fire on 9 March 2005 which substantially damaged one of two houses being developed on the same plot by Aldgate and was caused by a breach of contract by Unibar. Aldgate claimed £776,599 in damages, most of which was claimed on the basis that Aldgate was prevented by the fire from pursuing its established practice of constructing two properties on the same site at any one time.

Aldgate is a family operated business which generated substantial profits, principally when it acquired sites and developed them as dual properties. Aldgate had regularly subcontracted plumbing and heating works to Unibar. Unibar employed a sub-contracted plumber who negligently caused the fire using a blowtorch for some snagging work causing very substantial damage to the nearly completed house. The house had to be demolished to ground level and rebuilt.

The extra work required and the lack of funds from the sale of this property meant that Aldgate could not afford to buy further dual property sites without borrowing heavily, which its directors and shareholders were not prepared to do. The business was historically self-funded with the profit from the sale of developed properties being utilised to fund the next project with overdraft facilities being used sparingly.

Liability for the fire was only admitted by Unibar after proceedings were issued on 6 November 2008. Aldgate's evidence was to the effect that, if the fire had not happened, while it was developing Plot 3 at 2 Ermine Street, it would and could have sought to acquire Plot 1 at Ermine Street, failing which it would have acquired a single plot elsewhere. Once those plots had been developed and sold in between about June 2005 and May 2006, Aldgate said that it would have acquired another dual development site in mid 2006 and developed it and sold it within about 12 months. Thereafter the same process would have been completed between about September 2007 and August 2008. Aldgate compared this with what actually happened which in effect was, in terms of new development after the fire, the completion and sale of Plot 3 at Ermine Street and completion of a property at Ramsey Heights in December 2007.

#### *The Issues*

- (i) What would have happened in terms of Aldgate's trading activities of purchasing, developing and selling properties if there had been no fire?
- (ii) Was Aldgate entitled to the profit it alleged it had lost as a result of the fire relating to properties which it was unable to develop over the period May 2005 to the autumn of 2008?
- (iii) Was Aldgate entitled to the additional profit which would have been associated with the economies of scale achieved by working on two properties on one site at a time?

#### *The Decision*

Unibar accepted (in its closing submissions) that it was within the parties' contemplation when contracting in the ordinary course of things that a fire at No. 35 Cambridge Road might cause Aldgate to lose an investment opportunity; and that it was also foreseeable that that might have knock on effects in terms of Aldgate's future trading. Both sides

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ultimately accepted that the proper measure of loss of profit per house to be developed was £153,008 and that, if there was a loss associated with not being able to carry out dual property developments, it was 10% of that figure. This arose from there being an advantage in the economies of scale of constructing two houses on one site at about the same time rather than two houses on separate sites, particularly if those sites were some way apart, i.e. by the use of the same sub-contractors, the same methods of working and the same types of materials.

The Judge accepted that Aldgate's practice and policy was dual property development and that is what it would have proceeded with had it not been for the fire. It was then necessary to determine on the balance of probabilities and as necessary weigh up the percentage chances as to whether Aldgate would have been able to and would have proceeded with certain developments, and how long it would have taken to complete each development. The Court determined that the whole process of purchasing a property and obtaining planning permission (about 3 months), construction (about 12 months) and concluding a sale (about 4 months) would probably take about 19 months for a dual development over the period after the fire up to autumn 2008.

The Judge accepted that there was a 50% chance that Aldgate lost the opportunity of developing one dual property in 2005 with a loss of profit based on the economies of scale in the sum of £6,050. The Court also held that Aldgate was entitled to the loss of profit on a single property development in July 2005/February 2007 in the sum of £153,008 plus the loss of profit on one dual development between April 2007 to November 2008 (2 x £168,308) totalling £336,616. The Court awarded total damages of £401,253 after taking into account the profit of £94,421 Aldgate had received from the single development that it undertook at Ramsey Heights during that time.

#### ***Comment***

As stated in the Judgment, this case raised interesting issues of causation and in particular on the applicability of the "but for" test of causation. The Judgment sets out the various steps which have to be taken in analysing the extent to which different types of loss, and the losses said to have been actually suffered, are recoverable.

Proving entitlement to compensation for a lost opportunity, often referred to as the loss of a chance, is a complex exercise. The claimant must establish as a matter of fact that it lost the chance or opportunity by reason of the breach of duty by the defendant and that those losses are recoverable. An important factor in this case was that the Judge accepted that Unibar knew that Aldgate was a development company, that it developed dual property developments for resale and that it used its own money without borrowing investment capital.

There were also several sub-issues regarding hypothetical events that had to be determined and Aldgate was required to provide reliable evidence, including expert opinion, to convince the Judge that it had suffered, and was entitled to recover, the losses it claimed.

**Andrew Hales**  
**July 2010**