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CONSTRUCTION, ENGINEERING AND INFRASTRUCTURE

Claims against Approved Inspectors – the latest position

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An Approved Inspector ("**AI**") is an individual or organisation that privately and independently verifies that the Building Regulations have been complied with in a building project. This verification used to be conducted by the Building Control departments of Local Authorities only. AIs must be registered with the Construction Industry Council Approved Inspectors Register (CICAIR), be re-approved every 5 years and must have appropriate insurance cover. The Building Act 1984 is the primary legislation which governs AIs with secondary legislation such as the Building Regulations and the Building (Approved Inspectors etc.) Regulations 2010 providing further guidance.

AIs are required to operate to professional and ethical standards in the delivery of their services. CICAIR has introduced a Code of Conduct ("**the Code**") which all AIs are required to adhere to. The Code sets out the fundamental principles and expected behaviours that AIs are expected to adhere to and the standards of professional conduct and practice expected of AIs. In addition to the Code, AIs are also required to adhere to the Building Control Performance Standards published by the Department for Communities and Local Government and the Welsh Government. The aim of these standards is to ensure that the competition between Local Authorities and AIs does not drive down standards.

The role of the AI

Where a client decides to appoint an AI, it and the AI must notify the Local Authority of the intended project by submitting an "initial notice" which then places the responsibility for the verification of Building Regulations compliance on the AI.

The AI provides the client with advice throughout the entire life cycle of the project.

An AI is usually required to do the following throughout its appointment:

- Advise the client on the requirements of the Building Regulations and the information that needs to be submitted to the Local Authority;
- Ensure that proposals are compliant with the Building Regulations;
- Inspect and report on works as they progress; and
- Issue a final certificate to the client.

Who to bring a claim against?

Where a client has elected for the Local Authority to certify compliance with the Building Regulations, the client's design team must submit plans to the Local Authority to be approved. Upon completion and the issue of the Final Certificate by the Local Authority it may later transpire that the building was defective and not compliant with Building Regulations. The client would have no recourse against the Local Authority for economic loss arising from the issue of the Final Certificate.

The current law in England and Wales, which was established in the decision of *Murphy v Brentwood District Council (1991)*, is that the Local Authority is not obliged to safeguard commercial interests from pure economic loss. The case of *R (Gresty) v Knowsley MBC* (2012) affirms the Local Authority's Building Control "immunity" from causes of action stemming from approving defective works. In this case, the Court held that, although, the Local Authority approved defective foundations under a new house, as the Local Authority's Building Control had no contractual obligations nor any common law duty to the owners of the property to compensate for their losses. Where an AI is appointed to verify the compliance of the works this usually shifts the responsibility towards the AI.

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Unlike Public Authorities, AIs are appointed contractually to provide services that they will provide to the client and are required to have PI insurance to cover the economic loss arising out of negligence. AIs are often appointed for this reason instead of the Local Authority. Where it has been deemed that the building has not complied with the Building Regulations, the AI may be responsible to some extent for the loss resulting from the non-compliance.

Recent litigation

The Technology and Construction Court ("**TCC**") has passed down two judgments in recent months which consider the particular roles, responsibilities and potential liabilities of AIs, in tort.

Zagora Management Ltd and others v Zurich Insurance plc and others and Lessees [2019] EWHC 140 (TCC)

The freeholder and the leaseholders of two blocks in Manchester claimed against the AI after the flats were found to have serious defects in relation to fire related defects.

In his judgment, Judge Stephen Davies made clear that the claim against the AI were pleaded in fraudulent misrepresentation. It was claimed that the AI was aware that the statements it made in the Final Certificates were not true, or knew that there was no reasonable grounds to believe they were true, or were reckless as to their truth. Judge Stephen Davies held that deceit was proven, but essentially the claim failed because the AI had not intended the freeholder to rely on its certificates and in turn, the leaseholders could not prove that the false certificates had induced them to purchase the flats.

Management Company of Herons Court v Heronslea Ltd and others [2018] EWHC 3309 (TCC)

The lessees and management company of a block of twelve flats in Hertfordshire claimed against the AI after the flats were found to have inadequate fire and water resistance measures.

The claimants intended to sidestep the difficulties with a claim in negligence or the requirement to prove deceit by claiming that the AI had issued certificates that allegedly breached the Building Regulations, rendering it unfit for habitation under section 1(1) of the Defective Premises Act 1972. Waksman J considered the House of Lords judgement from *Murphy* in which it was decided that section 1(1) of the Defective Presmises Act 1972 did not apply to Local Authorities. Although Waksman J felt that it could apply to AIs "in isolation" in this instance Waksman J held that an AI and Local Authority should be treated the same way and so struck out the claim.

Comment

These decisions are likely to disappoint property owners as they highlight the historic, high hurdles claimants must surmount to bring a successful claim in tort against AIs. In contrast, AIs and their insurers are most probably relieved with the recent judgments from the TCC.

These cases leave little scope for claims against AIs from building owners/occupiers which is surprising given they are required to maintain professional indemnity insurance which should be there to protect freeholders, leaseholders and occupiers who are affected by the AI's negligence.

Unless AI's are willing to give collateral warranties to building owners, it remains difficult to see how parties who have no contractual remedy will be able to claim against AI's as it is now apparent that any route which might have been available through deceit/fraudulent representation and the Defective Premises Act 1972 has been cut off.

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