Fool if you think it’s over
Rachel Barnes, April 2006

Consultants and contractors might think that once their original client no longer has an interest in a project they are, in the absence of a collateral warranty or third party-rights, safe from claims from a new owner. That may not be the case. Take the following scenario.

A landowner enters into a building contract to build a property on its land. It then sells the land and the property on it. After the sale a defect in the property comes to light. The new owner has no redress against the previous owner. However, the previous owner can assign to the new owner the benefit of the building contract, and the new owner can then sue the contractor as if it (the new owner) had been the employer under the building contract. Or, if it is a design fault, the previous owner can assign to the new owner the benefit of the contract of engagement with the relevant designer, and the new owner can then sue.

Is it as simple as that? In principle, yes, as long as the contract in question does not prohibit an assignment, or make assignment conditional on the consent of the other party (that is, the party likely to be sued).

An assignment is simply a transfer. It is the term normally applied to the transfer of the benefit of a contract, including the right to claim damages for a breach of the contract. The right that the assignee acquires is no better or worse than that which the assignor had.

It has been argued that, where the assignor sells the property to the assignee without either party being aware of the defect at the time of the sale, the right of action the assignee acquires is worthless, because the assignor has suffered no loss and the assignee can be in no better position than the assignor.

This argument was rejected by the Court of Appeal in 1992 in the case of *Linden Gardens Trust vs Lenesta Sludge Disposals*. The effect is that a person who sells a property with a latent defect, caused by a breach of contract committed while the property was in his ownership, still has a claim for substantial damages against the perpetrator of the breach, regardless of the fact that they have recovered their loss through the sale. They can therefore assign the benefit of this claim to the new owner (if they are willing to). This would still seem to be good law, even though an appeal against the judgment was successful, on a different point.

The situation should be distinguished from that which arose in the parallel case of *St Martins Property Corporation vs Sir Robert McAlpine and Sons*. There the breach of contract that caused the defect occurred after the transfer of the property. In that situation, the previous owner would indeed be held to have suffered no loss and therefore, following the traditional rule of law for breach of contract, have a claim for only nominal damages.

The House of Lords in the *St Martins Property* case applied an exception to the traditional rule of law and held that the previous owner could still pursue a claim for substantial damages, on behalf of the subsequent owners on whom the loss had fallen.

However, the *St Martins Property* case would appear to be irrelevant to a situation where the sale of the property takes place after the breach of contract has occurred.

This could give rise to anomalies. For example, the damages claimable may be different depending on whether the *Linden Gardens Trust* case or the *St Martins Property* case applies. Also, where the former applies, one could get a situation where the previous owner and the new owner could have a claim against the same party for the same damage, since it's possible the new owner could have a separate claim, in tort.
Maybe it is a matter that needs to be considered further by the courts. Consultants and contractors need to remember that if their contracts are silent on the question of assignment, the benefits or rights under that contract are freely assignable without their consent and decide whether any restriction or prohibition of that right is appropriate for the particular project.

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