Reports from the courts

Our latest Reports From the Courts series article comes from **Andrew Croft**, **Ben Spannuth** and **Daniela Miklova** of **Beale & Company Solicitors LLP** who look at a judgment confirming that, whilst a defect must be more than only aesthetic or inconvenient, the design intent of the property in question is relevant and that the measure of damages must reflect the likely outcome had the services been provided in a professional manner; and another that provides some clarification for parties seeking or responding to Building Liability Orders

(1) Brenda Vainker and (2) Francois Vainker v Marbank Construction Limited & Others

[2024] EWHC 667 (TCC); Jefford J

In mid-2011, Mr and Mrs Vainker (the Claimants) engaged SCd Architects Limited (SCd) as Architects for RIBA Stages E-L pursuant to the standard terms of the RIBA Architect's Appointment 2010 (the Appointment) for the re-build of a residential property in Twickenham (the Property). Clause 7.3 of the Appointment contained a net contribution clause which stated that "the liability of the Architect shall not exceed such sum as it is just and equitable for the Architect to pay".

On 26 March 2013, Mrs Vainker entered a bespoke JCT Standard Building Contract Without Quantities 2011 with Contractor's Design Portion (the Contract) with Marbank Construction Limited (Marbank). Clause 2.1 of the Contract provided that "The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents".

The works began in 2013 and practical completion was certified on 15 May 2014. Following completion, an extensive snagging list was produced which included defects pertaining to the glass balustrades installed throughout the Property. The Claimants alleged that Marbank had installed toughened glass rather than toughened laminated glass in breach of specification clause L30/552, which provided for "15mm toughened laminated glass, Class A to BS 6206".

On 4 May 2020, the Claimants commenced proceedings against Marbank and SCd. The Claimants advanced claims relating to 64 defects set out in a Scott Schedule, including the defective glass balustrades.

The Claimants argued that toughened glass without a handrail was contrary to Building Regulation K2 and created health and safety issues. Therefore, the Property was unfit for habitation pursuant to s1 of the *Defective Premises Act 1972* (the Act). The Claimants alleged that SCd should have identified the patent defect when undertaking inspections with reasonable care and skill.

The Defendants argued that the wholesale replacement of the glass balustrades with toughened laminated glass would be disproportionate and that a handrail could be added to the top of the glass balustrades to prevent falling and ensure compliance with Building Regulation K2, although the Defendants' respective architect experts could not explain how this would be achieved. SCd also sought to rely on the net contribution clause contained in the Appointment to limit its liability in respect of the defective glass balustrades to 20%.

Decision

Jefford J found that, whilst the contractual and tortious claims against SCd were time-barred, the Property was unfit for habitation under the Act due to the health and safety risk posed by the inadequacies in the glass balustrades, noting that "if it is damaged or fails there is nothing else to hold on to or inhibit a fall. If laminated the risk would be minimal to non-existent".

Jefford J stated that "[i]t is unlikely that a defect that is only aesthetic or inconvenient would render a dwelling unfit for habitation". Jefford J thus found that "the recoverable damages should, therefore, be the cost of making the dwelling fit for habitation in the way it would have been had the services been supplied in a professional manner" – whether the specification had been met was therefore relevant as to whether the works had been undertaken in a professional manner. SCd's argument that the installation of a handrail would suffice was dismissed as it would be contrary to the design intent of the Property.

Further, Jefford J held that SCd's net contribution

clause did not cover liability as section 6(3) of the Act provides: "Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void".

Comment

This judgment provides guidance on the application of the Act, confirming that, whilst a defect must be more than only aesthetic or inconvenient, the design intent of the property in question is relevant and that the measure of damages must reflect the likely outcome had the services been provided in a professional manner. The judgment also confirms that s6(3) of the Act excludes reliance on contractual caps on liability, including net contribution clauses.

Willmott Dixon Construction Limited v Prater Limited & Others

Ex Tempore; Jefford J

Tesco plc appointed Willmott Dixon Construction Limited (Willmott Dixon) as main contractor on a project known as Woolwich Extra, which includes a 17-storey residential building (the Development). Willmott Dixon in-turn engaged Prater Limited (Prater) as the specialist envelope subcontractor, Sheppard Robson Limited (Sheppard Robson) as the architect, AECOM Infrastructure & Environment UK Ltd (AECOM) as the building services engineers, and AIS Chartered Surveyors (AIS) as the Approved Inspector.

AIS issued a final certificate in March 2014 confirming that the Development met Building Regulations. However, subsequent investigations into the Development found that Kingspan Kooltherm K15 insulation and Trespa Meteon rainscreen cladding formed part of the external wall system, which did not comply with Building Regulations.

In March 2020, Tesco issued proceedings against Willmott Dixon. On 30 April 2023, the parties reached a settlement with Willmott Dixon agreeing to undertake remedial works to the Development at a cost of c.£46.67m.

Willmott Dixon sought to recover the costs of the remedial works from Prater and its guarantor, Lindner Exteriors Holding Limited (Lindner), Sheppard Robson, AECOM, and AIS. Given Prater's and Lindner's weakened financial positions, which indicated that neither would be able to satisfy a judgment in the main claim, AECOM issued a Part 20 additional claim for Building Liability Orders (BLOs) against four Lindner Group companies – one of which was an English registered company and three of which were German companies – under s130 of the *Building Safety Act 2022* (the Act) (the Additional Claim). It was accepted that the Lindner Group companies formed part of the same corporate group.

Prior to filing a Defence, the German Lindner Group companies (the Applicants) issued an application requesting that the Additional Claim be heard separately from the main claim or alternatively a stay of proceedings arguing that the Applicants would incur significant costs if the Additional Claim was heard alongside the main claim, as they were not involved in the main claim (the Application). The Applicants asserted that the culpability of the parties to the main claim would be relevant to whether it was "just and equitable" for them Lindner Group to be made liable for the liabilities of Prater and Lindner.

AECOM submitted there was an inextricable overlap between the main claim and the Additional Claim such that they should be considered in parallel. AECOM noted that the Court would need to consider the evidence in the main claim when deciding whether to make the BLOs. AECOM highlighted that separating the claims would create repetition across two separate litigations, with the risk of inconsistent findings, causing delay, prejudice and uncertainty to the other parties.

Decision

Jefford J rejected the Application.

Jefford J observed that, whilst it is not a requirement of the Act for a party from whom a BLO is sought to be a party to the main proceedings, where possible it would generally be sensible and efficient for the main claim and the additional claim to progress together.

Jefford J also considered it unsatisfactory to consider the same evidence on the same issues twice and assured the Applicants that any burden imposed on the Lindner Group companies would be dealt with via appropriate case management and/or cost orders.

Comment

This decision provides some clarification for parties seeking or responding to BLOs. It confirms that BLOs are remedies available to defendants via contribution, as well as claimants, although it suggests that, on the basis that BLOs are a "relatively new creation" with limited legislative guidance, findings on BLOs are likely to be fact-specific to each case. **CL**