Reports from the courts

Our regular round up of the court decisions of most interest to construction comes from **Andrew Croft**, **Ben Spannuth** and **Daniela Miklova** of **Beale & Company Solicitors LLP.** The first case they look at represents the first time that the High Court has found a 'relevant liability' regarding an application for a Building Liability Order; and the second highlights that leaseholders should not bear the financial burden of fire safety remedial work, and that developers and their associated companies are the key targets for the costs of remediating fire safety defects.

381 Southwark Park Road RTM Company Limited & Ors v (1) Click St Andrews Limited (In Liquidation) and (2) Click Group Holdings Limited

[2024] EWHC 3179 (TCC); Jefford J

381 Southwark Park Road RTM Company Limited (the RTM company), a residents' right to manage company, was incorporated to acquire the freehold of St Andrews House, 381 Southwark Park Road in London (the Property) pursuant to the *Leasehold Reform Housing and Urban Development Act 1993*. On 26 February 2020, the RTM company entered into a Freehold Purchase Agreement (the FPA) with Click St Andrews Limited (Click St Andrews), a special purpose vehicle which owned the freehold and head lease of the Property and Click Group Holdings Limited (Click Group) (collectively the Defendants).

Pursuant to the FPA, it was agreed that Click St Andrews would develop the Property by removing the existing pitched roof and erecting an additional storey of three prefabricated modular units which would be lifted into place within two years (the Works). It was intended that the RTM company would subsequently purchase the freehold for £100,000 in its capacity as nominee for the participating leaseholders (the Leaseholders) and simultaneously grant leases to Click St Andrews for the new flats which would then be sold. Click Group guaranteed the obligations of Click St Andrews under the FPA.

Clause 5.2 of the FPA provided: "The Seller shall use all reasonable endeavours to procure that the Works are carried out: (a) with due diligence and in a good and workmanlike manner; […] (e) In accordance with all statutory or other legal requirements […]".

During the Works, repeated rainfall and thunderstorms occurred whilst the pitched roof was removed and the roof structure was not kept watertight resulting in water ingress. The Leaseholders engaged experts to undertake investigations which identified other alleged workmanship defects in the modular units including structural and fire safety issues. A Dangerous Structure Notice was issued by Southwark Council on 9 February 2024.

In 2022, the RTM company and the Leaseholders at the Property issued joint proceedings. In the Particulars of Claim, the RTM company claimed damages for breach of the FPA against the Defendants. The Leaseholders claimed damages against Click St Andrews for breach of statutory duty, negligence, nuisance and breach of the covenant of quiet enjoyment in their leases, arguing that the alleged breaches amounted to a breach under s2A of the *Defective Premises Act 1972* (the *DPA*). Accordingly, the Claimants also sought a Building Liability Order (BLO) pursuant to s130 of the *Building Safety Act 2022* (the *BSA*) in respect of Click St Andrews' liability under the *DPA*, which was subsequently amended to also include Click Group as an associated company under s131 of the *BSA*. S130(3) of the *BSA* provides that a " 'relevant liability' means a liability […] that is incurred – (a) under [the *DPA*] or section 38 of the *Building Act 1984*, or (b) as a result of a building safety risk".

The Defendants denied liability in their Defence arguing that the damage suffered by the Leaseholders did not amount to any of the pleaded breaches. On 19 May 2022, Click St Andrews was wound up voluntarily.

Decision

Jefford J awarded the damages sought by the RTM company and the Leaseholders.

Jefford J found that the Defendants failed to provide adequate protection against even normal rainfall and that there was no mitigation of risk

despite the severe weather warnings which gave rise to liability under the FPA. The subsequent failure to remedy the damage also amounted to breaches of the covenant of quiet enjoyment.

In respect of the BLO application, Jefford J was satisfied that, after analysis of the expert evidence, the alleged structural and fire safety issues gave rise to a "relevant liability" for the purposes of s130(3)(b) of the BSA. Accordingly, a subsequent hearing will be held to allow Click Group a proper opportunity to address the issue of whether it would be "just and equitable" for the Court to make a BLO against it.

Comment

This is the first time that the High Court has found a "relevant liability" regarding an application for BLO. This decision demonstrates how s130 of the BSA allows the High Court to determine whether a 'relevant liability' has arisen and that the liability can extend beyond the original SPVs that are inherent within the development sector.

Grey GR Limited Partnership v Edgewater (Stevenage) Limited and Ors

CAM/26UH/HYI/2023/0003; Judge D Wyatt, Judge A Sheftel and Mr M Williams

Grey GR Limited Partnership (Grey) is the freeholder of a 16-storey block of flats in Stevenage, known as Vista Tower. Vista Tower was converted to flats by Edgewater (Stevenage) Limited (Edgewater) in or around 2015, following which Grey purchased the freehold in June 2018.

In 2019, Grey was informed that fire safety defects including combustible core panels were present on Vista Tower. Subsequently, in June 2020 Grey applied to the Building Safety Fund seeking funding for remedial works which commenced in January 2024.

In May 2024, the First-Tier Tribunal (Property Chamber) (FTT) awarded a Remediation Order (RO) against Grey following an application by the former Department of Levelling Up, Housing and Communities (DLUHC). A RO was awarded by the FTT signifying that Grey is legally bound to remediate the building safety defects by 9 September 2025.

Prior to the DLUHC's application for a RO, Grey had applied to the FTT under s124 of the *Building Safety Act 2022* (*BSA*) for Remediation Contribution Orders (RCOs) against 96 entities including Edgewater (collectively, the Respondents) to require them to financially contribute to the remediation of "relevant defects" that Grey must complete by 9 September 2025 pursuant to the RO. Under s120 of the *BSA*, a relevant defect is defined as a building defect that arises "as a result of anything done (or not done), or anything used (or not used), in connection with relevant works" and which causes a building safety risk. Grey was required to demonstrate to the FTT that it would be "just and equitable" to award the RCOs against the Respondents.

Decision

The FTT awarded an RCO in the sum of £13,262,119 against Edgewater and 75 associated bodies.

It was the FTT's view that, based on the facts of the case, it was "just and equitable" to award an RCO against those Respondents that were either: (i) an associated body involved in the building sector: (ii) an associated body forming part of Edgewater's company group; or (iii) linked and/or shared owners to the family who owned Edgewater. The FTT acknowledged that the "just and equitable" test under s124 of the *BSA* is deliberately wide "so that the money can be found" and that "[d]ifferent considerations may be relevant and different approaches may be just and equitable in different cases".

In reaching its decision, the FTT applied a wide interpretation of "defect", noting that defects do not exclusively arise through non-compliance with Building Regulations, which had been argued by the Respondents' fire safety experts.

Whilst the FTT noted that the power to award RCOs against associated bodies "is a radical departure from normal company law", it reasoned that the approach "does not pierce the corporate veil because it does not expose the individual members to unlimited personal liability".

Comment

Whilst the outcome of future applications for RCOs will be fact-specific, this decision indicates that applicants will have a lower standard to meet to determine both whether a relevant defect has arisen and whether it is just and equitable to award an RCO. This corresponds with the rationale that leaseholders should not bear the financial burden of fire safety remedial work and highlights that developers and their associated companies are the key targets for the costs of remediating fire safety defects. **CL**