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Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Issue 295 – January 2025

Dispatch

Building Liability Orders

381 Southwark Park Road RTM Company Ltd & Ors v Click St Andrews Ltd & Anr

[2024] EWHC 3179 (TCC)

Developers often set up "*special purpose vehicles*" ("SPVs") to carry out developments which are subsequently wound up following completion. This would enable their parent companies to avoid long-term liability for any defective works in the development. However, one of the changes brought in under the Building Safety Act 2022 ("BSA") was the introduction under section 130 of building liability orders ("BLOs") aimed at restricting the benefits of this common practice, by "*piercing the corporate veil*". In other words, enabling findings of liability for building safety to potentially extend beyond the original "*special purpose vehicle*" to include associated companies within the same group of companies.

Currently, section 130 (Building Liability Orders) provides:

> "*(1) The High Court may make a building liability order if it considers it just and equitable to do so.*
> *(2) A 'building liability order' is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate ('the original body') relating to a specified building is also—*
> *(a) a liability of a specified body corporate, or*
> *(b) a joint and several liability of two or more specified bodies corporate.*
> *(3) In this section 'relevant liability' means a liability (whether arising before or after commencement) that is incurred—*
> *(a) under the Defective Premises Act 1972 [...] or*
> *(b) as a result of a building safety risk.*"

Section 62 of the BSA defines a "*building safety risk*" as "*a risk to the safety of people in or about a building arising from*" the spread of fire or structural failure.

The case which came before Mrs Justice Jefford concerned defects in and damage to a block of flats known as St Andrews House, 381 Southwark Park Road, London SE16. The claimants included a resident's company and leasehold owners of the flats, and the first defendant was an SPV which, at the time of the relevant events and the trial, owned the freehold and head lease of the property but was itself a wholly owned subsidiary of the second defendant ("Click Group Holdings"). The SPV was in liquidation at the time of the hearing. The resident's company entered into a Freehold Purchase Agreement ("FPA") with the defendants in 2020 under which Click St Andrews would, within a period of not more than two years, 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. During the works, there was water ingress and damage to the flats below, which was said to be a consequence of the defendants' failure to provide adequate protection to keep the roof structure watertight. The claimants engaged experts to undertake their own investigations which led to the identification of other alleged defects in workmanship in the modular units, including structural and fire safety issues.

As well as claiming that there were a number of breaches of contract under the FPA, it was said that these alleged breaches amounted to a breach of the statutory duty under section 2A of the Defective Premises Act 1972 ("DPA"). The leaseholders also sought a BLO in respect of Click St Andrews' liability under the DPA.

An expert called by the claimants said that they were surprised that the building certificate had been issued given the instances where the fire protection was not there and where there were so many things wrong. The judge agreed, and held that the defendant had committed fire and structural safety breaches which were breaches of the FPA and which gave rise to a "*building safety risk*" under section 130(3)(b) of the BSA. There were further breaches of the FPA relating to certain beams which potentially affected the structural stability of the building. These too amounted to "*building safety risks*".

In relation to the claims under section 2A of the DPA, the judge observed that the duty owed under section 2A was not a duty to see that the work is done in a workmanlike or professional manner and with proper materials. The section makes reference to the following statement: "*[the] dwelling is fit for habitation when completed*". The judge noted that this is a well-established duty owed under section 1 of the DPA and there was no reason why the duty under section 2 should not be characterised in the same way, namely a single duty to see that the outcome of any building work is that the dwelling is fit for habitation. Here, ultimately, the DPA claim failed because section 2A is a very new part, only coming into force on 28 June 2022 and, on the facts, it was impossible to identify anything that was done that could give rise to a breach of that section.

The case is significant because the judge found, for the first time in the High Court, that there was a "*relevant*" liability for the purposes of a BLO. The judge did not make a BLO. That would be the subject for a further hearing, at least in part to give Click Group Holdings a proper opportunity to address the issue of whether it would be just and equitable to make such an order against the background of the judgment.

The judge also noted that the BSA says little about the procedure to be adopted by a party wishing to seek a BLO but commented that:

> "*it certainly does not require a party to make that claim within existing proceedings. It would be surprising if it did since the circumstances in which it might be just and equitable to make the order may not arise until after proceedings to establish a relevant liability are concluded and a BLO could be sought against a corporate body that did not even exist at the time of those proceedings.*"

Where it was already in contemplation that an order would be sought against a particular associated company, it seemed to the judge to be "*sensible and efficient*" for that claim to form part of what might be called the main proceedings. But that did not preclude a subsequent claim for a BLO against some other associated company.

Bonds and Part 8

Power Projects Sanayi Insaat Ticaret Ltd Sirketi v Star Assurance Company Ltd (Rev1)

[2024] EWHC 2798 (Comm)

PP were engaged to construct an electrical power generation plant in Ghana. Part of the work was subcontracted to Glotec Engineering Ltd. The parties entered into two subcontracts (offshore and onshore). Under sub-clause 8.5 of the subcontracts, Glotec were required to provide an on-demand performance bond in favour of PP to secure Glotec's performance of their obligations under those subcontracts.

Sub-clause 8.5 provided that :

> "*Failure and or omission of the Subcontractor to proceed in compliance with the present or to perform and or remedy any defects, perform the Subcontract Works and all obligations, commitments, guarantees and responsibilities under the present and the applicable Laws, entitles [the Claimant] to make a demand under performance [sic] bond irrespective of any possible objections the Subcontractor [sic]-who is expressly consenting to that, and his consensus is only proved by the signature of the present contract.*"

Pursuant to clause 8.5 of the subcontracts, and upon Glotec's request, Star provided the bond in favour of PP on 22 November 2018. Towards the end of the project, a number of disputes with PP alleged that Glotec had not completed their obligations under the subcontracts. Glotec disagreed and claimed they were entitled to payment of, not least, the final 2% of the contract price. PP then made a demand under the bond dated 9 November 2021. It was not honoured and, as the bond was governed by English law and subject to the jurisdiction of the English courts, PP issued a Part 8 Claim Form for the payment of US $6.3 million pursuant to that demand. Part 8 is the procedure used where a party seeks the decision of the court, on a question that is unlikely to involve a substantial dispute of fact.

The bond was described by the Deputy High Court Judge Richard Millet KC as an irrevocable, unconditional on-demand payment instrument. The total amount of the bond was US$6,297,000 and it was valid until 21 November 2021.

Star said that the sums due under the bond were not due. It had a defence to the demand and these defences involve a substantial dispute of fact such as to make Part 8 inappropriate and to justify conversion of the claim into a Part 7 claim.

The judge disagreed saying that it was "*far from obvious*" that the facts put forward by Star provided a defence to PP's claim that would require the court to investigate them at trial.

The starting point was the legal nature of the bond. The bond here was, in the words of the judge, "*a classic performance bond*" of the type considered in the cases such as *Wuhan Guoyu Logistics Group Co Ltd and Anr v Emporiki Bank of Greece SA* (See *Dispatches* 145, 150 and 164)

Clause 3 provided that:

> "*[Star's] obligation to make payments under this Bond shall arise upon receipt of a demand made in accordance with provisions of this Bond, without any further proof or condition and without any right of set-off or counterclaim, and [Star] shall not be required or permitted to make any other investigation or enquiry.*"

Therefore, as a matter of law, the only defence that Star could raise was that the demand was fraudulent. This meant that Star needed to show that PP knew that it had no right to make the claim, and that Star knew that it was fraudulent at the time when its obligation crystallised, namely on the making of the demand. It was not entitled to fail or refuse to pay pending investigation of the state of the underlying account or relationships relating to that account; for example, simply setting out allegations that there was a dispute between Glotec and PP about whether Glotec or PP was in breach of the subcontracts. Nor was it entitled simply to rely on Glotec's case as against PP, however confident it was that Glotec's case was well-founded. The bond was an autonomous contract, independent of any disputes that may have arisen under the underlying subcontract. Liability under the bond was separate from liability pursuant to those underlying subcontracts.

Much of Star's evidence was "*largely opinion and hearsay*" being based on what Star had been told by Glotec of its dispute with PP, and confirming that Star agreed with Glotec. That was no more than belief in the merits of Glotec's case against PP, and the corresponding weakness of PP's case against Glotec.

Whilst the evidence showed that there was clearly a burgeoning dispute between Glotec and PP which was beginning to take shape before the demand was made on 9 November 2021, there was nothing to suggest that PP had acknowledged or admitted any cross-claim, or that it knew that it had no right to any money under the subcontracts. What was needed was evidence that PP knew for a fact that Glotec's position was right, and that its own position in the dispute was wrong, and that it therefore had no right to make the demand. The fact that Glotec had a cross-claim of its own was legally irrelevant, in respect of the attempts to resist the call on the bond, unless Star knew that it was unanswerable and that PP had no right to make any claim for any amount.

Further, there was no evidence that Star knew at the time of the demand that PP's claim was fraudulent. Had it done so, it would have said so. The terms of its letter of response of 23 November 2021 went nowhere near making such an assertion. On the contrary, Star merely stated that after "*investigation*", its position was that the subcontracts had been "*executed*" (i.e. performed), expressing surprise that PP was making a claim on the bond when 2% of the final price had yet to be paid. These statements were inconsistent with any knowledge on the part of Star that the demand was fraudulent.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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