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CONSTRUCTION & ENGINEERING SOLICITORS

Construction Law Update

Remoteness defence struck out in cladding claim

In *Orchard Plaza Management Company Ltd v Balfour Beatty Regional Construction Limited* [2022], the Technology and Construction Court was asked to rule upon the Defendant contractor's argument that the losses claimed against it were too remote to be recoverable at law.

In granting the Claimant's application for an order striking out that part of the contractor's defence and/or awarding summary judgment against the contractor, the Court was satisfied that the cost of repair for a defective fire-safety system under an assigned collateral warranty was not too remote.

Background

The Defendant had entered into an amended JCT Design and Build Contract with the freeholder of an apartment block (the "**Property**") for office conversion works (the "**Works**").

The Works were carried out between 2007 and 2008, during which time the Defendant granted the development's funder (the "**Funder**") the benefit of a collateral warranty in relation to the Works (the "**Warranty**") as part of a loan facility agreement.

In 2020, following the discovery of cladding and fire safety-related defects at the Property, an improvement notice was issued to the Claimant management company requiring it to, among other things, replace the rainscreen cladding installed at the Property. The Claimant went on to claim damages from the Defendant for the costs associated with this remedial work. The Claimant maintained it was entitled to the repair costs associated with the remedial works by virtue of the Warranty, the benefit of which had subsequently been assigned from the Funder to the Claimant.

For its part, the Defendant contended that at time the Warranty was executed, the losses contemplated by the contracting parties did not include the repair costs claimed and were instead restricted to diminution in value of the Funder's security in the Property.

This case concerns the Claimant's subsequent application to strike out that part of the Defence which asserted that the losses were too remote to be recoverable. The Claimant also applied for summary judgment.

Held

The Court struck out the Defence and ordered summary judgment in favour of the Claimant for the reasons outlined below.

Were the losses claimed under the Warranty too remote?

The Court rejected the Defendant's assertion that at the time of entering into the Warranty the parties had not contemplated the inclusion of repair costs such that any loss was necessarily restricted to diminution in value of the Funder's security in the Property.

Drawing on multiple authorities including the tests set out in the leading case of *Hadley v Baxendale* and the more recent case of *AG of the Virgin Islands v Global Water Associates*, the Court determined that the repair costs were not too remote and were recoverable given this was a type of loss which was "reasonably contemplated as a serious possibility".

While the Court held that a right to assign a contract to a third party will not be sufficient to bring into contemplation the kind of loss which might be sustained by *any* assignee, it noted that in this instance the Warranty expressly provided for subsequent assignment by the Funder without restriction on the *type* of persons to whom the Warranty could be assigned. As such, it was in the reasonable contemplation of the Defendant as a serious possibility at the time the Warranty was entered into that an assignee (whoever that might be) would incur repair costs attributable to the remedial works owing to the

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Defendant's breach of contract. The repair costs were recoverable and the losses under the Warranty were not limited to diminution in value.

The Court also found that irrespective of assignment, it was always "*natural and foreseeable*" that had the Funder exercised its right of step-in and taken full possession of the Works pursuant to the Warranty, it would have incurred the repair costs itself.

Could the Defendant rely on remoteness of loss as a defence pursuant to the Warranty?

Clause 12.3 of the Warranty provided that an assignee of the Warranty should *not* be prevented from recovering any loss or damage resulting from breach of the Warranty owing to the fact that:

- Such person is an assignee;
- The loss or damage suffered has been suffered only by the assignee and not the original beneficiary (i.e. the Lender); or
- The loss suffered by the assignee is "*different*" to that which would have been suffered by the original beneficiary.

The Court reviewed clause 12.3 and other terms of the Warranty and found that the wording of the same did not preclude the claim by reason of remoteness.

The Court reasoned that an alternative finding would wholly undermine the purpose of clause 12.3, which was intended (and was expressly drafted) to negate the possibility of a "no loss" type defence from arising on assignment. The rationale for inclusion of the same was to ensure that a debtor would not be "*put in any worse position by reason of the assignment*".

In particular, the Court found that the word "*different*" was capable of encompassing different types, kinds and quantities of loss. In other words, there was no meaningful distinction between actual and contemplated loss (absent the assignment).

Analysis

This case provides a useful reminder of the tests the court will apply when deciding on issues of remoteness of loss, particularly in the context of collateral warranties.

The findings in this case, which recognise that losses in reasonable contemplation of parties can include different types of loss suffered by another beneficiary post-assignment, also highlights the importance of accurate and thoughtful drafting when apportioning liability between contracting parties, particularly in the construction industry, where "no loss" wording is commonly used.

This case also provides further evidence that the courts will adopt a pragmatic approach when dealing with potential liability in the context of fire safety.