FENWICK ELLIOTT

The construction & energy law specialists

Keeping up with the Building Safety Act: recent updates explained

16 May 2024

Ben Smith, Senior Associate, Fenwick Elliott

Huw Wilkins. Senior Associate, Fenwick Elliott

The end of the transitional period

FENWICK ELLIOTT

The Building Regulations etc (Amendment) (England) Regulations 2023

- Amend B.R.2010 and apply to all buildings inc. HRB
- Set out new dutyholder and competency duties

The Building (Approved Inspectors etc. and Review of Decisions) (England) Regulations 2023

- Amend the Building (Approved Inspectors etc) Regulations 2010 to support new HRB controls
- BSR will be the only building control authority for HRBS, not local auths/AIs

The Building (Higher-Risk Buildings Procedures) (England) Regulations

- Building control regime for HRBs
-Gateways, change control, golden thread, mandatory occurrence reporting

The Higher- Risk Buildings (Management of Safety Risks etc) (England) Regulations 2023

- Details around how AP/PAP should manage building safety risks, safety case reports, mandatory occurrence reporting, golden thread information, residents' engagement strategy and complaints

Changing landscape for claims

FENWICK ELLIOTT

The construction & energy law specialists

FENWICK ELLIOTT

The construction & energy law specialists

Triathlon Homes v SVDP, Get Living Plc and EVML [2024]

Background

FENWICK ELLIOTT

- The proceedings concerned five residential buildings at Stratford in East London, originally developed by the first respondent, SDVP, as part of the accommodation for 17,000 athletes and officials participating in the London 2012 Olympic Games.
- At the time of development SDVP (the first respondent) was owned by the Olympic Delivery Authority, and, after the Olympic Games, SDVP was sold and is now owned by Get Living Plc (the second respondent). The former athletes' village is now known as East Village and is a large permanent residential estate.
- Triathlon is a limited liability partnership that was established to provide affordable housing at the former athletes' village (which is now called East Village).
- The repair and maintenance of the structure and common parts of the East Village is the responsibility of the third respondent, East Village Management Ltd, a company owned jointly by Get Living and Triathlon.

Background (cont)

FENWICK ELLIOTT

- Serious fire defects were discovered in November 2020; the current remediation plans are due to be completed in August 2025. The total cost of the work exceeds £24.5 million.
- Five applications were issued by Triathlon against SVDP and Get Living an associate of the freeholder of the blocks, for RCOs under section 124 of the BSA seeking a contribution of nearly £18m in total in relation to five buildings.
- The FTT bundled together the five applications, a move that was seen as an efficient approach to reduce time and costs.
- The FTT granted RCOs against SDVP and Get Living, ordering them to make payments of:
    1. Over £16m to EVML in respect of the major works.
    2. Over £767,000 to EVML in respect of other remedial measures.
    3. Over £1m by way of additional costs to Triathlon.

Can an RCO be made in respect costs incurred pre-BSA 2022?

FENWICK ELLIOTT

SDVP and Get Living argued:

(i) That a RCO could not be made in respect of costs incurred before the commencement of the BSA.

(ii) That the fact costs were incurred before the date of commencement of the BSA was a reason, or a contributory reason, why it would not be just and equitable for a RCO to be made.

The Tribunal roundly rejected these arguments:

- There was "no doubt" that section 124 allows remediation contribution orders to be made in respect of costs incurred before 28 June 2022.
- It was "*inconceivable*" that leaseholders in in a building which had not yet been remediated at the time the BSA came into force would be protected, but not those where the defects had already been completed.

When is it just and equitable to make an order?

FENWICK ELLIOTT

- The making of an RCO is subject to the FTT finding that it is "just and equitable" for an order to be made.

- The BSA 2022 does not specify when it is just and equitable to make an order in any particular case, or how the FTT ought to exercise its discretion.

- The FTT determined that the discretionary power ought to be exercised having regard to the purpose of the BSA 2022 and all the relevant factors.

When is it just and equitable to make an order?

FENWICK ELLIOTT

•The policy of the BSA is that primary responsibility for the cost of remediation should fall on the original developer.

• A wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company ([266]).

•The Tribunal attributed little weight to the risk that the major works would not be completed if the Tribunal did not make an order.

•The Tribunal held that it was difficult to see how it could ever be just and equitable for a party falling within the terms of section 124(3), and well able to fund the relevant remediation works, to be able to claim that the works should instead be funded by the public purse ([278]).

FENWICK ELLIOTT

The construction & energy law specialists

Secretary of State for Levelling Up, Housing and Communities v Grey GR Limited Partnership [2024]

Background

FENWICK ELLIOTT

- Vista Tower is a 16-storey block, exceeding 45 metres, with 73 residential flats. It was originally constructed in the 1950s/1960s as office premises, and subsequently converted to residential use in 2015/2016.

- In 2019, the landlord (Grey GR Limited) was made aware that Vista Tower suffered from building safety defects, with combustible materials requiring remediation.

- The defects and remedial works were not in dispute between the parties. By the time of trial, the landlord had commenced works, with 18 months left before completion and had entered into a build contract and a grant funding agreement under the BSF.

The Parties' Positions

FENWICK ELLIOTT

The SoS argued that:

- As the pre-qualification criteria were met in respect of Vista Tower, it was entitled to a remediation order pursuant to section 123 of the BSA.
- The Respondent's application to the BSF for funding was of no relevance to whether a remediation order should be made or its terms.
- Section 123 of the BSA says nothing about the tribunal needing to be satisfied that an order is just and equitable.
- If the Tribunal did have discretion, the Applicant's view is that the Respondent should have "forward funded" the works, rather than wait for BSF funding.

The Parties' Positions (cont)

FENWICK ELLIOTT

The Respondent argued that:

- The Respondent's parent company is a holder of pension funds with a portfolio of residential properties is in the region of £150m; it is not realistic to expect those funds to pay for the remedial work.
- Nowhere in the Building Safety Fund guidance was there any suggestion that the works should be done first and funding claimed later. It was also untrue or at least highly unlikely that the Respondent would have been able to carry out the works and claim funding later
- A Remediation Order was akin to an order for specific performance and therefore no order should be made unless it was necessary or desirable to do so.

FTT Findings

FENWICK ELLIOTT

- It had the power to and a discretion as to whether to make a remediation order.
- The facts of the case and in particular the works required, and the situation of the relevant parties are much more relevant to the exercise of the discretion.
- ROs are a no fault remedy.
- An RO can be made as a backstop to give reassurance to applicants/leaseholders.

FENWICK ELLIOTT

The construction & energy law specialists

URS Corporation Ltd
v
BDW Trading Ltd

Background

FENWICK ELLIOTT

- The Parties:
  - Owner and developer: BDW Trading Ltd
  - Structural Designers: URS and Cameron Taylor One Ltd.
- The Projects:
  - High rise buildings in London, that achieved Practical Completion between March 2007 and February 2008
  - High rise buildings in Leicester that achieved Practical Completion between February 2005 and October 2012.
- Nature of claim: as a result of negligent design, the structures were seriously defective thereby requiring remedial works.

Appeal relating to Amendments consequential to BSA

FENWICK ELLIOTT

- The amendments in question were:
  - To make a claim pursuant to s1(1) of the Defective Premises Act 1972;
  - To seek a claim pursuant to s1 of the Civil Liability (Contribution) Act 1978;
  - To refer to the longer limitation periods under s.135 of the Building Safety Act.
- URS objected to these objections.

Are the new limitation periods under the BSA available to BDW?

FENWICK ELLIOTT

- **No.**
  - Claims under s1 of the Defective Premises Act:
    - Claims in relation to buildings completed prior to 28 June 2022 can be commenced up to **30 years from PC**.
    - Claims in relation to buildings completed after 28 June 2022 can be commenced up to **15 years from PC**.
  - S135(3) provides: "*The amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force.*"
  - Extended limitation period applies to all claims save for those that have already been finally determined, or settled.

Does the DPA apply only to lay purchasers?

FENWICK ELLIOTT

- No.
  - URS argued the DPA was intended to protect lay purchasers of defective properties, not commercial developers. They were wrong.
  - The words of s1(1)(a) are clear that BDW owed a duty to URS because URS was *"a person taking on work for or in connection with the provision of a dwelling"* and that dwelling was *"provided to the order of any person, to that person* (i.e. BDW)".
  - S1(1)(a) did not include wording limiting its application. Nor did anywhere else in the DPA. There was no basis for introducing a significant qualification.

Does the DPA require property ownership?

FENWICK ELLIOTT

- No.
  - URS argued that BDW had no claim under the DPA because they had sold the buildings after completion and therefore suffered no loss.
  - BDW were both owed and themselves owed duties under the DPA, so the sale of the buildings was irrelevant. They remained liable to the purchasers after sale, and so would suffer loss, which they could seek to recover by way of their own claim against URS.
  - Recoverability of damages under the DPA is not linked to or limited by property ownership.

The Civil Liability (Contribution) Act 1978

FENWICK ELLIOTT

- URS also argued that BDW could not make a claim under the Contribution Act, because not claim had been made or intimated by any third parties.
- The right to contribution is provided by s.1(1) which provides:

  "*Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).*"
- There is nothing in s.1(1) which provides that BDW' right to claim contribution from URS does not arise until there is a claim against BDW by another party (e.g. a purchaser).

The Civil Liability (Contribution) Act 1978 (2)

FENWICK ELLIOTT

- The Court then set out the requirements for a potential claim under the Contribution Act:
  - Is BDW liable, or could be found liable, to another party (e.g. a flat owner)?
  - Is URS liable, or could be found liable, to another party (e.g. a flat owner)?
  - Are their respective liabilities in respect of the same damage suffered by another party?
- So for its claim under the Contribution Act to succeed, in the Court of Appeal's eyes, the Building Owners do not need to have made a claim against BDW – it is enough that they could have done so.

What next?

FENWICK ELLIOTT

- URS has been granted permission by the Supreme Court to appeal.
- It will be heard on 2-5 December 2024 by a panel of 7 justices.

FENWICK ELLIOTT

The construction & energy law specialists

Wilmott Dixon v Prater & Others

Background

FENWICK ELLIOTT

- The Parties:
  - Client: Tesco
  - Main Contractor: Wilmott Dixon
  - Architect: Sheppard Robson
  - D&B Façade Specialist: Prater, along with its guarantor
  - Building Services engineers: Aecom
  - Approved Inspector: AIS Surveyors
- The Project: Mixed-use Scheme in Woolwich, South London
- Claim value: Approximately £50million.

Building Liability Orders

FENWICK ELLIOTT

- Introduced by s130 of the Building Safety Act

"(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."

[emphasis added]

Building Liability Orders – Essential new guidance from the TCC - 4 Pump Court - Barristers' Chambers

Aecom's application against Prater

FENWICK ELLIOTT

- The facts:
  - After intimation of the main claim, Prater and the Linder Group underwent corporate restructuring.
  - Publicly available information indicated that, following that restructuring, neither Prater nor its guarantor would be able to satisfy any future judgment in the main claim.
  - Aecom issued a Part 20 claim for BLOs against four Linder Group companies (one English company and 3 German companies).

Issue 1: Timing of the Application

FENWICK ELLIOTT

- The 3 German companies wanted to delay the BLO issue until after the judgment of the main claim.
- The judge recognised the need to take into account the cost consequences when considering when issues of BLOs should be determined.
- It would generally be sensible and efficient for matters in the main claim and additional claim to progress together.

Issue 2: "*Just and Equitable*"

FENWICK ELLIOTT

- There is no need for there to have been deliberate dissipation of assets by the intended subject of that BLO.
- The fact that the two defendants have insurance that might cover at least part of their alleged liability under the main claim didn't impact the court's decision in this case (though it could be a relevant factor in other cases where BLOs are sought).

FENWICK ELLIOTT

The construction & energy law specialists

Questions?

Thank you!

Ben Smith
Senior Associate
Fenwick Elliott

Huw Wilkins
Senior Associate
Fenwick Elliott