Fenwick Elliott
The construction & energy law specialists
Issue 24, June 2013

Welcome to the June edition of ***Insight***, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue we give practical advice to those who certify, on how to avoid being on the receiving end of a claim.

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Think before you sign

When developers and certifying architects or surveyors certify new builds, probably the last thing on their minds is whether they might have any liability to subsequent owners and funders years down the line. The judgment in *Hunt & Others v Optima (Cambridge) Ltd & Others* [2013] EWHC 681 (TCC) deals with precisely this issue.

The *Hunt v Optima* case serves as a timely reminder as to what might happen if a project is certified in circumstances where latent construction defects subsequently develop. This twenty-fourth issue of *Insight* discusses the case and provides practical advice to those who certify, on how to avoid being on the receiving end of a claim from a third party who relies on a certificate to their detriment.

The facts

Hunt v Optima was concerned with the construction of a new four-storey block of 26 flats that was developed by Optima (Cambridge) Limited ("Optima") between 2001 and 2004. Thirteen of the flats were retained by Optima for letting purposes and the remainder were sold largely to long leaseholders who included the claimant purchasers.

The work was carried out by various contractors including Strutt & Parker ("S&P") who were retained by Optima to carry out periodic inspections of the flats as construction progressed in order that they could produce architects' certificates. The certificates were prepared for the benefit of potential purchasers and confirmed the development had been constructed to a satisfactory standard and in accordance with the approved drawings and Building Regulations.

As would be expected, as landlord, Optima had agreed with the purchasers to maintain, repair and renew the main structure of the building and its common parts under the provisions of the landlord's repairing covenant in the leases.

As time went on, a number of quite serious construction defects became apparent in the flats, the common parts and the services, all of which were caused by poor workmanship and poor supervision.

Subsequently, proceedings were issued against both Optima and S&P by the purchasers on the basis that Optima was, amongst other things, in breach of its repairing covenant and that S&P had negligently misstated in breach of warranty that the building had been constructed to a satisfactory standard in accordance with Building Regulations when this was not the case.

Proceedings were also issued against Optima by four purchasers who claimed Optima was in breach of the Agreements of Sale through which they had purchased the flats. The Agreements of Sale provided at clause 3.1 that the building would be completed in a good and workmanlike manner with suitable materials pursuant to any planning permissions that would be granted, and further, that the building would be fit for occupation on completion and would comply with all planning permissions and the Building Regulations as soon as reasonably practicable.

S&P contested liability on the basis that it owed no duty of care to the purchasers and their certificates did not constitute any type of guarantee or warranty. It also disputed that its surveyor, Mr Egford, had been negligent in failing to identify the various defects that had manifested.

The Judge, Mr Justice Akenhead, held that Mr Egford had been too dependent on assuming effectively that Optima and others were doing his job for him. He had either relied upon what Optima had told him, or else he had assumed that the local authority building inspectors had vetted the works. In essence, he had failed to make an independent check of what he was certifying.

The court's decision

Unsurprisingly, the Judge found that Optima was in breach of clause 3.1 of the Sale Agreement and the repairing covenant in the various leases. Less predictably, S&P was found by the Judge to have a special relationship with the purchasers that was akin to a contract. This was so despite the fact that S&P had never entered into any formal contract with any of the purchasers and was in contract with Optima only.

So how did a contractual relationship arise?

Mr Justice Akenhead emphasised the fact that whilst S&P had been retained by Optima, the purchasers (and also

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their potential lenders) relied upon the certificates. S&P made it clear from the face of the certificates that the purchasers and any ultimate lenders would rely on the certificates. As a result, not one purchaser obtained their own survey.

Given the wording of the certificates, S&P were found to be liable in negligence in relation not only to the giving of the certificates but also to the performance of the services Mr Egford was certifying.

The certificates were found to be warranties based on an inspection by S&P that the building was satisfactory and it was held to be implicit that the inspection and the certifying was carried out with reasonable care and skill. The certificates confirmed that Mr Egford had appropriate experience to certify the works and they made reference to the fact that S&P's liability under the certificates would extend to six years from the date of the certificate. Liability extended to the first purchasers and their lenders, and upon each sale of the property during the six-year liability period to subsequent purchasers and their lenders.

In light of this, some of the certificates were regarded by the court as being enforceable contractual warranties.

How can you avoid liability?

The most obvious way to avoid the type of liability to which Mr Egford found himself subject is to make sure you think carefully when preparing your certificate. In particular:

- Consider whether there are any third parties with whom you might have a special relationship that might be regarded as being akin to a contract, and who might rely on your certificate to their detriment and suffer a loss as a result.

- Whether a third party relies on your certificate will ultimately be a matter of fact. If what you are certifying is never communicated to any third party it would be impossible for a third party to rely on it. Prepare your certificate with the likely readership in mind.

- Ensure your certificate does not contain any wording that might make it sound as if it is a contractual warranty. Make sure, for example, that there is no reference to any period of liability beyond the date of the certificate. Contractual warranties typically deal with liability in terms such as: *"the Beneficiary may not commence any legal action against the Consultant under this agreement after [six* OR *12] years from the date of [practical completion* OR *making good of defects] of all of the Project".* Also ensure that you do not warrant that you are certifying with reasonable care and skill as this might give rise to a liability in negligence. Contractual warranties often contain clauses confirming the works are to be carried out *"with all the reasonable skill, care and diligence to be expected of a qualified and experienced member of the Consultant's profession undertaking the Services on works similar in scope and character to the Project".*

- Make the purpose and scope of your remit clear.

- To avoid a third party relying on your certificate, include a disclaimer on the face of the certificate which sets out the limitations of the certificate and explicitly prevents any third party with whom you are not in contract from relying on it.

- Do not regard certificates as a box-ticking exercise. You must pay attention to what it is that you are certifying and ensure the certificate is accurate. Double-check that what you are certifying is correct and be sure you are not misstating or overstating the position.

- As a belt and braces measure, ensure your professional indemnity cover is sufficient, just in case you do find yourself on the receiving end of a claim.

Conclusion

The decision in *Hunt v Optima* serves as a useful reminder of the fact that the law of negligence can introduce liabilities to certifiers that are extra-contractual and which fall well outside the scope of their professional appointments, and so certificates must be prepared with care.

Following this decision, it will be necessary for the RIBA to amend its June 2008 guidance entitled *Explaining an Architect's Services*. The 2008 guidance makes no reference to the extent of liability to which architects might be exposed in the law of negligence. To the contrary, the guidance is prefaced in terms whereby architects' certificates *"are not warranties or guarantees".*

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
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