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The construction & energy law specialists

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

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Dispatch

Design: duty to review

Carrington v American International Group UK Ltd

[2025] EWHC 1010 (TCC)

The dispute in this case related to a house extension and refurbishment. HHJ Davies had to consider whether Carrington had properly particularised her claims and whether they had a real prospect of success on the case pleaded. One of the issues that arose was whether or not there was a duty to review the construction information during the build. Was that information sufficient for construction or were further detailed drawings required?

The designer's insurers said that the duty to review arose in circumstances where the architect had previously provided a design, and then had cause to review the design they provided. Here, Carrington's primary case was that the architect had failed to provide that design. Accordingly, there was no design, as such, to *"review"*.

Having considered the authorities, HHJ Davies noted that a designer who also supervises or inspects work is under an obligation to review the design until it has been constructed and, after that, if something occurs to make it necessary or at least prudent for the designer to do so. Further, a cause of action for a failure properly to review the design is a different cause of action from a failure to provide a proper design in the first place.

There was nothing in any of these authorities to suggest that the duty to review can only arise where a design has already been provided. The judge gave an example of a structural engineer who was contracted to provide a general structural design, but failed to design one particular element of that design, and this was not picked up at that design stage. However, the structural engineer was also contracted to supervise or inspect the works and failed to appreciate the absence of or to provide the missing design at construction stage. It seemed to the judge to be reasonably arguable that the structural engineer could be held liable for breach of a duty to review at that stage.

There was no obvious distinction in principle between someone who was contracted to design but does not in fact do so, and someone who is contracted to design and does so, whether competently or negligently. In every case where such person is also under a duty to supervise or to inspect, then it is – subject always to the express terms of the contract – at least reasonably arguable that, if something occurred to make it necessary or at least prudent for them to consider whether a sufficient design has been provided to enable the structure to be properly built, they must consider that question even if they have provided no design at all, just as much as if they had provided some design.

Here, the allegation pleaded was the failure to provide the necessary details to facilitate adequate construction. The architect proceeded on the basis that the design drawings and specification already produced, and the structural engineer's details also provided, were sufficient for construction, so that nothing further needed to be issued. Carrington alleged that what had already been provided did not provide sufficient information for the construction phase, and the architect when circumstances arose ought to have appreciated the need to review this decision to proceed on the basis of the available information, either failing to review whether or not the design already issued was sufficient or deciding, wrongly, that there was no need to review the design. This was sufficient for this part of the case to proceed.

Witness evidence

Toppan Holdings Ltd & Anor v Augusta 2008 LLP

[2025] EWHC 1691 (TCC)

In a dispute arising out of the performance of professional services and construction operations in respect of the design and construction of a care home, the judge, Martin Bowdery KC, made a number of interesting comments about the nature of witness evidence when there was discussion about the danger of treating a witness's recollection of events that happened a long time ago as firm evidence and the potential value of contemporary documents over that witness evidence.

The judge noted that reliance upon contemporaneous documentation is not without its own difficulties and that: *"Historians must always challenge their sources"*. Contemporaneous documentation can themselves be: *"self-serving; based upon an incomplete understanding of what was occurring; and drafted without the benefit of hindsight"*. This meant that a "*dogmatic preference*" for documentary evidence over witnesses' recollections of what was said and was done was "*unhelpful*". The main tests which the judge applied to assess the credibility of the witness evidence were:

- The consistency of the witness's evidence with what is agreed or clearly shown by other evidence to have occurred;
- The internal consistency of the witness's evidence; and
- The demeanour of the witness.

Here, the witnesses in question gave clear, concise and credible answers to the questions asked. They were not partisan or argumentative. They gave no indication of giving carefully scripted, pre-prepared answers. Where their evidence differed or was not fully supported by contemporaneous documentation, there were reasonable and credible reasons for this.

BSA: Remediation and Remediation Contribution Orders

Property: Empire Square, 34 Long Lane, London SE1 4NH

LON/00BE/BSB/2024/0602

This was a decision of the First-tier Tribunal ("FTT"). The lessees of Empire Square sought a Remediation Order ("RO") under section 123 of the Building Safety Act 2022 ("BSA") against the landlord (Fairhold Athena Ltd), in relation to a number of defects including

defective cladding. The landlord in turn sought a Remediation Contribution Order ("RCO") under section 124 of the BSA against the developer (Berkeley Homes) including ongoing waking watch costs as well as legal and expert costs.

The position of the leaseholders was that they were *"stuck in the wings"* while the landlord and developer continued to argue about what should be done and to what standard. Works subject to an Improvement Notice ("IN"), which should have been completed by November 2025, were *"nowhere near done"* and some had not even commenced. Priority should be given to the practical needs of the leaseholder, not the dispute about standards. The leaseholders did not consider that either party had:

> *"in mind their very real problems of living in an unsafe building causing them stress and anxiety, with skyrocketing insurance costs, and barely any opportunity to mortgage (or remortgage) or sell while the known issues exist, whether in order to get away from the risk or for some to simply move on with their expanding families and the like."*

The leaseholders observed that progress had only been made by bringing the matter before the FTT. The landlord said that it would not be fair and just to make an RO. The developer was responsible for defects. Further, the landlord was not a construction company. If they had to remediate, it would be a much longer process. Alternatively, the landlord said that an RO should be made only if an RCO was also made. This would ensure that the purpose of the BSA – that innocent parties should not pay for remedial work required because of developer defects – was given full effect.

The developer took a neutral view of whether an RO should be made. It remained of the view that the RO could not and did not bind it. Another issue the FTT had to take into consideration was whether it could issue a RO in circumstances where, as here, the developer had stated its intention to carry out the remediation works. Further, the developer had, in April 2022, signed the Developer Pledge, promising to take responsibility for remediation/mitigation works to address defects in buildings it had developed.

The FTT noted that the BSA was:

> *"solution focussed rather than blame focussed, it is concerned with the building not with the parties to the application. We must take a purposive approach - ask ourselves what the best answer is in this application, to achieve remediation of the relevant defects in the building for the safety of the leaseholders. The outcome of that assessment must be within a range of reasonable decisions, but would not be open to challenge unless no reasonable decision maker, on the facts know to it, could have come to the same decision. That is qualitatively different from an argument that a decision is not just and equitable because of some key feature or behaviour of a party."*

The FTT accepted that, with ROs, the focus was not on providing redress for non-compliance with a legal obligation (i.e. specific performance) but on remediation of life-threatening building safety defects in tall residential buildings. Here, the FTT was satisfied that the defects were relevant defects under the BSA.

Whilst the relevant defects had been known about for a very long time, the developer and landlord had not agreed a Remedial Works Agreement. Further, the INs did not offer any reassurance. The landlord was at all times under an obligation to comply with them, but major issues remained unresolved. Given the substantial period of time during which the landlord and developer had failed to agree even the scope of the works, the FTT had *"no faith"* that if they did not make an RO, the pace of progress would increase. Making the RO was more likely to result in an increase in activity resulting in making the building safe, than not making an order.

When it came to the RCO, the landlord, sought an order for incurred (and continuing) waking watch costs, expert reports, management costs and legal costs. Under section 124(2A) of the BSA, the costs incurred in taking *"relevant steps"* towards remediation can be recovered under RCOs. Here, the FTT was satisfied that it was a reasonable decision on the part of landlord, to stand up a waking watch, and to retain it even after a fire alarm system was installed. The FTT also was satisfied that it was fair and just to make an order that the developer pay the reasonable costs of management incurred by reason of the need to remedy the relevant defects or take the steps needed to get the remedial works carried out.

The FTT also agreed that the landlord was entitled to claim its legal costs and the costs of expert reports:

> *"We are satisfied that it is within our jurisdiction under section 124(2) to therefore include legal costs within the very broad ambit of costs described per that section. There is nothing in the Act that we find prohibits us from doing so. ... To interpret section 124 otherwise would result in absurdity."*

It was only this litigation that had driven any progress. The legal proceedings were brought about because of the poor construction. In other words, the FTT would not have been here but for those defects. The FTT noted that the BSA has at its heart:

> *"... a non-fault based purposive approach to remediating buildings that pose a risk to the safety of people in and about the building arising from something used (or not used) as soon as reasonably possible, for the protection of leaseholders."*

The principal goals of the BSA are that buildings that require remediation are remediated as quickly as possible, and that those not responsible for the defects that require remediation do not pay for it. To establish that a defect is a relevant defect, all that needs to be established is that it is one which causes a *"building safety risk"*. This risk is widely defined as: *"'a risk to the safety of people in or about the building arising from the spread of fire or the collapse of the building or part of it"*. Whilst the standard of remediation to be imposed by any RO was not specified in the BSA, in the caselaw to date, that standard had been interpreted to mean that remediation works should meet an outcome that satisfies the building regulations/standards in force at the time of their remediation.

In all the circumstances, the FTT considered that it was fair and just to make an RCO, both for the incurred costs and for the estimated sums that the landlord would incur in remediating the building. The FTT then suspended both the RO and RCO, saying that this was, in their view, the best way to achieve the remediation of the identified items in the RO in the shortest possible period by the appropriate body (i.e. the developer). The FTT had adopted this *"pragmatic"* approach because the developer and landlord had shown that they could cooperate, particularly under the pressure of litigation. If they did not work together, then the RO and RCO would take effect.

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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