Combustible cladding—limitation expiry is no excuse for inadequate particulars (Naylor v Roamquest)

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Construction analysis: The Technology and Construction Court (TCC) reiterated that an impending limitation expiry does not relieve claimants of their burden of pleading and establishing a positive case. In this combustible cladding dispute, the leaseholder claimants made allegations of defects that were not based on inspections or opening up carried out by appropriately qualified experts and were not the subject of an expert report. The leaseholders were permitted to amend their pleadings so as to identify precisely the nature, extent and location of the alleged defects. However, given the lack of investigation, they may struggle to do so, in which case parts of their claim might become barred. The decision underscores the need for claimants and their legal representatives to engage early and manage limitation periods appropriately. The decision also comments on the measure of damages (remedial costs) where the claimants constitute a minority of leaseholders. Written by Alex Ottaway, senior associate (Australian solicitor) at Bryan Cave Leighton Paisner LLP.

Naylor v Roamquest Ltd [2021] EWHC 567 (TCC)

What are the practical implications of this case?

Statement of Case

When approaching the expiry of a limitation period, it is good practice for the claimant to invite the defendant to enter into a standstill agreement. If a standstill cannot be agreed, the claimant may need to issue a protective Claim Form. However, the authorities make clear that, if the claimant is unable to set out the basis of its claim in at least a rudimentary way, issuing a protective Claim Form may be an abuse of process.

Combustible cladding claims invariably require the works to be opened up and inspected, which requires time, resource and planning. It is essential that, at the earliest opportunity—well before limitation expiry—claimants instruct appropriately qualified experts to inspect the works and produce a detailed schedule of defects and an expert report. A failure to do so could result in strike-out or summary judgment, or other orders that may have a barring effect.

Measure of damages

Defects claims are often brought by a minority of the leaseholders. If the claim succeeds at trial, the court may need to consider whether to award the claimants (i) all costs of all remedial works, (ii) the fraction that might be levied on each claimant via the service charge or (iii) diminution in value, expressed as the cost to remediate the defects affecting the flats in which the claimants have an interest. In some cases, it may be difficult for a leaseholder to recover the cost of remedial works carried out elsewhere on the building, or on another building altogether.

What was the background?

A development in Greenwich with 1,002 residential flats had combustible cladding that was undergoing remediation. The NHBC had accepted the leaseholders' claim under a Buildmark Policy covering 'necessary repairs' (constituting most but not all of the remedial works). It also accepted waking watch costs, but not other losses such as alternative accommodation costs.

The freeholder (Roamquest) confirmed it would not seek any contribution from the leaseholders in respect of remedial works to correct non-compliances with the Building Regulations. However, it did not commit to rectifying technical breaches that did not give rise to safety concerns.

Despite these positive signs, faced with an impending limitation expiry, a number of leaseholders issued protective proceedings against Roamquest and the builder (Galliard Construction).

Statement of Case

The leaseholders' allegations of defects were not based on inspections or opening up by appropriately qualified experts and were not the subject of an expert report.

The Statement of Case:

- said that certain cladding components were 'likely to be defective or missing', 'believed to be Class C' or 'assumed to have contained combustible materials'
- said that the documents disclosed by Roamquest and Galliard Construction 'do not demonstrate' that the original construction met the requirements of BR135, and
- appended a Schedule of Defects that did not assert with any particularity the nature, extent and location of the alleged defects

Roamquest and Galliard Construction made an application for strike-out under CPR 3.4(2) and summary judgment under CPR 24.2. They submitted that parts of the Statement of Case, such as the above, were speculative and an abuse of process, that no positive case was asserted, and that inadequate particulars had been given.

Measure of damages

The claimants were the leaseholders in respect of just 82 out of the 1,002 residential flats. However, they claimed all costs of all remedial works to all blocks. Roamquest and Galliard Construction submitted that each claimant could only have sustained loss in relation to the remedial works to the extent those works related to his or her flat. Accordingly, they applied for this part of the Statement of Case to be struck out or summary judgment entered.

What did the court decide?

Statement of Case

The court said that the leaseholders' claim was issued prematurely, to avoid limitation difficulties, and without expert evidence. This meant that Roamquest and Galliard Construction did not know the case they had to meet.

The allegations were based on the absence of documents from Roamquest and Galliard Construction to prove there are no defects. This had the effect of imposing on Roamquest and Galliard Construction the burden of identifying whether defects exist and proving their absence. The court said that it was not proper for the leaseholders to bring a claim on such a basis.

The court referred to the decision of *Nomura International plc v Granada Group Ltd* [2007] EWHC 642 (Comm) at [37] in which Mr Justice Cooke said (i) if a claimant cannot set out the basis of its claim even in a rudimentary way, it has no business issuing a Claim Form, and (ii) issuing a Claim Form to stop a limitation period running (where the claim is poorly particularised) is an abuse of process.

While the court allowed the leaseholders to amend their Statement of Case to identify the defects with precision, given the lack of investigation and expert evidence, the leaseholders may struggle to do so. Accordingly, although the court declined to order a strike-out or summary judgment, its order might nonetheless have a barring effect.

Measure of damages

In respect of the leaseholders' claim for all remedial costs, the court did not order a strike-out or summary judgment, as it considered it an issue for determination at trial.

In the decision of *Rendlesham Estates plc v Barr Ltd* [2014] EWHC 3968 (TCC), Edwards-Stuart J surmised that an owner of a top-floor penthouse may be entitled to the full costs of repairing a defect in the roof that rendered the flat uninhabitable, rather than merely his or her service charge share of the cost.

In the present decision, the court said that the ability of each claimant to recover the cost of carrying out any part of the works would depend on whether it can be shown that the specific works were reasonable and proportionate to remedy the breach in question. If the matter proceeds to trial, it will be interesting to see how the leaseholders seek to overcome this potentially substantial hurdle.

Case details:

- Court: TCC, London
- Judge: Justice O'Farrell
- Date of judgment: 10 March 2021

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