Neutral Citation Number: [2023] EWCA Civ 189

Case No: CA-2023-000120

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Mr Adrian Williamson KC
(Sitting as a Deputy High Court Judge)
[2022] EWHC 2966 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2023

Before:

LORD JUSTICE COULSON

- -

Between:

URS CORPORATION LIMITED	**Appellants**
- and -	
BDW TRADING LIMITED	**Respondents**

- -
- -

Fiona Parkin KC & Ronan Hanna (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellant**
Lucy Garrett KC & John McMillan (instructed by **Osborne Clarke LLP**) for the **Respondent**

Hearing date: 9 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on February 23 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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ON APPLICATIONS

LORD JUSTICE COULSON:

1. The respondents are developers. The appellants are structural engineers. Between about 2005 and 2012, the respondents engaged the appellants to carry out structural design work for the blocks of flats that they were building. Following the Grenfell Tower disaster in 2017, the respondents, like many other developers in the UK, carried out extensive investigations into the safety of the buildings that they had built.

2. In late 2019, whilst carrying out these investigations on a particular block, the respondents noticed signs of what they considered to be structural defects. That discovery led to a wholesale review of the structural condition of a number of other blocks for which the appellants had provided engineering designs. It is the respondents' case that the same or similar defects were discovered in some of those blocks too, and that the defects were due to the appellants' negligent design.

3. The appellants' underlying position is that any cause of action in tort accrued to the respondents in 2019, when the respondents discovered that the design was allegedly defective. The appellants argue that, because by then the respondents no longer had a proprietary interest in the buildings, had no obligation to rectify the defects, and no liability to third parties because of limitation, the cause of action accrued at a time when no loss had been or could have been suffered by the respondents. This was the primary reason for their case that the respondents' losses were not recoverable in tort.

4. O'Farrell J ordered that the issues of law between the parties be dealt with as preliminary issues, on assumed facts. On the 'no loss' point, in so far as it related to the respondents' possible liabilities to others, it should be noted that assumed fact 9(b) was in these terms:

> "At the time that BDW first became aware of the defect and/or first incurred the costs pleaded…BDW did not have an obligation in law to rectify the defects. BDW's case is that (i) it owed obligations to third parties in relation to the defects but (ii) any action brought by third parties against BDW to enforce those obligations would be time-barred."

5. Judgment on those preliminary issues was handed down by Fraser J on 22 October 2021 [2021] EWHC 2796 (TCC). Broadly speaking, the respondents were successful because Fraser J decided that, with some exceptions, the scope of the appellants' duty of care extended to the alleged losses, and that those losses were in principle recoverable. He found at [108] that the respondents' cause of action accrued not later than the date of practical completion of each of the blocks and not at a later date.

6. The appellants appealed. Ground 1 took issue with the judge's conclusion that the respondents' losses were within the scope of the appellants' duty. Ground 2, which I regard as the principal issue, argued that Fraser J should have concluded that the cause of action did not accrue at the date of practical completion but much later in 2019 (when the defects were discovered), which in turn meant that the respondents had not suffered the loss required to complete a cause of action in negligence. Ground 3 was something of a catch-all, to the effect that Fraser J had erred in not striking out the respondents' claim as disclosing no reasonable cause of action.

7. On 20 January 2022, I granted the appellant permission to appeal against the decision of Fraser J on all three grounds ("the first appeal"). For reasons which are not the fault of the parties, that appeal is not due to be heard until April 2023.

8. On 28 June 2022, after I had granted permission to appeal, the Building Safety Act 2022 came into force. Section 135 of that Act is concerned with limitation. The relevant parts of s.135 read as follows:

> "(1) After section 4A of the Limitation Act 1980 insert—
>
> "**4B Special time limit for certain actions in respect of damage or defects in relation to buildings**
>
> (1) Where by virtue of a relevant provision a person becomes entitled to bring an action against any other person, no action may be brought after the expiration of 15 years from the date on which the right of action accrued.
>
> (2) An action referred to in subsection (1) is one to which—
>
> (a) sections 1, 28, 32, 35, 37 and 38 apply;
>
> (b) the other provisions of this Act do not apply.
>
> (3) In this section "relevant provision" means—
>
> (a) section 1 or 2A of the Defective Premises Act 1972;
>
> (b) section 38 of the Building Act 1984.
>
> (4) Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date, to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years.
>
> (5) In subsection (4) "the commencement date" means the day on which section 135 of the Building Safety Act 2022 came into force….
>
> (3) 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…
>
> (5) Where an action is brought that, but for subsection (3), would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights.
>
> (6) Nothing in this section applies in relation to a claim which, before this section came into force, was settled by agreement between the parties or finally determined by a court or arbitration (whether on the basis of limitation or otherwise)."

9. The respondents maintain that two principal things have changed since the judgment of Fraser J. First, they say that, in accordance with the new limitation periods in the Building Safety Act, they can now pursue a claim against the appellants under the Defective Premises Act, which claim had not previously been made. (I note that they have also added a claim under the Civil Liability (Contribution) Act 1978, although it is not immediately apparent how that was triggered by the coming into force of the Building Safety Act). Secondly, the respondents say that the provisions of s.135

which, on the face of it, retrospectively extend the relevant limitation period to one of 30 years, mean that assumed fact 9(b) no longer applies.

10. As a result of these events, the respondents sought to amend their pleadings. The applications to amend were allowed by the deputy High Court judge and were the subject of two rulings, the first on 8 November 2022 ([2022] EWHC 2966 (TCC)), and the second on 14 December 2022, which does not yet appear to have a neutral citation number.

11. Two disputes have arisen between the parties in advance of the first appeal. I called those in, to be argued out at a hearing before me on 9 February 2023. The first is whether, as a result of the Building Safety Act, the first appeal has been rendered academic. The second is whether the appellant should be given permission to appeal the decisions of the deputy High Court judge which allowed the amendments. I heard argument on those issues and gave the parties the answers, together with a brief statement of reasons. I said that I would provide a judgment elaborating on those reasons.

Question 1: Is the First Appeal Academic?

12. On behalf of the appellants, Ms Parkin sought to have this issue determined in advance of the appeal although, to be fair to the respondents, they have never suggested that the first appeal was entirely academic. Their main point is that, whatever the outcome on Grounds 1 and 2 of the first appeal, Ground 3 (which sought to reverse Fraser J's decision and uphold the appellants' application to strike out the claim) could not succeed because of the extended limitation periods set out in the Building Safety Act. Thus Ms Garrett said that the outcome on Grounds 1 and 2 of the first appeal may go only to costs. As she succinctly put it at the hearing on 9 February 2023, assumed fact 9(b) was based on an assumption as to the limitation position which no longer applies.

13. Ms Parkin firmly maintained that the appeal was not academic. She said that assumed fact 9(b) represented the respondents' understanding of their position at the time (2019). She said that, whilst the negligence claims remained live, she was entitled to have Grounds 1 and 2 decided and if she was successful, it meant that the unamended claim - which was only in negligence - would and should have been struck out by Fraser J. In addition, she submitted that, because the new/alternative claims under the Defective Premises Act and the Civil Liability (Contribution) Act were legally flawed, assuming she was successful on Grounds 1 and 2, then s.135(6) of the Building Safety Act meant that the claim would have been finally determined by a court, so that the extended periods envisaged by the Building Safety Act would simply not apply to this claim.

14. As I made plain to the parties at the hearing, it is not for a single Lord or Lady Justice of Appeal at an interlocutory hearing to decide substantive matters which may be relevant to the outcome of a forthcoming appeal. At this stage, I broadly accept Ms Parkin's submissions that Grounds 1 and 2 may well not be redundant; whether or not they are ultimately found to be so will depend on the detailed arguments advanced at the hearing in April. There is in any event a major and freestanding dispute about

Ground 3, because of the possible scope and application of s.135 of the Building Safety Act. In those circumstances, I do not believe that the first appeal can fairly be regarded as academic.

15. The answer to the first question is therefore No.

Question 2: Should the Appellants be given Permission to Appeal the Decisions Allowing the Amendments?

16. On behalf of the appellants, Ms Parkin argued that she had a real prospect of successfully showing that the deputy High Court judge erred in allowing the amendments. She submitted that he had applied the wrong test and that he should have 'grasped the nettle' and decided the simple but important points of law that led her to argue that none of the new claims added by amendment had any prospect of success and should not therefore be allowed. She also said that the decision to allow the amendments brought with it at least a potential risk that the s.135(6) argument may no longer be open to her. This was because, if the amendments were allowed, they would 'relate back' to the commencement of the proceedings. That may mean that they would be treated as being in play at the time of Fraser J's order such that, even if the claim in negligence was struck out, the existence of the new claims might prevent the action as a whole from being struck out.

17. In response, Ms Garrett submitted that there were numerous different ways of putting the test on amendments which the deputy High Court judge had to apply, and that he had substantively applied the right test. She also said, by reference to paragraph 29 of his second judgment that, following a concession made at the hearing below by Mr Hargreaves KC on behalf of the respondents, it had been agreed that, if the points of law in respect of the new claims were determined in Ms Parkin's favour (such that it was decided that they had no prospect of success), she could run her arguments under s.135(6). Therefore, Ms Garrett said there was no detriment to the appellants in the amendments having been allowed.

18. Again I repeat the point that I am anxious not to decide anything which might constrain what arguments either side can put forward at the substantive appeal hearing. By reason of that risk, and the potential complexity of the arguments raised by the application to amend, I decline to say at this stage whether or not, pursuant to CPR 52.6(1)(a), the appellants have a real prospect of success in appealing the orders which allowed the respondents to amend their pleadings.

19. However, I am firmly of the view that, irrespective of r.52.6(1)(a), this is one of those unusual situations where, pursuant to r.52.6(1)(b), "there is some other compelling reason for the appeal to be heard". Indeed, I consider that there are three separate such reasons for the proposed second appeal to be heard alongside the first.

20. The first reason is that the second appeal is closely entwined with the first appeal. During leading counsels' arguments at the hearing on 9 February 2023, they kept straying from one appeal to the other. That is not a criticism; I consider it entirely understandable. Amongst other things, the points about section 135(6), and the arguments about the potential availability of claims under the Defective Premises and Contribution Acts, may arise in both appeals. It is impossible sensibly to disentangle them. I consider that it is entirely appropriate to order a second appeal between the

same parties, to be heard at the same time as the first appeal, in circumstances where the issues that arise in the second are so closely related to the issues that arise in the first.

21. The second reason concerns the potential detriment to the appellants if the amendments are allowed to stand. There is a risk - and I do not put it higher than that – that, if the amendments are treated as having been allowed, they may adversely affect Ms Parkin's position under s.135(6). That there is such a risk was expressly acknowledged by the respondents. This led to paragraph 29 of the second judgment, which appeared to except this point from the consequences that would otherwise normally flow from the allowing of amendments. But I am not sure that the wording of paragraph 29 quite does that. Furthermore, I am always anxious about submissions where some of the arguments are based on an unwritten concession. In those circumstances, it is much the safest course to allow Ms Parkin to develop her arguments on both appeals, unconstrained by any answering contention from the respondents that the points she makes are not open to her because the amendments have been allowed.

22. The third compelling reason to grant permission to appeal is that both appeals concern potential issues that arise out of s.135 (and possibly other parts) of the Building Safety Act 2022. The section is novel, and the issues to which it gives rise have never been considered before: because of the pragmatic approach he adopted, they were not considered in detail by the deputy High Court judge. Depending on the precise issues which arise on these appeals, some appellate guidance may be helpful.

23. For those three reasons, therefore, the answer to the second question is Yes. I grant permission to appeal in respect of the orders allowing the amendments. That second appeal will be heard at the same time as the first appeal in April 2023.

24. Following a discussion about directions, I made it plain that:

(a) It would be more convenient if each side produced one comprehensive skeleton argument dealing with all issues;

(b) It is imperative that the parties agree a timetable for the proper division of the three day appeal hearing which has now been fixed. If that could be extended into a list of the issues to be dealt with, and the proper sequence in which they might be addressed, so much the better;

(c) I expect the parties' solicitors to co-operate on these and other procedural matters so as to ensure that the hearing in April deals with the substance of the issues, not any peripheral skirmishing.