Building Liability Orders – Essential new guidance from the TCC

In an ex-tempore judgment handed down in the case of **Wilmott Dixon -v- Prater and others** last Thursday 21st March Jefford J, gave important new guidance in relation to a new and developing front in construction litigation – Building Liability Orders under s.130 of the Building Safety Act 2022.

The Background.

The case concerns allegations that the design and construction of the external walls at a development at Love Lane, London, are unsuitable from a fire safety perspective. Nearly £47 million is claimed against a range of Defendants, including two related companies, Prater Limited ("**Prater**") and Lindner Exteriors Holding Limited ("**Lindner**").

One of the Defendants, represented by **Sean Brannigan KC** and **Thomas Crangle** of 4 Pump Court, and **Beale & Co**:

(a) alleged on the basis of publicly available accounting information that both Prater and Lindner had, after becoming aware of the claim, largely disposed of their assets, tracing them through a series of transactions with another English-registered and various German-registered members of the same corporate group to which they belonged; and

(b) relying upon those alleged transfers, claimed by way of an additional claim in the proceedings Building Liability Orders against those English and German registered members of that corporate group.

This is ground-breaking: most commentators have assumed that Building Liability Orders are remedies which can be sought by Claimants: this is the first reported case in which *a Defendant* has sought a Building Liability Order against companies related to another defendant in order to secure an effective contribution to any liability which it may have.

The German companies sought to prevent that by seeking an order that the claim for a Building Liability Order be stayed until the main claim was resolved. They did so on the basis that it would be unfair for them to have to deal with the claim until the question of whether Prater and Lindner were liable had been resolved and/or they would not meet that liability.

The Judgment

In a robust and far-reaching Judgment, Jefford J accepted fully the submissions made by **Sean Brannigan KC** and **Thomas Crangle** to the contrary, rejecting the application for a stay.

Importantly, she found that:

(a) A party seeking a Building Liability Order was not obliged to bring its claim for such an order at the same time as the primary claim against a related company;

(b) However, if a Building Liability Order **was** claimed before the resolution of a primary claim the correct approach would normally be to have that claim heard and dealt with at the same time as the primary claim: any difficulties with ensuring that the additional Defendants to that Building Liability Order claim were afforded a proper and cost-effective chance to deal with it could normally be dealt with by sensible trial management;

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(c) That was because:

(i) On proper analysis of the legislation, Building Liability Order claims would normally raise issues which did not necessarily arise in the main claim – but resolving those issues would normally involve consideration of much of the evidence relevant to the main claim;

(ii) It would generally not be sensible to have the Court try to grapple with those issues after the main claim as doing so might involve either considering evidence more than once and/or require further evidence on much the same issues;

(iii) It was no answer to that obvious practical point to say that Building Liability Order claims were claims contingent upon the liability of others: contingent claims (such as claims for a contribution, or claims under guarantees) were the norm, not the exception, in sophisticated litigation – and claims for Building Liability Orders were no different; and

(iv) It was certainly no answer to say that a Building Liability Order claim could only arise and/or be made if the company facing the primary claim failed to pay it: such a failure to pay was not a pre-condition under the Building Safety Act 2022.

Further Points.

Also notable from the argument in the case is the following:

(a) First, the Court noted during argument that it was entirely possible in an appropriate case that it would be "just and Equitable" (the test under Building Safety Act 2022) to impose a Building Liability Order on related companies where the primary company had disposed of assets **even if such disposal was entirely innocent and not done to "asset strip" that company.**

(b) Secondly, it is notable that one of the companies facing the claim for the Building Liability Order expressly relied both in its pleaded Defence and in its submissions to the Court upon the fact that the Lindner companies facing the primary claim (Prater and Lindner) had valid and effective professional indemnity insurance which would serve to meet, at least in part, the claim made against them. Such waiver of the confidentiality of such insurance – and express reliance upon it – is unusual and points to the unusual and ground-breaking aspects of Building Liability Orders.

Both the precedent of a Defendant seeking its own Building Liability Orders by way of additional proceedings and the robust guidance of Jefford J in this regard is a development which is likely to be of assistance to others going forward.

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