Case No: HT-2022-000311
HT-2022- 000254

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Neutral Citation Number: [2024] EWHC 3569 (TCC)

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 19 December 2024

BEFORE:

MRS JUSTICE JEFFORD DBE

BETWEEN:

(1) 381 SOUTHWARK PARK ROAD RTM COMPANY LIMITED
(2) SOPHIA ELIZABETH SMITH
(3) ARMAND JUNIOR HOLDINGS LIMITED
(4) PIZARRA Y BALDOSAS SA
(5) LAURA JANE MACKIE
(6) CHARLES WILLIAM GEORGE FRY and EDWARD CHRISTOPHER MURRAY FRY
(7) GLORIA NOK TUNG CHAN
(8) PROPERTIES (RESIDENTIAL 2) LIMITED
(9) SALIM LALANI and ROZIM LALANI
(10) KAMALA NADIR KYZY BUCHHOLZ
(11) LUKE EDWARD PRICE

Claimants

- and -

(1) CLICK ST ANDREWS LIMITED (IN LIQUIDATION)
(2) CLICK GROUP HOLDINGS LIMITED

Defendants

MR M LEVENSTEIN appeared on behalf of the Claimants
The Defendants did not appear and were not represented

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

MRS JUSTICE JEFFORD:

The application

1. The leaseholder claimants, that is the second to eleventh claimants, make an application for a Building Liability Order under section 130 of the Building Safety Act 2022 against a background which is already set out in my judgment ([2024] EWHC 3179 (TCC)). In anticipation of that application being made, I made two relevant findings as to relevant liability in that judgment.

2. Section 130 of the Building Safety Act 2022 provides as follows:

> "(1) The High Court may make a building liability order if it considers it just and equitable to do so.
>
> (2) A "building liability order" is an order providing that any relevant liability … of a body corporate ("the original body") relating to a specified building, is also -
>
> (a) a liability of a specified body corporate …
>
> (3) In this section, "relevant liability" means a liability (whether arising before or after commencement) that is incurred --
>
> (a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or
>
> (b) as a result of a building safety risk."

A building safety risk is defined as:

> "… a risk to the safety of people in or about the building arising from the spread of fire or structural failure."

Subsection (4) provides that:

> "A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body."

3. In my judgment I found that there was a relevant liability within the meaning of section 130(3)(b) in two respects. Firstly, at paragraph 198, I said that in the light of the evidence of Mr Ferguson, the architectural expert, I was satisfied that there was a breach of certain clauses of the Freehold Purchase Agreement in the respects set out above in that judgment and that those breaches gave rise to a relevant liability for the purposes of section 130(3)(b). The relevant paragraphs immediately were the paragraphs of my judgment concerned with the evidence in relation to fire safety and I set out Mr Ferguson's conclusions at paragraph 194 which drew together the respects in which his expert evidence, which I accepted, was that there was inadequate fire protection within the building. The second respect in which I found that there was a relevant liability within the meaning of section 130(3)(b) was in respect of the structural adequacy of certain beams which, in effect, support the upper storey of the property. That finding is set out at paragraph 219 of my judgment. Those were my findings as to relevant liability.

4. The order - and I will return to this point – is, therefore, necessarily sought in respect of that liability and, if made, the order will provide, as set out in section 130(2), that the relevant liability of Click St Andrews is the liability of another body corporate. The order is sought against the second defendant, Click Group Holdings, on the basis that Click Group Holdings is an associated company of Click St Andrews within the meaning of the Act. Further, as section 130(1) provides, the order will be made if I consider it just and equitable to do so.

5. Before I turn to those issues, I should say that there was always a claim for a Building Liability Order in the Particulars of Claim but, originally, that was made only on the basis of a breach of section 2A of the Defective Premises Act 1972. I did not find there to be any basis for finding such a breach in this case. That is explained in my judgment and I say no more about it. However, a late amendment was made to add a claim based on a relevant liability in the sense of a liability incurred as a result of a building safety risk and that is what I found there to be in the respects that I have already set out.

Associated body corporate

6. Turning then to the provisions of the Act, it seems to me, firstly, that there is no real issue that Click Group Holdings is an associated company of Click St Andrews for these purposes. Section 131 of the Act provides at subsection (1) that:

> "(1) For the purposes of section 130, a body corporate (A) is associated with another body corporate (B), if -
>
> (a) one of them controls the other, or
>
> (b) a third body corporate controls both of them."

The subsection then provides that the following subsections (2) to (4) set out the cases in which a body corporate is regarded as controlling another body corporate. One of those subsections, subsection (4), provides that:

> "A body corporate (X) controls another body corporate (Y) if X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes."

7. The position in relation to these two companies, Click St Andrews and Click Group Holdings, is that Click Group Holdings, in my judgment, does control or did control Click St Andrews. That is because Click Group Holdings holds all the shares of Click Above Limited and Click St Andrews is a wholly owned subsidiary of Click Above Limited. Therefore, Holdings controlled Click St Andrews indirectly in the sense that it was able, through that corporate structure, to secure that the affairs of Click St Andrews were conducted in accordance with its wishes. Indeed, on the facts, as Mr Levenstein has submitted, the controlling or directing mind of both of these companies was the same person, that is, Mr Emmett who appeared at trial on behalf of Click Group Holdings .

8. There are therefore, in my judgment, two factors in the Act which are satisfied, namely, that there is a relevant liability and that this claim is made against a body corporate which is associated with Click St Andrews within the meaning of the Act. That, therefore, means that the principal issue I have to consider is whether it is just and equitable to make this order.

Just and equitable

9. The only case to date in which that short phrase has been considered is the decision of the First Tier Tribunal, albeit an FTT constituted by the President of the Upper Tribunal, Lands Chamber, and the Deputy President of the Upper Tribunal, Lands Chamber, in *Triathlon Homes LLP and Stratford Village Development Partnership* [2024] UKFTT 26 (PC). The application before the FTT was for a remediation contribution order under section 124 of the Building Safety Act 2022. That provides a somewhat different jurisdiction from the jurisdiction of the High Court to make a Building Liability Order but it is also a necessary element of the making of that order that it should be just and equitable to do so. The FTT was therefore concerned with the words that also appear section 130.

10. In paragraph 237, the tribunal said this:

> "Section 124 gives no guidance on how the FTT is to decide whether it is 'just and equitable' in any particular case to make an order. Beyond stating the obvious, that the power is discretionary and should therefore be exercised having regard to the purpose of the 2022 Act and all relevant factors, it is not possible to identify a particular approach which should be taken."

There is however, to my mind a steer, in that paragraph to have regard to the purposes of the Act and to all relevant factors.

11. In terms of the purposes of the Act, at paragraph 266 the First Tier Tribunal said this:

> "The obvious purpose behind the association provisions is to ensure that where a development has been carried out by a thinly capitalized or insolvent development company, a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedy in the relevant defects by hiding behind the separate personality of the development company. It seems to us that the situation of SVDP with its relatively precarious financial position and its dependence for financial support upon Get Living, its wealthy parent company, constitutes precisely the sort of circumstances at which these provisions are targeted."

12. This case seems to me to have similarities to that scenario in that Click St Andrews, to whom the relevant liability attaches, was a special purpose vehicle whose sole existence was to acquire the freehold of the property, in due course to develop the top floor of the property, and then to divest itself of the freehold as it sought to do through the Freehold Purchase Agreement. It was inevitably thinly capitalised and dependent on inter-company or inter-group loans for its financial wellbeing. Those are matters that were considered in the course of the applications for a freezing injunction and the evidence that was adduced at those hearings supports that position.

13. The difference, if there is a relevant difference, here is that the description of Click Group Holdings as a wealthy parent may well be misplaced. Indeed, one of the reasons why the freezing injunction was not continued against Click Group Holdings was the perception that, in truth, it had no real assets. There remains considerable doubt as to the financial standing of Click Group Holdings.

14. Mr Levenstein, nonetheless, submits that it would still be just and equitable to make a Building Liability Order in respect of Click Group Holdings because the emphasis, as he put it, should be on the financial position of the first defendant rather than on the parent company. He relied in part on paragraph 255 in the decision in *Triathlon* in which the tribunal said this:

> "The increase in value of Get Living's investment in East Village is not a matter to which we give great weight, although to the extent that it is relevant at all it is obviously a point in favour of making an order. It is common ground that Get Living has the resources to enable it to comply with any order the tribunal may make, but even if there had been doubt about that we think it would be an unusual case in which the source or extent of a respondent's assets or liabilities will carry much weight when deciding whether it is just and equitable to order it to bear the cost of remediation."

15. I respectfully agree with that approach. In the circumstances of this case, it seems to me that the indicators, at least prima facie, are very much in favour of the making of an order in respect of Click Group Holdings because it is the holding company of Click St Andrews, albeit by one step removed, and because the directing mind of the companies is common.

The arguments of Click Group Holdings

16. It is fair that I should address a number of further points on which I did not ask Mr Levenstein to address me at this hearing, not least because he did so in the course of the trial, and particularly in the context of the application to amend the Particulars of Claim. As I have mentioned that application was made in the course of the trial to seek a building liability order against an unspecified corporate entity on the basis of a relevant liability rather than a liability under the Defective Premises Act. It was the subject matter of argument and objection from the second defendant then represented in person. The same arguments were capable of being deployed in objection to the making of the Building Liability Order. I dealt with them at the time but I deal with them again now briefly and will be forgiven for some degree of repetition.

17. Firstly, it was argued on behalf of Click Group Holdings that the amendment ought not to be allowed because there was no expert evidence in relation to the fire safety and structural matters relied upon. That was particularly so in relation to fire safety where the argument was advanced that no fire safety expert had been called. That was a point I addressed in my judgment. It was a thoroughly bad point. Mr Ferguson, the architectural expert, had been called to give that evidence. He did give that evidence and it is recited in my judgment. There were specific points on which it was suggested he had not been fully informed - for example, that sprinklers had been installed - but that was simply wrong. He had been asked about them and given his opinion.

18. It was also suggested that the second defendant had been deprived of the opportunity to cross-examine specifically on the requirements of the Building Safety Act and whether there was a building safety risk. That was again, in my view, a misconceived argument. There may be cases where there is a live issue as to whether a risk is a building safety risk but, in this case, the nature of the risks was straight forward. The risks were those posed by inadequate fire protection and an insufficient load bearing capacity of beams. Nothing was identified that could have been put, or would have been put, with the benefit of distinct expert evidence, to suggest that those did not pose a risk to safety of people from spread of fire or structural failure, reflecting the definition of a building safety risk.

19. That point is of some importance because it has been submitted to me in the course of this application that one of the few reasons that might militate against it being just and equitable to make the order would be if the body against whom that order was sought had not had the opportunity to have a fair trial in respect of the making of the order.

20. In this case, that potential argument does not run because Click Group Holdings participated in the trial and not only had the opportunity to have fair trial but did have a fair trial, and the arguments that were advanced in opposition to the application to amend had no merit for the reasons I have just given.

21. The second argument advanced in relation to the application for leave to amend, which is also relevant to the application now made, is that it would not be just and equitable to make any order because of the terms in which it was claimed. The submission made was that no party was identified on the face of the pleading against whom that order would be sought. That point had no merit in the circumstances of this case. It was very clear from submissions, and is again recorded in my judgment, that, despite the absence of the naming of any party in the pleadings, a claim would be made against Click Group Holdings.

22. In any event, the Act does not require a party to be identified in pleadings or joined into proceedings before such an order is made. That is because it may not be apparent that a particular company will be pursued, and which company may be pursued may turn on changeable financial arrangements, or the company against whom the order is sought may not even exist at the time of the original proceedings. Before the order is made, the relevant body corporate must be specified but it does not follow that the associated company must be named or specified in the substantive proceedings. It is fair to say that I have observed in another context that where it is known that an application will be made against a particular party, it is sensible to join them into the ongoing proceedings to ensure that all issues are dealt with, but that does not preclude the seeking of a Building Liability Order against a party not joined.

23. In this case, none of this arises because Click Group Holdings was a party to the proceedings.

24. The only other argument advanced was that the claimants have a contractual arrangement with the defendants and a Building Liability Order would allow them to "correct their own failure" - presumably meaning their failure to ensure that any claims could potentially be enforced against both defendants. The individual leaseholders, however, do not have a contractual arrangement with Click Group Holdings but only with Click St Andrews. However, Click Group Holdings guaranteed the performance of Click St Andrews Limited under the Freehold Purchase Agreement and it seems to me that that guarantee militates in favour of Click Group Holdings Limited being liable to the leaseholders for the losses that flowed from the breaches of the Freehold Purchase Agreement which give rise to the relevant liability. The making of that Building Liability Order, albeit it may be of limited value given the financial position of Click Group Holdings, provides the leaseholders with a direct route to claim against Click Group Holdings which they otherwise do not have.

Conclusions

25. For all those reasons, I consider that it is just and equitable to make the Building Liability Order.

26. I said at the outset that, if made, the terms of that order would be that the relevant liability of Click St Andrews is also the liability of Click Group Holdings. In that context, the liability must, in my judgment, be the relevant liability only because that is the only matter in respect of which the Act gives me the jurisdiction to make such an order.

27. However, in the course of argument, Mr Levenstein submitted that the Building Liability Order would or should extend to liability in respect of all of the leaseholders' losses whatever the breach from which they arose. He argued, but did not develop the argument, that section 130 acted as a gateway to a broader order as to the liability of an associated body corporate.

28. I simply do not see how that argument can be made out. The leaseholders' individual losses largely, if not entirely, flowed from the water ingress that occurred in July 2021. The water ingress, and the carrying out of the works which gave rise to it, did not give

rise to a relevant liability within the meaning of the Act. They had nothing to do with a risk to the safety of people in or about the building arising from the spread of fire or structural failure. It makes no sense to treat the "relevant liability" as a gateway to recovery of all losses arising from any liability that might have been found on the part of Click St Andrews. That is not what the Act provides for.

29. I cannot, however, see anything that requires me to quantify the liability in respect of the relevant liabilities as set out in my judgment at the point of making the Building Liability Order. That is particularly relevant here because of the potential issues in identifying what losses, beyond the cost of remedial works, flow from the relevant liability and not the water ingress. It may in future often be the case that such a Building Liability Order will be made in terms of liability for an amount, particularly if, as here, the order is being made following a trial which has identified the extent of the liability in monetary terms. But it does not seem to me that I am required to do that and to make an order in an amount. At present, there are no figures before me which would enable me to do so, or at least to do so without considerable further interrogation of the spreadsheets that have been produced for the purposes of this hearing. That is not a reason not to make the order in terms that reflect the wording of section 130.

30. Therefore, the order that I will make, subject to any further refinement of the language, is a Building Liability Order providing that the relevant liability of Click St Andrews Limited to the leaseholders, as set out in my judgment, is also the liability of Click Group Holdings to the same leaseholders.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge