LEXOLOGY

Cladding Claim avoids strike out

Beale & Co

United Kingdom | November 24 2021

CASE REPORT: *Crest Nicholson Operations Ltd & Anor v Grafik Architects Ltd & Anor [2021] EWHC 2948 (TCC)*

A recent unsuccessful application for strike out has shed light on the Court's attitude towards the threshold for strike out in terms of lack of particularisation of a claim. The judgment made specific reference to this threshold in claims involving cladding and fire safety defects.

Background

The Claimant ("Crest") is the developer of a residential apartment building at The Quays in Portishead. The First Defendant is the architect who designed the development. The Second Defendant is NHBC Building Control Services Limited ("BCS") who were retained to carry out the services of an Approved Inspector.

The claim alleges a range of cladding defects, including the incorporation of combustible phenolic insulation and allegedly non-compliant Parklex cladding together with the defective design and installation of the cavity and fire barriers. Crest alleges that BCS, in their capacity as Approved Inspector, failed to identify defects which were non-compliant with Building Regulations at the time.

On 20 May 2021, following protocol-compliant pre-action correspondence, Crest served Particulars of Claim ("the Particulars") on The First Defendant and BCS.

The Strike-out Application

On 22 July 2021 BCS made an application to strike out the claim pursuant to CPR3.4(2). No prior notice was given to Crest, nor did BCS seek further information from Crest prior to making the application. The application was made on the basis that the Particulars disclosed no reasonable grounds for bringing the claim and/or because the Particulars were an abuse of the court's process. The application set out two arguments for strike out:

1. **The Particulars of Claim did not sufficiently particularise the alleged breaches of duty to enable BCS to understand the case.**

In support of their application, BCS referred to *Pantelli Associates Ltd v Corporate City Developments Ltd [2011]*, a professional negligence claim where the defendant had failed to set out the factual basis of their counterclaim. In that case, Coulson J found that "*generalised and generic allegations*" did not meet the standards required under CPR16.4(1) to form *"a proper pleading of a case of professional negligence"*.

2. **The claim is not supported by expert evidence.**

Whilst Crest had spoken with an expert, no expert report had been filed and the expert's comments were limited to stating BCS's performance was "poor". Once again BCS relied on *Pantelli* in which Coulson J found that "*it is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise*". In response, Crest relied on *ACD (Landscape Architects) Ltd v Overall [2012]* where Akenhead J found that the comments in *Pantelli* "*are not expressed to and do not lay down an immutable rule of practice that in no circumstances no pleading can be put forward which pleads professional negligence unless and until the party pleading has secured supporting expert evidence*".

Judgment

Whilst presiding judge HHJ Watson acknowledged that the allegations in the Particulars required further clarification, she found that, even as they stand, the Particulars clearly disclose a cause of action and reasonable grounds for bringing the claim. On this basis, the application for strike out was dismissed. HHJ Watson felt that the proper course of action by BCS should have been a Part 18 request for further information, rather than seeking strike out of the claim. HHJ Watson even went so far as to say that application for strike out *still* would not have become the appropriate next step in the event the Part 18 request went unanswered, instead suggesting BCS should then have applied for an order compelling Crest to comply with the Part 18 request.

Importantly, the judgement made reference to cladding and fire safety claims as a whole and argued that "*BCS's ability to understand the case it has to meet has to be viewed in the context of the very high level of awareness in the construction industry of the issues surrounding the problems that have been identified in many buildings with facade systems that do not meet the fire safety requirements of the Building Regulations*". Whilst HHJ Watson noted this does not absolve Crest of the need to explain its case, it certainly appears to potentially lower the threshold of particularisation for cladding and fire safety defects.

Regarding the lack of expert evidence, HHJ Watson accepted that a 'poor' performance may not equate to breach of duty. However, she ruled that expert evidence, even of a provisional nature, was sufficient and did not give reason for strike out as set in *ACD*.

Comment

Pantelli has long been a reference point for the proper practice of pleading claims. This recent judgement by HHJ Watson reaffirms the threshold for strike out as being a high one. In addition it arguably renders it even harder to strike out claims relating to cladding and fire safety on account of comments made about general industry awareness in that regard.

Beale & Co - Giles Tagg and Angharad Biggs