



## LEGAL BRIEFING

### *Broster & Ors v Galliard Docklands Ltd & Anor* [2011] EWHC 1722 (TCC)

#### *The Facts*

In 1997 Galliard Docklands Ltd (“Galliard”) employed East London Construction Ltd (“ECL”) to design and construct a terrace of six three-storey townhouses with a common roof. The building contract was in the standard JCT Standard Form with Contractor’s Design (1981 edition incorporating amendments). ECL completed these works and Galliard sold the townhouses to six individual purchasers including two of the claimants in these proceedings - the other claimants were subsequent purchasers.

On 8 January 2005, high winds caused the roof to lift up to one metre before falling back on to the top of the walls causing damage to the houses. Remedial works to the premises were carried out in spring 2007 and half of the remedial works costs were borne by the National House Builders Council.

The claimants brought proceedings for damages against Galliard and ECL alleging that the cause of the roof lifting was the failure by ECL to ensure (either by way of design or construction) that the roof joists in respect of each of the premises were strapped to the walls and the installation of the ceiling joists into an open bed joint.

The claimants pleaded that at the time of completion of the works by ECL, in circumstances whereby it had failed to strap the roof joists to the walls, a cause of action in negligence accrued to Galliard against ECL and that under Section 3 of the Latent Damage Act 1986 each claimant acquired a cause of action against ECL upon purchasing their respective properties. As part of this claim, the claimants alleged that the premises, individually and as part of the terrace, amounted to a complex structure, so that the construction of the roof should be regarded as separate property to the rest of the premises.

In the alternative, the claimants alleged that each dwelling within the premises amounted to a separate property and that to the extent to which the lack of strapping in one of the properties caused or contributed to the failure of the roof over a separate property owned by a claimant, that claimant had a cause of action in negligence against ECL in respect of that property, arising out of ECL’s negligence in the construction of the other properties.

In seeking an order dismissing the proceedings, ECL argued that the case as formulated had no realistic prospect of success because there could be no liability as what was damaged was in essence “the thing itself”, namely the terraced units sharing a common roof. ECL also argued that Section 3 of the Latent Damage Act did not apply because there was no physical damage to the houses before Galliard sold them.

#### *The Issues*

Did ECL owe a duty of care to the claimants in relation to the physical damage to their houses caused by a negligently designed or fixed common roof or was the damage considered to be damage to the “thing itself”?

Did Section 3 of the Latent Damage Act apply?

#### *The Decision*

Mr Justice Akenhead held that the claimants had no realistic prospect of success in their claims because:

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- (i) any cause of action relating to physical damage caused by the dislodgement of the roof was damage caused “to the thing itself”; and
  - (ii) there was no protection or new cause of action available pursuant to the Latent Damage Act.

In coming to these conclusions, the Judge confirmed that when considering whether a builder of a building owes a duty of care to owners or occupiers of that building with whom it has not been in contract, it is well established law that the builder’s duty of care, at least generally if not invariably, does not extend to damage to the building itself. The Judge decided that the houses were built as one construction, physically linked to and homogenous with each other and they shared at least a common roof. In these circumstances it would be wholly artificial to treat the segment of the roof over each individual house as separate from the whole roof or to treat the whole roof as separate to the walls of the houses below.

With regard to the Latent Damage Act, the Judge held that Galliard did not have a cause of action against ECL before the houses were sold because no physical damage had occurred at that time, and therefore the claimants could not rely on the Act.

***Comment***

This judgment shows that in seeking to establish that duty of care is owed by a builder to a subsequent purchaser for damage to the building itself, it is very difficult to succeed in claiming that parts of a single structure, even in separate ownership, should be treated as separate properties. The Judge stressed that one needs to consider the structure in question as a whole and to avoid any artificiality in practically considering the structure.

The claimants appeared to be left without a remedy for the half of the remedial works costs which were not borne by the National House Builders Council, but the Judge did note that the claimants could have sought to protect themselves from such losses when they purchased their houses. For example, they could have carried out a detailed structural survey and may well have had insurance against storm damage.

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