DEFECTS LIABILITY PROVISIONS – MAKING GOOD PRACTICE…

- Can a tenant bring a claim against a contractor under a collateral warranty for breach of the defects liability provisions of the building contract, after a Notice of Completion of Making Good Defects has been served?
- Is the position the same under the 2011 and 2016 editions of the JCT Standard Form?
- Can an employer be in breach of its obligations to a tenant to enforce the defects liability provisions, once the Notice has been served?

WHAT'S IT ABOUT?

The City and County of Swansea employed Interserve Construction Ltd for the construction of the Liberty Stadium in Swansea under a JCT Standard Form of Building Contract with Contractor's Design 1998 edition. Following its completion in July 2005, Swansea Stadium Management Company Limited (**SSMCL**) took a lease of the Stadium and Interserve gave a collateral warranty to SSMCL in relation to the works.

The Defects Liability Period under the building contract ran for 12 months from PC. Under a separate agreement between the Council and SSMCL, the Council was obliged to enforce its rights under the building contract in respect of the Defects Liability Period.

Several defects in the works subsequently came to light, namely defective flooring and paintwork. Remedial works were carried out to rectify these issues and in May 2011 the Council issued a Notice of Completion of Making Good Defects, which confirmed that any and all defects which it required to be rectified had been made good as of 14 April 2011.

In April 2017, SSMCL commenced proceedings against Interserve and the Council, alleging that (1) the original works were defective, (2) Interserve had failed to identify and rectify these defects as required by the building contract, and (3) the Council had failed to enforce its obligations under the building contract in respect of the Defects Liability Period.

SSMCL's first claim was dismissed in 2018, when the TCC decided that, because proceedings were brought 12 years and 5 days after PC, the claim was time-barred. SSMCL argued that, because it had not executed the warranty from Interserve until some 7 years after PC, the claim ought not to be time-barred. The Court disagreed, stating that the warranty had retrospective effect. This case was explored in greater depth in our Spring edition of Constructive Comments, which can be found here.

SSMCL's remaining claim regarding the Defects Liability Period was considered in the 2019 case of *Swansea Stadium Management Co Ltd v City and County of Swansea [2019] EWHC 989 (TCC)* in which the Court held that, by issuing the Notice of Completion of Making Good Defects, the Council had effectively brought the relevant contractual defects rectification machinery under clauses 16.2 and 16.3 to an end. **Conclusively, any and all defects which the Council had required the contractor to rectify were deemed to have been made good upon service of this notice**.

It followed then, as the Court explained, that the Council could not be in breach of an obligation to enforce its rights under the building contract after this time either, as it could not enforce rights that had been brought to an end.

WHY DOES IT MATTER?

Importantly, the Court said that the Notice had no impact on SSMCL's ability to bring a claim against Interserve in respect of its core obligations under the building contract. As such SSMCL could have brought a claim against Interserve for breach of its obligations to design and construct the works in accordance with the contract, if that claim had not been statute-barred.

Whilst this case concerned clause 16.4 of the 1998 contract, the Court stated that this position would be the same in relation to the Certificate of Making Good under the 2011 contract (clause 2.39). As clause 2.39 is practically the same in the 2016 edition, it is more than likely that the position would be the same under this edition too.

WHAT NOW?

The decision of the court that the issue of the Notice of Completion of Making Good Defects has conclusive effect in bringing to an end the contractor's obligation to rectify defects under the defects rectification provisions confirms the expected position, given the wording of the relevant clause of the JCT which deems completion of making good defects to have taken place for all purposes of the contract on the date named in the notice.

It is similarly logical that an employer should be protected from a claim under a third party agreement for failure to enforce its rights with regard to the rectification of defects, once those rights have been bought to an end by the issue of the Notice.

From a tenant's (or other interested third party's) perspective it highlights the need for the tenant to be involved in or (at the least) aware of the steps being taken by the employer to secure the rectification of defects under the defects liability provisions and consideration should be given to whether a contractual right to make representations during the certification process should be included in any relevant agreement.

It also highlights that, although in principle the limitation period applying to claims for breach of the defects rectification obligations extends beyond the limitation period applying to claims for breach of the contractor's obligations in relation to design and construction of the works, this is likely to be of limited assistance to a claimant whose primary claim for breach of contract is statute barred if the Notice of Completion of Making Good Defects (or similar confirmation of compliance with defects rectification obligations) has been issued.

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