Case No: HT-2020-000165

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Neutral Citation Number: [2024] EWHC 1687 (TCC)

Royal Courts of Justice
Strand,
London,
WC2A 2LL

Date: 20 May 2024
Start Time: **15.14** Finish Time: **15.51**

Before:

THE HONOURABLE MRS JUSTICE JEFFORD DBE

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Between:

(1) BRENDA VAINKER **(2) FRANCOIS VAINKER**	**Claimants**
- and -	
(1) MARBANK CONSTRUCTION LTD **(2) MERCER & MILLER (A FIRM)** **(3) SCD ARCHITECTS LTD**	**Defendants**

- -

DANIEL CROWLEY for the **Claimants**
ROBERT CLAY for the **First Defendant**
The **Second Defendant** was not present or represented
BENJAMIN FOWLER for the **Third Defendant**

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APPROVED JUDGMENT **(re para 253)**

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MRS JUSTICE JEFFORD:

1. The issue which I now have to decide arises, in a sense, from paragraph 253 of my judgment, in which I contemplated that there might be an application by Marbank and/or SCd to issue a Contribution Notice and I invited further submissions on that matter to be dealt with at the hearing of the consequential matters.

2. Neither Marbank nor SCd in the course of these proceedings had issued Part 20 claims for contribution against each other, despite the fact that a number of claims were made against both of them. In closing submissions, Mr Clay submitted, on behalf of Marbank, that Marbank was entitled to make a claim for contribution without a Part 20 Notice. He placed particular emphasis on a claim for contribution in respect of the glass claim. No issue is taken by SCd that Marbank should not have permission, even at this stage of the proceedings, to issue a Part 20 Notice in respect of the glass claim, and indeed, Mr Fowler had already made submissions as to the appropriate percentage contribution of both Marbank and SCd.

3. Mr Clay's submission was not, however, limited to the glass claim - that was simply the claim that he emphasised - and, in my judgment, I recognised that the claim for contribution which he sought to put forward would extend to the brickwork claim. However, I found against Marbank on the issue of whether such a claim for contribution could be made without a Part 20 claim, hence the invitation or contemplation in paragraph 253 of my judgment.

4. The principal issue between the parties now is that SCd object to the court giving permission to Marbank to issue a Contribution Notice in respect of the brickwork defects. Recognising that position, Mr Fowler made no written submissions on the appropriate apportionment, although he has done so, without prejudice to his primary position, in oral argument.

5. It seems to me that the main thrust of Mr Fowler's submission is that it is unfair and unjust to permit Marbank to make a claim for contribution at this stage of the proceedings and he submits that that is for two reasons. Had SCd known that they faced a claim for contribution in respect of a brickwork defect that was purely aesthetic and not structural, they would, Mr Fowler says, have adduced (i) further evidence as to the causative potency of the design elements relied upon by the claimants as a breach of duty by SCd and the workmanship defects alleged against Marbank to that aesthetic defect, and (ii) further evidence as to the appropriate remedial works if the defect were merely aesthetic.

6. The underlying assumption in that argument is that, in these proceedings by the claimants, SCd could never have been liable for an aesthetic defect and could not reasonably have been expected to address the issues that might arise. In order to consider that submission which assumes, as Mr Fowler fairly recognised, that SCd would succeed on its limitation defences other than under the Defective Premises Act, it is necessary to consider briefly the history of the proceedings.

7. The claim form was issued in May 2020 and Particulars of Claim served towards the end of that year. SCd's Defence was served in January 2021 and, as well as denying liability, the Defence took a limitation defence on the brickwork claim. SCd also set out its case that the contract between it and Mrs Vainker was one that incorporated

standard terms and conditions which included a net contribution clause at clause 7.3 of those standard terms.

8. In the Reply the claimants said that they did not have the requisite knowledge for the purposes of section 14A of the Limitation Act 1980 until 4 May 2017 so that the claim form was issued in time. This was not an entirely bald assertion and there was a relatively lengthy pleading of the claimants' case on this issue. The Scott Schedule was served in August 2021. Under the brickwork defects, item 1 described the nature of the defect as being "brickwork permanently damp and/or stained and/or discoloured" and alleged that there was a real risk of early brickwork failure. Two options for remedial works were identified: Option A cleaning of the brickwork by a brick cleaning contractor and Option B which, in summary, was removal and replacement of brickwork.

9. In SCd's Response to the Scott Schedule they said that their primary response was to be found in the identified paragraphs of the Defence which were paragraphs which amounted to a general denial, pointing out inadequacies in the claimants' position and particularisation of their case. But SCd also responded as follows: "Without prejudice to the above denials, it is submitted that the technical experts should confer about the prospects of the cleaning succeeding as this may be an ineffective and unnecessary process." The only other specific point made related to the chimney stack: "As to cost of remedial works SCd ask for clarification on a number of issues".

10. As the case progressed, the experts did not confer about the cleaning; nothing further was said about it. Nonetheless the quantum experts, Mr Finn for the claimants and Mr Johnson for SCd, agreed a cost of cleaning of approximately £7,000.

11. By the time of the trial the position was this. There was a claim against SCd in contract and tort in respect of the discoloured brickwork, which did not turn on whether or not the house was unfit for habitation at the date of completion and for which the appropriate remedy might be cleaning or might be Option B (replacement). Even if SCd were found to be in breach, SCd had a limitation defence in contract and also a limitation defence in tort unless the claimants could rely on section 14A. The claimants did not concede that defence in tort, and although SCd might have regarded that limitation defence as strong there was a risk that it would not succeed. If that limitation defence did not succeed SCd was at risk of a claim in respect of remedial works to remedy the discolouration which might only be an aesthetic defect. It was a positive part of SCd's case that the claimants had no evidence that the brickwork was structurally unsound or posed an increased risk of damp penetration, so the defect could, on that case, only be aesthetic in nature. In opening submissions SCd said that they should not be required to pay for the wholesale removal of the stained brickwork and replacement of the brickwork when no expert opined that that was reasonably required to remedy the discolouration, and two of the three experts opined that the metal drip detail proposed by SCd in 2013 would likely mitigate the level of staining.

12. To my mind, this makes it clear that SCd knew this claim remained in play, even if they regarded it as doomed, or sought to persuade the court that it was doomed. If, as is submitted to me, SCd had elected to prepare their case on the basis that the limitation defence was bound to succeed and the claim in tort doomed to fail, that was their decision as to how they would conduct the case and a risk that they took. If the tortious claim succeeded against SCd, SCd had advertised their intention to rely on

the net contribution clause and would therefore have had to advance a case as to "the extent to which it was just and equitable for SCd to pay, having regard to the extent of its responsibility for the loss and/or damage in question". That is the wording of the net contribution clause and it mirrors the wording of section 2(1) of the Civil Liability Contribution Act 1978.

13. SCd expressly said in Opening that they would rely on the net contribution clause and it was the subject matter of submissions in oral Opening. In the written Opening SCd said, as Mr Clay has drawn my attention to, that under clause 7.3 of its appointment SCd was entitled to have its liability capped at the sum at which it was just and equitable for it to pay, based on the extent of its responsibility for the loss and/or damage in question, on the assumption that all other persons providing services on the project had no exclusions or limitations to rely upon and had paid the sum which would reflect the extent of their responsibility for such loss. Such persons, SCd said, would include Marbank "in respect of the brickwork, glass balustrades and rooflight". That put squarely in issue Marbank's responsibility, and correspondingly SCd's responsibility, and SCd had pleaded a positive case that the cause of discolouration was Marbank's workmanship defects.

14. Mr Fowler submits that the net contribution clause could, in reality, only be relevant in respect of the claim under the Defective Premises Act, and therefore, only relevant if there was a risk of structural failure so that those submissions in opening and the pleaded case could only be relevant if there was such a risk of structural failure. But on the evidence in this case I cannot see the distinction that it is sought to draw between the cause of water penetration to the brickwork causing discolouration of the brickwork and water penetration to the brickwork which might ultimately cause structural failure, or the risk of early structural failure and by the same token, the respective responsibility of SCd and Marbank in terms of design and workmanship. These were not unrelated allegations of (i) design/workmanship defects which had led to discolouration and (ii) design/workmanship defects which had led to an early risk of failure. Exactly the same issues arose in respect of both, and, on the claimants' case they were closely related. The claimants' case and Ms Hoey's evidence was that water penetrating the brickwork had caused the permanent discolouration and would cause an early risk of structural failure. The fact that I rejected the latter of those complaints or arguments does not affect the nature of the evidence which was called and which one would have expected to be called by both SCd and Marbank on those issues, and it does not lead to the conclusion that one would have expected there to be distinct evidence as to the causal potency of the respective breaches.

15. I note also that one issue that arose in the course of Opening submissions was that Mr Crowley submitted that there was a practical problem in the application of the net contribution clause, if it became relevant, because SCd had not pleaded a percentage contribution. Mr Fowler's response in oral argument was that where there was a claim for contribution one would not normally expect to see that pleaded, in other words, one would not normally expect to see the percentage contribution pleaded, and that would ultimately be a factual matter for the court. I do not over-emphasise that submission. Clearly, Mr Fowler would say, and has said today, that that would be a factual matter for the court with the appropriate evidence before the court, but it seems to me that at the time it realistically recognised that issues of relative causal potency and responsibility for defects were already before the court.

16. Despite what had been said in the Response to the Scott Schedule, SCd itself chose not to adduce any further evidence on the cleaning option, which would obviously not relate to any structural defect, or on the appropriate remedial works in the event that the defect was purely aesthetic. The point that has been made today is that SCd simply had no interest in adducing such evidence because it could only be held liable if there were a structural defect, but that, as I have said and as is accepted, presupposes that there was no viable claim against SCd in tort rather than under the DPA. In my view SCd took the risk of that not transpiring to be the case. In other words, they took the risk as to what evidence they would adduce at trial, and that would not, as I will come to in a moment, have been affected by whether or not there was a claim for contribution against them. I say that particularly because both defendants firmly said that they were not responsible for any aesthetic defect and there was commonality in their expert evidence that the claimants simply could not prove their case as to the cause of the discolouration and aesthetic defect.

17. The expert evidence adduced by both nonetheless did address the cause of that discolouration. There was an entire section of Mr Satow's expert evidence on behalf of SCd headed "Discoloured Brickwork" and addressing the alleged causes. He repeatedly expressed his opinion as to the cause of the discolouration and he was cross-examined on those issues.

18. It is said by SCd that, had they realistically faced a claim for an aesthetic defect only, they would have called, and/or ought now to have the opportunity to call, further specialist expert evidence and are prejudiced by the fact that they did not have the opportunity to do so. As I have said, they did face a claim for a purely aesthetic defect, albeit one that they asserted they had a limitation defence to, and in respect of which I found in due course in their favour. Mr Satow's report and Mr Fowler's opening both referred to the possibility of more specialist expert evidence being called. SCd relied on reports that were before the court but on which no evidence was called. SCd could have put more evidence before the court and in my view could reasonably have been expected to do so, but chose not to.

19. Further, the primary case against SCd at trial, recognising the potential limitation defence, was pursuant to the Defective Premises Act. It was a necessary element of that case that the house was, on completion, unfit for habitation. SCd ultimately successfully pinned its colours to the mast of the case that the house was not unfit for habitation but, at the risk of repeating myself, SCd was at risk of a contrary finding and a claim against it for the cost of remedial works to remedy the structural defect. SCd again adduced no further evidence as to the appropriate remedial scheme for the structural defect but chose instead to rely on the inadequacy, on its case, of the claimants' evidence. That supports my view that SCd chose not to adduce any further evidence on the appropriate remedial scheme if there were only an aesthetic defect, and did so in any event and not merely because there was no claim for contribution against it.

20. In all those circumstances, I do not accept that SCd has been prejudiced, or would be prejudiced, by my giving permission now for Marbank to bring a claim for contribution against SCd in respect of the brickwork claim. The two respects in which it is submitted SCd would be prejudiced by not having before the court evidence which it might otherwise have adduced and wished to rely on, do not, in my view, hold water for the reasons I have given. It seems to me that SCd took a risk as

to the outcome of the litigation and in terms of the evidence that they sought to put before the court and they are not prejudiced by not being able to have a further bite of the cherry in that respect.

21. In that context, I note also that SCd has taken no objection to the making of a claim for contribution in respect of the glass at this stage of the proceedings. The only reason for the distinction between glass and brickwork could be, or would be, that a claim under the Defective Premises Act was more likely to succeed in respect of the glass because laminated glass posed a risk to health and safety and could be seen as rendering the house unfit for habitation. SCd judged, rightly as it transpired, that their chances of success were greater in respect of the brickwork claim, both because of the limitation defence in tort and the lack of a risk to health and safety, but those claims were live against SCd and the court could reasonably expect SCd to adduce all of the evidence on which it wished to rely in respect of both of those cases.

22. That means, therefore, that I give Marbank permission to issue and serve the Contribution Notice, the Part 20 claim, for which an application has now been made. I dispense with re-service in the circumstances of this case and proceed to consider the claim for contribution in respect of the brickwork defects.

23. In short, the starting point for that consideration is that I found that there was negligence on the part of SCd in the design of the DPC set back 5mm from the edge of the brickwork. I did not find that to be negligent in isolation but in the circumstances where there was also no capping to the brickwork. I clearly do not intend to repeat the whole of the judgment in that respect, but that was the nature of the design defect - not a single design failure but one which operated as part of a whole.

24. However, I found that that was exacerbated by matters of construction. Again, seeking not to rehearse the judgment at length, it seems to me that the most relevant paragraphs start at paragraph 215. There I said, and I will be forgiven for quoting myself:

> "Firstly, it will be apparent from what I have said above in relation to the brickwork that I am satisfied that there is ample evidence that the cavity trays were set back to a significantly greater extent than the 5mm specified, that is by at least 20mm (as agreed in the Joint Statement) and by up to 65mm as observed by Ms Hoey. The setting back of the cavity trays even further than specified must have exacerbated the effect of permitting more moisture to penetrate the brickwork and, since I accept Ms Hoey's opinion that that is the probable cause of the damp appearance of the brickwork, that must have been contributed to by Marbank's breach of the specification. Other than the suggestion of Mr Satow that the mortar joints could be described as bucket-handled, that is slightly concave, there does not seem to be any dispute that the joints were also flush, rather than recessed which, even if the cavity trays had not been so far set back, would have prevented the exposure of the edge of the cavity tray."

25. At paragraph 216 I continued: "Whether any other defects have contributed to the appearance of the brickwork is a more difficult question", but I concluded that other construction defects that did contribute to the water penetration, and thus the

discolouration, included lead flashings not being lapped over cavity trays and cavity trays placed directly on brickwork.

26. At paragraph 234 I described those defects as "widespread". I said this: "Although some of the workmanship issues have been remedied in the course of the remedial works carried out when water ingress occurred and in the course of snagging, the more recent inspections provide ample evidence that they remain widespread. These include the manner in which the lead flashings were installed, the cavity trays placed directly on brick and the poor quality specials", and I note that the poor quality specials had nothing to do with SCd.

27. It is also right, and Mr Clay wholly accepts, that the claim against SCd that turned on an alleged breach of its inspection obligations failed. Mr Clay submits that the appropriate contribution as between Marbank and SCd should be 50/50. Mr Fowler, as I have said, entirely without prejudice to his primary position, submits that it should be 75% Marbank to 25% SCd. I prefer Mr Fowler's submission on that issue. It seems to me that that division realistically represents responsibility and the allocation which it is just and equitable to make in accordance with the 1978 Act. There was a design defect which I found to have been caused by the negligence of SCd, but it would have, at worst, set the DPC back 5mm from the edge of the brickwork with a flush joint. As installed, the DPC was set far further back, the joints were completely flush so that the cavity tray could never have been exposed and the other defects were, in my judgment, purely matters of workmanship which contributed either to the discolouration of the brickwork or to the need, in the case of the specials, for remedial works to be carried out. Accordingly, that is the contribution which I will order Marbank to make, namely 25% of the cost of the brickwork remedial works.

28. So far as the glass is concerned, Mr Fowler submitted at trial, and still submits, that the contribution should be 20% SCd and 80% Marbank. Mr Clay in the Contribution Notice put the SCd contribution figure at 40%. Again, I prefer Mr Fowler's submission. The primary responsibility for the installation of the wrong glass was Marbank's. It was quite simply the wrong glass. It is, of course, right that I found liability on the part of SCd because SCd had failed to observe that the wrong glass had been installed and, in my view, ought to have observed that the wrong glass had been installed, but the primary responsibility must be that of the contractors who installed the wrong glass and the remedial works that followed flowed from that breach by Marbank. It is also the case that there were numerous workmanship defects in the way in which the glass was installed, which I do not intend to recite. I made the point in judgment that, given that the glass was replaced, the way in which it was fixed would be dealt with at the same time and so there was no separate claim for the remedying of those workmanship defects, but as a matter of what is just and equitable in terms of responsibility for the damage suffered by the claimants, it seems to me that that, too, ought to be reflected in the respective levels of contribution.

29. Accordingly, as I have said, I will accept Mr Fowler's submission, and the contribution to be made by SCd in respect of the glass is set at 20%

MR FOWLER: My Lady, we also have a contribution claim which goes the other way. It has not been dealt with expressly, but------

MRS JUSTICE JEFFORD: I am sorry, you are quite right. Mr Clay said at the beginning: no objection taken to that because what is sauce for the goose is sauce for the gander. In so far as it needs to be said expressly, it works the same way for you as it does for Mr Clay.

MR FOWLER: I am grateful.

(This Judgment has been approved by the Judge.)

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