[2018] EWHC 3309 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT

Case No: HT-2017-000404

Courtroom No. 29

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Monday, 29th October 2018

Before:
THE HONOURABLE MR JUSTICE WAKSMAN

B E T W E E N:

THE LESSEES AND MANAGEMENT COMPANY OF HERONS COURT
Claimants

-and-

(1) HERONSLEA LIMITED
(2) TNV CONSTRUCTION LIMITED
(3) NATIONAL HOUSE-BUILDING COUNCIL
(4) NHBC BUILDING CONTROL SERVICES LIMITED

MR P LETMAN appeared on behalf of the Claimant
MR S TOWNEND appeared on behalf of the Fourth Defendant

APPROVED JUDGMENT

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MR JUSTICE WAKSMAN:

Introduction

1. In this action the claimant, the lessees and management company of Heron's Court, a block of twelve of flats in Shenley Hill, Radlett ('Heron's Court'), claim damages from four defendants. All claims arise out of the construction of the flats in 2012, which, it is said, was seriously defective in many ways. The costs of putting rights the defects is estimated at £2.3 million plus VAT. Added to this are the costs of housing all of the residents for about six months while remedial works are carried out, and that is estimated at £250,000, and then there are some other costs.

2. The first defendant, Heronslea Limited, is the developer. The second defendant, TNV Construction Limited, is the main contractor. The third defendant, the National House Building Council ("NHBC"), provided a 'buildmark' insurance policy in respect of these newly built flats. The fourth defendant, NHBC Building Control Services Limited ("BCS"), is a company related to the NHBC, and which has approved inspector ("AI"), status. This meant that it was authorised to carry out inspection of the plans and building works in respect of the flats and certify, or not, that the relevant building regulations had been complied with. This is that same role which is carried out by a local authority inspector and that regime, prior to the introduction of the approved inspector regime, was the only one permitted.

3. Among other things, Heron's Court alleges that there were up to 101 individual breaches of building regulations concerning in particular fire resistance and water resistance in respect of the flats or some of them. As against BCS, Heron's Court alleges that it falls within section 1(1) of the Defective Premises Act 1972 ("the 1972 Act"), because, in its role as approved inspector, it had taken on work, 'for or in connection with the provision of a dwelling,' i.e. the construction of the flats. On that basis, BCS then had a duty under Section 1(1) to see that the work it took on was done in a workmanlike manner or, as the case may be, in a professional manner with proper materials and so that the dwelling would be fit for habitation when completed.

4. Heron's Court alleges that the flats were not fit for habitation in many different respects and that constituted a breach of the appropriate building regulations. It further alleges that this came about, at least in part, because BCS did not do its work in a workmanlike or professional manner.

5. The instant application is one by BCS to strike out entirely the claim brought against it pursuant to CPR 3.4(2)(a) or (b) on the basis that: (1) the particulars of claim disclose no reasonable grounds for bringing the claim against BCS as a matter of law; and/or (2) it was, and remains, devoid of particulars to such an extent that it amounts now to an abuse of the process. Originally there was a third ground, namely that the claim being one in professional negligence was unsupported by any appropriate expert evidence. That ground, however, is not maintained on a standalone basis, but the position as to expert evidence is relied upon, in the context of ground 2. I deal with each ground in turn.

Ground 1

6. This principally involves the scope of the expression, 'Takes on work for or in connection with the provision of a dwelling.'

A Preliminary Point

7. A preliminary point taken by Mr Letman for Heron's Court is that ground 1 is not suitable for a strike out application at all and the Court should refuse to deal with it. This objection is based essentially on the notes at 3.4(2) in the White Book which say in the third paragraph as follows:

> 'The strike-out procedure is not appropriate to strike out a claim in an area of developing jurisprudence since in such areas decisions as to novel points of law should be based on actual findings of fact. A statement of case is not suitable for striking out if it raises a serious live issue fact which would can be only properly be determined at a hearing by oral evidence.'

8. It is said that the case before me is a developing area of jurisprudence in the law of torts and it would require all kinds of factual findings for a resolution which could only be made appropriately at trial. There is nothing in this point. This is not a case of some difficult or developing area of law which is much better decided against particular facts found at trial. Rather, first, it is a question as to whether this defendant falls within the words of a well-known statute or not. Second, this is to be would be ascertained by reference to proper construction of the provision in the context of some well-known authorities and the role of an approved inspector. Thirdly, no particular facts need to be found and indeed, none are alleged in the particulars of claim, other than the fact, which is not denied, that BCS purported to carry out its role as an approved inspector. Fourth, it is a relatively short point of law and in the event was dealt with together with ground 2, well within a day. Accordingly, I proceed to consider ground 1 on the merits.

The role of the approved inspector.

9. The approved inspector regime was introduced by the Building Act 1984, which in Part 2 permitted, for the first time, inspectors to be drawn otherwise than from the relevant local authority. That Act, which I shall refer to as 'The Act', and as amended, provides, of course, for the making of building regulations thereunder. Section 49 provides for the making of regulations in relation the appointment, role and duties of approved inspectors. The latest version of those regulations are The Building (Approved Inspector etc.) Regulations 2010. Part 2 of The Act then sets out the position where there is supervision of building works for the purposes of building regulations to be undertaken by an approved inspector.

10. Thus, section 47 deals with the giving and acceptance of an initial notice, and where a notice in the prescribed form has been given jointly to a local authority by a person intending to carry out work and a person who is an approved inspector, the approved inspector, while that notice is in force, shall undertake such functions as may be prescribed with respect to the inspection of the plans of the work, the supervision of that work, and the giving of certificates and other notices. A local authority served with that notice may not reject it except on prescribed grounds, and shall reject the notice if any of the prescribed grounds exist.

11. Section 48 provides that so long as that notice continues in force, the function of enforcing building regulations that is conferred on a local authority is not exercisable and that is because it is going to be done by the approved inspectors.

12. Section 49 provides then in respect of the designation of that approval, and the system whereby approval for any given approved inspector is to be granted or not.

13. So approved inspectors are entitled to charge fees in the usual way. They were not entitled to have any financial interest in the project concerned. That, of course, parallels the fees that are payable to the local authority in its inspectors do the work.

14. Section 50 then says that where an approved inspector has inspected plans and is satisfied that plans are neither defective nor show that the work if carried out would contravene any building regulations, he shall give a certificate in the prescribed form to the person carrying out the works and to the local authority. There is then a similar provision for final certificates. There is also a criminal liability, which arises only if the inspector gives a notice or certificate which purports to comply with the Act, but contains a statement that he knows to be false or misleading in a material particular, or does so recklessly.

15. I will come to civil liability under The Act later on. We then go to the Regulations of 2010 themselves. Section 8 says that the functions of approved inspectors are to take such steps 'as are reasonable to enable to approved inspector to be satisfied within the limits of professional skill and care that the relevant building regulations have been complied with.' Section 9 deals with the independence of those inspectors. Section 12 provides for consultation with fire authorities in the appropriate case.

16. Paragraph 18 of the Regulations deals with cancellation of the initial notice and says that an inspector who is of the opinion that any work described in the notice which has been carried out contravenes any provision of the building regulations and may give notice in writing to the person carrying out the work specified. This must state the requirement of building regulations which in the approved inspector's opinion has not been complied with and the location. The notice of contravention will then inform the person carrying out the work that if, within a prescribed period that person had neither pulled down nor removed the work, nor effected such alterations as in it may be necessary to make it comply with building regulations, the approved inspector will cancel the initial notice. Other provisions deal with the giving or not of planning certificates as I have mentioned, and equally, the final certificate.

17. At this stage, I shall deal with one argument made by Mr Letman for Heron's Court. This was to the effect that there was an important and relevant distinction between a local authority inspector and an approved inspector because the former was working within a compulsory regime. It was his job to carry out inspections in accordance with the powers of the local authority, while an approved inspector, as a separate contractor, volunteers his or her services, on a case-by-case basis, therefore having the choice of whether to be the approved inspector for a particular developer or not. In my judgment, that is a wholly artificial distinction. Both kinds of inspector have, in essence, the same role. Both have fees payable in respect of their works and both of them must be independent. I return to this point further below.

The Particulars of Claim

18. I now deal with the particulars of claim. Section 2(4) describes BCS as a specialist provider of building control services, including inspection and certification for the purpose of the

building regulations, and is a person taking on such work for and in accordance with the provision of a dwelling house, within the meaning of Section 1(1). That contention is then repeated in Paragraph 6.

19. Paragraph 21 says that the flats, including the common parts, contained numerous defects, and then the remainder of Paragraph 21, in different sections, sets out what those defects were. There is a large list of defects in 21(2) concerning fire protection. There are also a number of defects referred to in Paragraph 21(3), so far as flooding and severe rising damp, and others concerning, for example, ventilation, sanitation, drainage and a host of other defects.

20. Paragraph 22 alleges that the builder was in breach of the statutory duties under the 1972 Act and Paragraph 3 alleges a breach likewise on the part of BCS, stating that the work which it did in providing building control services was not done in a professional manner, and approving building works that were contrary to the building regulations so that the flats contained the numerous defects referred to above, and are unfit for habitation on completion.

21. The nature of the defects, in other words the way in which each particular defect contravened, among other things, the building regulations, is prefaced in Paragraph 32 and then is set out in a long list at Annex D. There are loss and damages claims against all defendants in the same form and those losses are alleged against BCS among the others. 85 of the 101 building regulation breaches are alleged as against BCS. It will be noted at the outset that no particulars of the breach of Section 1(1), in terms of how the approved inspectors work was not done in a professional manner in relation to each of the defects alleged, were provided. It is also clear, as noted above, that no special role was relying on particular facts, was alleged against BCS. Finally, it is clear that no freestanding duty of care is alleged against BCS. Either it fell within Section 1(1) of The 1972 Act. If it did not, that is the end of the claim.

The words of Section 1(1).

22. If one takes the relevant words in isolation, it is obviously possible to bring an approved inspector within them. After all, an approved inspector does work and it is 'connected with' the building of the flats. However, that is too abstract an exercise. Moreover, as Mr Justice Davies in the Australian Federal Courts stated in *Hadfield v Health Insurance* [1987] 15 FCA 487 at p491:

> "expressions such as 'in connection with' are commonly found in legislation, but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute. The terms may have a very wide operation, but they do not usually carry the widest possible ambit, for they are subject to the context at which they are used, to the words with which they are associated, and the object or purpose of the statutory provision in which they appear."

23. For the reasons given below, I do not accept that the observations made by Mr Justice Antony Edwards-Stuart in *Rendlesham Estates Plc & Ors v Barr Ltd* v Barr [2014] EWHC 396 detract from the obviously correct dicta, in my judgment, of Mr Justice Davies.

24. The approved inspector regime, of course, came about some years after the 1972 Act, so it is worth examining what the Law Commission had in mind in its report which led to the

passing of that Act. Both sides accept that the report may be referred to, and indeed both sides place some reliance upon it.

25. The report which is dated 15 December 1970 is headed 'Civil Liability of Vendors and Lessors for Defective Premises.' Paragraph 26, dealing with the recommendations, said that the law should be amended to improve the legal position of purchasers of dwellings, so that, the builder of a dwelling should be placed under a duty similar to a common law obligation to build properly and should not be able to contract out of it. This duty should be imposed on 'not only builders but also anyone else, in particular, any subcontractor or professional man who takes on work for or in connection with the provision of a new dwelling.' In paragraph 29, it says that the obligation is imposed on those taking on work for or in connection with the provision of a dwelling so that developers and subcontractors would be embraced, but the content of the proposed obligation relate and relates only to that work which has been taken on. So, when a builder takes on work under a contract which obliges him to build to a given design, or in accordance with plans and specifications so provided to him, then his obligation will be discharged if he builds in a workmanlike manner. It is, of course, in tailor-made buildings for the architect or surveyor to provide the plans.

26. Paragraph 31 says that the effect of imposing this obligation on all those who take on the work involves giving special consideration to a number of classes of persons who are not builders in the ordinary accepted meaning of the term, and they are professional men who provide designs, plans and specifications, and who also undertake supervision of building work on behalf of their own clients, subcontractors, particularly specialists, who, as well as taking on some contract work are frequently concerned with the planning and design, suppliers of components specially constructed for use in dwellings; and suppliers of mass-produced components or general building materials for use in dwellings. The position of those persons would be as follows: professional men would have to take on work with all due care and skill. They will be under general obligation to provide designs, plans and specifications, which will include only methods and materials which if followed, would result in the dwelling be fit for habitation. Subcontractors will be under similar obligation, so far as they take on work and supply the material.

27. Paragraph 32 stated that those persons on whom the obligations are imposed should not be left at risk for an indefinite period. There should be a limit of time running from the date when the work was completed.

28. Finally, in the main text, they say that they appreciate the imposition of obligations covering that as dealt with in the preceding paragraphs, effect a change of liability so far as professional may not concern. They see no reason why a lower standard of duty should be appropriate. They are professional men, they are engaged in connection with housebuilding, to assist in producing a house fit for habitation. Then, in particular, they deal with professional men who have skill in designing dwellings and their components.

29. Then the draft Bill is attached and the explanatory note to clause one, which is in the same form as Section 1 of the Act, says that there is a threefold statutory duty on anyone who takes on work for or in connection with the provision of a dwelling, or anyone who in the course of a business or in the exercise of statutory powers, of providing or arranging for the provision of dwellings, or arranges for others to take on work, and the paradigm case there

is obviously where the local authority is exercising its power to build that development as a provider of housing.

30. It goes on to say that the duties imposed on builders, subcontractors, professional men, such as architects, surveyors and engineers, who themselves take on the work, and upon developers, local authorities who arrange for builders and other persons to take on that work.

31. It is, in my judgment, abundantly clear from the fair reading of those parts of the report, that the Law Commission considered that those who could fall within clause 1, other than builders, would be architects, designers, and those supervising the construction of the works on behalf of one of the building or designing parties. That is quite different from an inspector, whose essential function is not to contribute in any meaningful way to the design or construction of the building, but rather to certify simply whether that design or construction is lawful in a building sense, and that is the extent of the role.

32. I was also referred to a few passages on the second reading of the Defective Premises Bill in the House of Commons and then in the Lords. I have some doubt as to whether these extracts would pass the *Pepper v Hart* test, but that does not matter. That is because I did not find any of the extracts to be of any real assistance at all, and certainly not so as to assist the Heron's Court's interpretation of Section 1(1). There were some references to the exercise by the local authority of their powers, but, as is plain from the Law Commission report, that is *qua* builder or developer providing housing, not *qua* providing inspection services for the purpose of the building regulations.

33. I was also referred to some ancillary provisions of Section 1 of The Act, namely that a person who takes on such work for another on terms he has to follow the instructions, would not be liable, provided they follow the instructions. Secondly, that a person is not to be treated as having been given instructions simply because he has agreed to do the work in a particular way. Then, sub-paragraph 5: any cause of action is deemed to have accrued at the time when the dwelling was completed, but if after that time, the person who had done work for or in connection with the provision does further work to rectify it, the cause of action shall be deemed to have accrued at the time when the further work was finished.

34. It seems to me that certainly those provisions envisage a paradigm example of a party falling within Section 1(1) as the building contractor or subcontractor, but since it is accepted that an architect or designer would fall within Section 1(1), I do not think that this takes the matter much further. However, I do consider to be of some significance the fact that Regulation 8 of the 2010 Regulations does not impose a particular level of duty on the inspector, as I have already noted. Breach of that duty could give rise to a claim for statutory duty, if section 38 of the Building Act had been brought into force. What that says is that a breach of duty imposed by building regulations, so far as it causes damage, is actionable except insofar as the regulations provide otherwise, and those regulations would include the regulations pertaining to the approved inspector regime.

35. Then section 1(3) says that this would not affect the extent to which any breach of a duty in connection with this part of The Act, or any other enactment dealing with building regulations, is actionable or would prejudice a right of action that exists apart from the enactments relating to building regulations.

36. Section 38 still remains not in force, but it is some indication that as far as the building regulations are concerned, including for approved inspectors, it is contemplated that there would be a separate freestanding regime for any civil liability. That militates, to some extent, against the notion that approved inspectors should be subject to Section 1(1) of The 1972 Act, a different statute and the prior statute. At the very least, one might have expected the 1972 Act to have been amended so as to include approved inspectors, via the Building Act, if that was the intention. That is so especially since the duty imposed by Section 1(1) is different to and almost certainly stricter than, the building regulation duty, and is concerned specifically with a lack of fitness for habitation. I appreciate the proviso in Section 38(3) that I have read, but I do not think that that is a complete answer to the point. It is a very general provision designed effectively so that the new Section 38 liability will not adversely affect any other cause of action that might be available. In the paradigm case of builders, for example, it is obvious there could be claims falling outside claims that arise under Section 38.

37. I should also add that the distinction between these was described thus in *Keating* at 16-003. A person within s 1(1) of the 1972 Act has to do professional work in a professional manner. It is thought that all persons coming within the section are under a strict duty to fulfil its requirements and it would not be a defence to show the work was done with proper care, whereas under Regulation 8, it is a question of taking reasonable steps. Those different tests suggest to me that it would be odd if the inspector was subject to one regime by section 1(1) and yet another one by virtue of the Regulations, which designates specific duties for persons performing the role of an inspector. I do not accept, as Mr Letman submitted, that the position is the other way around. In other words, that, *au contraire*, if the inspectors were not intended to fall in Section 1(1) of the 1972 Act, the Building Act should have said so expressly. I consider this point to be the wrong way round.

38. All of that said, even if I was wrong on this, it would not alter my overall conclusion, and that is because, in my judgment, there are other very substantial reasons for not construing section 1(1) so widely as to include inspectors, and that is apart from the Law Commission report. The first of the reasons is a major one, the decision of the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398. In this case, the claimant brought a claim against the local council for passing the original plans which had relied upon defective consulting engineer's advice. The result was that the house was built with defective foundations causing substantial losses to the claimant. The claimant did not suggest that the local authority inspect fell within the 1972 Act (perhaps itself a telling point), but rather alleged a freestanding duty of care against the local authority, applying the then current test in the existence or otherwise of duty of care, as laid down in *Anns v Merton London Borough Council* [1978] AC 728. The trial judge, and later the Court of Appeal, upheld the existence of a duty of care here, and found local authorities liable in negligence for the passing of the plans.

39. The House of Lords reversed those decisions and departed from *Anns v Merton*. In so doing, they made observations about The 1972 Act which I regard as illuminating. First of all, the speech of Lord Mackay, beginning at 457b. He said that the choice is first to remove altogether the qualifications for the cause of action which *Anns* held to exist or to go back to the position as it was, before *Anns*, which would also involve overruling *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373. He then said:

> 'Faced with the choice I am of the opinion that it is relevant to take into account that Parliament has made provisions in the Defective Premises Act 1972 imposing on builders and others undertaking work in the provision of dwellings obligations relating to the quality of their work and the fitness for habitation of the dwelling. For this House in its judicial capacity to create a large new area of responsibility on local authorities in respect of defective buildings would in my opinion not be a proper exercise of judicial power….While of course I accept that duties at common law may arise in respect of the exercise of statutory powers or the discharge of statutory duties I find difficulty in reconciling a common law duty to take reasonable care that plans should conform with byelaws or regulations with the statute which has imposed on the local authority the duty not to pass plans unless they comply with the byelaws or regulations and to pass them if they do.'

40. It is plain that he thought that the 1972 Act had nothing to do with local authority inspectors, which is why the recognition of a new duty of care owed by them would be such an extension of their liability. One then goes to the speech of Lord Bridge at page 481. Having referred to the 1972 Act he said:

> 'It would be remarkable to find that similar obligations in the nature of a transmissible warranty of quality, applicable to buildings of every kind and subject to no such limitations or exclusions as are imposed by the Act of 1972, could be derived from the builder's common law duty of care or from the duty imposed by building byelaws or regulations.'

41. He says that he found it:

> 'impossible to suppose that anything less than clear express language such as is used in section 1 of the Act of 1972 would suffice to impose such a statutory obligation…since the function of a local authority in approving plans or inspecting buildings in course of construction is directed to ensuring that the builder complies with building byelaws or regulations, I cannot see how, in principle, the scope of the liability of the authority for a negligent failure to ensure compliance can exceed that of the liability of the builder for his negligent failure to comply.'

42. In other words, to permit an additional liability of the builders, i.e. further to the 1972 Act, by reason of a new duty of care concerning building regulations, would be wrong. If so, he is saying even more so in respect of the local authority in its role of the approver of plans. I accept that this passage is perhaps more nuanced than that from Lord Mackay. But on a fair reading, again, I think that Lord Bridge is assuming that the 1972 Act, on any view, would not be imposing a liability on the inspectors and that is confirmed by a further passage at page 482C, where he says this:

> 'These may be cogent reasons of social policy for imposing liability on the authority. But the shoulders of a public authority are only "broad enough to bear the loss" because they are financed by the public at large. It is pre-eminently for the legislature to decide whether these policy reasons should be accepted as sufficient for imposing on the public the burden of providing compensation for private financial losses. If they do so decide, it is not difficult for them to say so.'

43. It is impossible to see how he could have made that observation if he thought that there already was liability on the local authorities, and therefore the public purse, via The 1972 Act.

44. Then finally, Lord Oliver, beginning at 491:

> 'It may be said that to hold local authorities liable in damages for failure effectively to perform their regulatory functions serves a useful social purpose, by providing an insurance fund from those who are unfortunate enough to have acquired defective premises can recover at least part of the expense to which they have been put… One cannot but have sympathy with such a view although I am not sure that I see why the burden should fall on the community at large rather than be left to be covered by private insurance. But, in any event, like my noble and learned friends, I think that the achievement of beneficial social purposes by the creation of entirely new liabilities is a matter which properly falls within the province of the legislature and within that province alone. At the date when *Anns* was decided the Defective Premises Act 1972, enacted after a most careful consideration by the Law Commission, had shown clearly the limits within which Parliament had thought it right to superimpose additional liabilities upon those previously existing at common law and it is one of the curious features of the case that no mention even of the existence of this important measure, let alone of its provisions — and in particular the provision regarding the accrual of the cause of action —appears in any of the speeches or in the summary in the Law Reports of the argument of counsel..
>
> There may be sound social and political reason for imposing upon local authorities the burden of acting, in effect, as insurers that buildings erected in their areas have been properly constructed in accordance with the relevant building regulations. Statute may so provide. It has not done so and I do not, for my part, think that it is right for the courts not simply to expand existing principles but to create at large new principles in order to fulfil a social need in an area of consumer protection which has already been perceived by the legislature but for which, presumably advisedly, it has not thought it necessary to provide.'

45. Again, I cannot see how Lord Oliver could have made those observations save on the assumption that obviously for him, a local authority inspector's activities are not within The 1972 Act. Of course, the above passages do not represent the *ratio* of the decision, which itself was concerned with the imposition of a freestanding duty of care on the local authority, but they are extremely persuasive, in my view, on the question of the proper scope of Section 1(1). It is fair, also, to make reference some other observations from the Court of Appeal in its decision in *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858, where Lord Denning said:

> '…Parliament did nothing to recognise *Dutton*'s case as good law. Thirdly, *Dutton*'s case, if correct, gives a remedy against a local authority whose inspector is negligent or turns a blind eye, but it's doubtful if the statute gives a remedy. It depends on whether he takes on the work in connection with the provision of a house.'

46. Those words may give rise to much debate, even up to the House of Lords before it is settled. Lord Justice Roskill said, 'it is very far from clear when the local authority when performing its duties under the bylaws, can ever come within Section 1 at all, and it is undesirable to express any view.'

47. Those are not categorical statements, but they certainly can give no comfort to Heron's Court here, and they tend in the opposite direction, and of course, we now have the observations of three of their Lordships in the later case of *Murphy*.

48. In the course of argument and as I have presaged earlier, it became clear that Mr Letman's submissions depended to a significant extent on showing that there was for these purposes a valid difference between the position of a local authority inspector and an approved inspector, even though their actual role was essentially the same. It would be very odd if

their roles were different, given that the approved inspector regime is effectively a privatised version of the local authority regime. Mr Letman accepted that the local authority inspector would not be caught be Section 1(1), or at least it was likely that he would not be. This was because, he said, he did not 'take on' any work for or in connection with the building. That was because his involvement was effectively involuntary. He was, as it were, foisted upon the building team, pursuant to his duties to which he owed as an employee of the local authority. Accordingly, he was outwith section 1(1). On the other hand, the approved inspector does take on the work because, via a contract, he has decided to do so.

49. I do not agree with that as a matter of construction. It seems to me that the expression 'take on' connotes 'undertakes'. Both a local authority and an approved inspector undertake their statutory roles in respect of building regulation compliance, in relation to any particular building with which they are involved. The fact that one is employed by the local authority and the other may be an independent contractor cannot possibly make any difference, and it if were otherwise, it would mean that a developer should always use an approved inspector because on this hypothesis, they are encompassed within section 1(1), while a local authority inspector is not. That might be an option for those who are constructing large developments, or ones which happen to involve the NHBC, but in a very large number of cases it may not be an option at all; the notion that whether there is recourse under the 1972 Act should depend on whether the inspector is in the private or the public sector where their core duties are the same is, in my judgment, absurd.

50. What that argument did, however, reveal is the difficulty with the basic contention that the approved inspector falls within section 1(1) in the first place. If one agrees that local authority inspectors and the approved inspectors should be treated as in the same way for these purposes, which I do, it makes plain that the observation that I have quoted from *Murphy* would be the same if what the House of Lords was considering was a new duty of care on approved inspectors, as opposed to local authority inspectors; i.e. the backdrop would be equally that they were not within the 1972 Act.

51. It is true that the relevant approved inspector can do more than merely say 'yes' or 'no' to plans or to a phase of construction so far as compliance with building regulations is concerned. As I have quoted, Regulation 8 does permit him to point out the breach and provide for it to be remedied. In fact, unsurprisingly, local authorities have the same power. See section 16 of the 1984 Act. But that is still not, in my view, a contribution to the provision of the dwelling, in the sense of the builder or an architect. What it is contributing to is the aim of ensuring that the building is lawful and if the power under Regulation 8 really meant that an approved inspector was within section 1(1), it would make it even more absurd that in Heron's Court's case, a local authority with the same powers was not.

52. Heron's Court, however, does place reliance on the decision of Mr Justice Antony Edwards-Stuart in *Rendlesham*. The particular issue concerning section 1(1), among very many others there, was whether or not the common parts of a block of flats, and work to them by the builder, will work in the connection with the provision of each of the individual apartments.

53. The learned judge concluded thus:

> 'The application of the section to any particular piece of work is very fact specific. If the

> work for the provision of the dwelling in question is part of a larger development carried out by the same contractor under the same contract, then it is certainly arguable that all the work done in the course of the development is done in connection with the provision of the relevant dwelling.
>
> On the facts of this case it seems to me to be an inescapable conclusion that the work to the structural and common parts of both blocks was work done in connection with the provision of each of the apartments in the two blocks, since the owner of every apartment has an interest in and a financial responsibility for maintenance and repair of the structural and common parts of both blocks.'

54. He had also observed at paragraph 51 that a structure would either have to be physically or functionally connected with the relevant dwelling before it could be said to have been constructed in connection therewith, and that is what he found in this case.

55. I follow all of that, but fail to see how it helps Heron's Court here. The issue there was all about one element of building works in relation to another element of building works in the same block of flats. I do not see how that assists with the issues before me, which is whether an entirely different type of work that is carried out by an inspector falls within section 1(1) as well.

56. True it is, that Mr Justice Edwards-Stuart also said in paragraph 52, in a rather different context, that of arbitration clauses, that the words "in connection with" have been described as words of the widest import; then he quotes a Court of Appeal case, but context is everything, and his observations there are clearly connected to the context that was before him, i.e. the relationship between one set of building works, at least functionally or economically, with another set of building works. Nor do those observations, in my judgment, in any way amount to observations which are inconsistent with the general observations made by Mr Justice Davies in *Hadfield*, to which I have already referred.

57. I note also the other basis which Mr Justice Edwards-Stuart relied upon in connecting the two building work. He said that an apartment cannot be built without foundations or a roof or a structure or frame. Accordingly, it must follow that the structure and common parts of each block represent work that is carried out in connection with the provision of each of the apartments. The point is, that it is because the other building works were an essential part of the construction of the flats, the latter could not be built without them. However, a building can be built without complying with building regulations from a construction or design point of view. That it cannot be built lawfully is entirely a different matter in my judgment. It is not right, therefore, to say that the words of section 1(1) are to be construed in a complete vacuum or that there is no ambiguity, because in theory, the approved inspector could fall within them as a result of which context can be ignored. Context includes all of the materials that I have already referred to.

58. There is nothing in the textbooks which clearly suggests that inspectors might be caught by section 1(1). The closest one gets is the commentary in *Keating* at 16-005, again dealing with the 1972 Act and suppliers: 'how far other suppliers who provide goods such as boilers which would then be used in the dwellings and are for suitable for us in the dwellings to the builder can be liable depends on the application of the section and the facts of particular case.' Then it says, 'It is not clear whether a local authority performing its duties under the Building Regulations can ever come within the section.' It seems to me that that is a direct reference back to the dicta from *Sparham-Souter*, which I have already referred, and as I

have already noted, that is hardly a ringing endorsement of Heron's Court's position.

Conclusion on Ground 1

59. For all those reasons, therefore, I am quite sure that an approved inspector performing or purporting to perform its usual duties under the Regulations in the way described in this case is not a person who has taken on work for or in connection with the provision of a building. Accordingly, Heron's Court's claim against BCS fails at the first hurdle. There are no reasonable grounds for bringing it and it must be struck out.

Ground 2

60. In the light of that conclusion, it is not strictly necessary for me to deal with the alternative head of this application. All I would say is that despite the vague way in which this claim has undoubtedly been put (partly, I suspect, because of some urgency perceived by those bringing it because of limitation), and notwithstanding the delay on the part of Heron's Court in engaging with the need to provide particulars, had I been prepared to allow the claim in principle to go ahead, I would not then have struck it out *in limine* as being an abuse of process due to lack of particulars.

61. I take the point that at one stage, Heron's Court was saying that no particulars of breach were really needed because it was so obvious from the quantity and nature of the breaches of regulations pleaded. I also take the point that it would have been wrong for Heron's Court to rely, as it did at one stage, on *res ipsa loquitur* which is not an appropriate doctrine for a professional negligence case; and I agree that if one looks at the particulars of each individual breach of regulations, it is sometimes not apparent why without more, that shows a relevant breach on the part of BCS of its professional obligations. On the other hand, Heron's Court has now, very belatedly began to engage more helpfully with the provision of further information, and there is now, for example, a report from its expert dated 9 October which seeks to engage specifically with the position of BCS.

62. So, for example, the report makes reference to applicable building standards and building control performance standards in a section which runs from pages 8 to pages 10 using the internal numbering of the report, and also page 12, and then at page 14. He gives of an example of why it was that the defects would be a breach of professional obligations if they were actionable. At paragraph 5.4 makes reference to the fact that periodic inspections onsite at key stages should have identified that there was, for example, water penetration in the basement, or steel work that was unprotected and the extent of the unprotected steelwork was so extensive and prevalent he could not understand how this was not observed with obvious lines of enquiry also failing to be pursued, and matters of that kind.

63. Accordingly, had this point arisen, the proper response in my view would have been to order the required particulars to be provided, quite possibly accompanied by an unless order and with an appropriate order for costs in favour of the fourth defendant. In the event, as I say, this matter does not arise, and accordingly the claim will be struck out. I am indebted to counsel for their excellent submissions.

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This transcript has been approved by the judge.