THE TORT OF DECEIT: AN OVERLOOKED AVENUE OF RECOVERY IN CLADDING CLAIMS?

Following the Grenfell tragedy on 14 June 2017, it has become all too clear that many buildings contain defective cladding systems. Whilst some uncertainty remains as to exactly how this came to be the case, there is a growing consensus that the way many cladding products were marketed by the manufacturing companies was, at best, questionable and, at worst, dishonest.

Where a dwelling contains defective cladding, those with a legal or equitable interest in that dwelling can look to both the Building Safety Act 2022 ("the Act") and the Defective Premises Act 1972 ("DPA") to provide recourse.[1] But what about those who do not have a legal or equitable interest in a dwelling but are nevertheless facing loss as a result of defective cladding? A prime example might be a main contractor or designer facing liability under the DPA for a dwelling it built/designed many years ago. Understandably, in this scenario, the contractor/designer may well feel that it should not be the one left holding the loss; however, as a result of the new retrospective limitation periods introduced by the Act, the options for passing on or reducing its liability are likely to be limited.[2]

When faced with this scenario, parties generally look to the Act to provide the foundations for a contribution claim.[3] But, what if in all the excitement generated by the Act, a much older and potentially useful cause of action has been overlooked? The purpose of this article is to break down the tort of deceit and, in doing so, (hopefully) highlight why it should not be overlooked in the context of cladding claims.

By Adam Walton

1 Those who manufactured and/or sold the defective cladding can be pursued under section 149 of the Act, and those who took on work for the provision of the dwelling can be pursued under section 1 of the DPA.

2 Claims under s.1 of the DPA and s.149 of the Act have a thirty-year retrospective limitation period where the cause of action accrued before 28 June 2022: see ss. 135 and 150 of the Act. So, for example, if a claim relates to a dwelling built in early 2008, absent a bespoke limitation period, the contractor/designer on the hook will be unable to pass on/reduce its liability by bringing claims in contract (see section 5 and/or section 8 of the Limitation Act 1980), or negligence (see section 14B(1) of the Limitation Act 1980)

3 For example, by establishing the cladding manufacturer's (or another such party's) liability under s.149 of Act and then seeking contribution for the "same damage" under the Civil Liability (Contribution) Act 1978.

The tort of deceit

The ingredients of the tort of deceit were set out by Jackson LJ in *Eco 3 Capital Limited v Ludsin Overseas Limited* [2013] EWCA Civ 413 at [77]:

"(i) The defendant makes a false representation to the claimant.

(ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.

(iii) The defendant intends that the claimant should act in reliance on it.

(iv) The claimant does act in reliance on the representation and in consequence suffers loss.

Ingredient (i) describes what the defendant does. Ingredients (ii) and (iii) describe the defendant's state of mind. Ingredient (iv) describes what the claimant does."

Ingredient (i): The defendant makes a false representation to the claimant

Deceit responds to materially false representations of fact or law, which are made expressly or implied from conduct.

Where there is a dispute about the falsity of the alleged representation, the court normally looks to how a reasonable representee circumstanced as the actual representee would have understood the representation.[4] However, as Clarke J noted in *Raiffesen Zentralbank Osterreich v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) at [339], *"it is not sufficient that the representation was false in a sense which the representor did not understand or intend it to bear"*. Accordingly, it is for the claimant to show that the defendant intended its representation to be understood in the sense in which it is alleged to be materially false.

Deceit would therefore be capable of responding to false representations made by a cladding manufacturer about its defective cladding product. Such representations may, inter alia, relate to: performance criteria, suitability for use on certain buildings, compliance with standards and regulations, and the results of testing.

Ingredient (ii): The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false

Ingredient (ii) requires fraud, and the essential requirements of fraud were set out by Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at 374:

"First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

So, contrary to what many may instinctively think, fraud (in this context at least) does not require active and conscious dishonesty. Indeed, to satisfy ingredient (ii) the claimant need only establish that the cladding manufacturer: (1) had no belief in the truth of its representations about the defective cladding; or (2) was reckless or careless as to whether the representations it made about the defective cladding were true or false.

With regard to establishing fraud, as against certain cladding manufacturers, the Grenfell Inquiry should give heart to potential claimants: whilst the evidence put before the Inquiry about the conduct of cladding manufacturers has been generally startling, as against one manufacturer, the evidence was of such veracity that it was described as having perpetrated a fraud on the market.

Where fraud can be established, it will be no defence for the cladding manufacturer to claim that it did not intend to deceive or mislead the claimant.

Ingredient (iii): The defendant intends that the claimant should act in reliance on its representation

Intent, for the purposes of ingredient (iii), is formulated in the same way as in the criminal law: to act with intent means for the cladding manufacturer to have made the false representation with a view that it shall be acted upon by the claimant. In this way, intent includes both the case where the cladding manufacturer actually desires the claimant to rely on what it says, but also where it appreciates that in the absence of some unforeseen intervention the claimant will actually do so.[5]

As set out by Flaux J (as he then was) in *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm) at [139], for the purposes of deceit, there are three types of representee:

"first, persons to whom the representation is directly made and their principals; secondly, persons to whom the representor intended or expected the representation to be passed on and thirdly, members of a class at which the representation was directed."

It is thus not necessary for the cladding manufacturer to know precisely who the representation is intended for, provided it intends it to be relied on by someone in the claimant's position.[6] This can pertinently be seen from the decision in *Swift v Winterbotham* (1873) LR 8 QB 244 at 253 where it was held:

"In order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby."

The courts can be observed to have taken a liberal approach toward what constitutes a representation to "a class of persons", and have held that an action for deceit could be based on a newspaper advertisement, provided the claimant could show that s/he was one of the class of persons at whom it was directed: *Richardson v Silvester* (1873) LR 9 QB 34. In this regard, as the editors of *Clerk and Lindsell on Torts (24th ed.)* observe at para. 17-34:

"It is obviously a question of fact whether in a particular case a person was intended to rely on a false statement. In practice, however, the test is often whether it was in the defendant's interest that he should do so."

Sensibly, then, anything used to market defective cladding products (product brochures, leaflets, and British Board of Agrément certificates, for example) could be capable of founding a claim in deceit.

Ingredient (iv): The claimant does act in reliance on the representation and in consequence suffers loss

In the context of deceit, reliance operates as a narrow form of factual causation: the claimant's loss must have resulted from its reliance upon the cladding manufacturer's false statement. The false representation

4 Barley v Muir [2018] EWHC 619 (QB) at [177].

5 *Zagora Management Ltd v Zurich Insurance Plc* [2019] EWHC 140 (TCC) at [11.16].

6 So, for example, someone in the position of a main contractor, architect or designer.

7 *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48 at [18], [26]-[27]; J. Murphy, "Misleading appearances in the tort of deceit" [2016] *Cambridge Law Journal 301, 308.*

judgment or mind of the claimant, but it need not have been the sole cause of its loss: all that is required is that the claimant was partly influenced to act in the way it did by the false representation.[8]

In the context of agency, an agent's reliance can constitute a claimant-principal's reliance. Indeed, as Flaux J (as he then was) held in *OMV* [2015] EWHC 666 (Comm) at [139]:

"it is clear that where the agent acting on behalf of the principal has relied on the fraudulent misrepresentation and the principal thereby suffers loss, the principal can recover in deceit even if the relevant representation is not actually passed to him."

Whilst it is a defence to a claim in deceit to establish that the claimant actually knew the truth, it would be no defence for a cladding manufacturer to argue the claimant's reliance was unreasonable or that the claimant might have discovered the falsity of the representation through exercising ordinary care.[9]

Accordingly, it would not matter whether or not the claimant was sensible to choose the defective cladding product. All the claimant would need to establish is that it (or its agent) relied upon or was in some way influenced by the manufacturer's false representations when deciding to use the defective cladding, and it was this choice that led it to suffer loss.

Damages: what could be recovered?

In short, just about everything: the measure of damages in deceit is all loss directly flowing from the claimant's reliance upon the defendant's false representation.[10] In this way, it would be no defence for a cladding manufacturer to claim the loss suffered by the claimant was unforeseen.

It is to be noted, however, that a claimant is not entitled to damages in respect of loss which it could reasonably have avoided once it became aware of the deceit.[11] In other words, upon becoming aware of the cladding manufacturer's deceit, a claimant must still seek to mitigate its loss.

Limitation

Although deceit is subject to the same six-year limitation period that other torts are subject to,[12] as it is fraud-based, the fraud exception set out in section 32 of the Limitation Act 1980 applies. It provides relevantly:

"(1) Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; …

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

Pursuant to section 32(1)(a), then, the six-year limitation period only begins to run from the point when the claimant discovered, or could have discovered with reasonable diligence, the actual fraud (i.e., the deceit) which is alleged to have been perpetrated by the cladding manufacturer.[13]

In relation to what amounts to reasonable diligence, the question is whether or not the claimant could have discovered the fraud without taking exceptional measures it would not reasonably have been expected to take. As Millet LJ (as he then was) held in *Paragon Finance Plc v Thakerar & Co* [1999] 1 All ER 400 at 418:

"The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ … suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

So, where a deceit claim is brought against a cladding manufacturer and a limitation defence is raised, it would be open to the claimant to argue that its claim is not time-barred on account of the cladding manufacturer's deceit not being discovered, and not being reasonably discoverable, until much later.[14]

Pulling the threads together

In the scenario where (1) a party used (incorporated, purchased, etc.) a defective cladding product; (2) it did so on the basis of materially false representations made to it by the manufacturer, whether directly (in correspondence, for example), indirectly (i.e., through an agent or intermediary), or in marketing materials; and (3) that party has suffered loss as a result, deceit should not be overlooked as a potential route to recovering that loss.

8 *Hayward* [2016] UKSC 48 at [26] and [29].

9 See *Mellor v Partridge* [2013] EWCA Civ 477 at [20] (Lewison LJ): *"it does not lie in the mouth of a liar to argue that the claimant was foolish to take him at his word."*

10 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 at 167.

11 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 265-267 and 285.

12 See section 2 of the Limitation Act 1980.

13 See *Barnstaple Boat Co Ltd v Jones* [2007] EWCA Civ 727.

14 A possible argument might be that the deceit was not reasonably discoverable until Phase One of the Grenfell Inquiry was published in October 2019.