Mr and Mrs Vainker v (1) Marbank Construction Ltd; (2) Mercer & Miller (a firm); and (3) SCd Architects Ltd [2024] EWHC 667 [TCC]
New case on the Defective Premises Act 1972

1. On 25 March 2024, Mrs Justice Jefford handed down judgment in *Mr and Mrs Vainker v (1) Marbank Construction Ltd; (2) Mercer & Miller (a firm); and (3) SCD Architects Ltd* [2024] EWHC 667 [TCC] in which she found for the claimants Mr and Mrs Vainker against Marbank and SCD (the claim against Mercer & Miller was settled shortly before trial).

2. Mrs Vainker engaged the Defendants to build a new-build house. There were a number of defects in the as-built house. While much of the 818 paragraph judgment makes factual findings on the defects, there is an illuminating analysis of s.1 Defective Premises Act 1972 ("DPA").

3. Jefford J cited the decision of Edwards-Stuart J in *Rendlesham v Barr* [2014] EWHC 3968 (TCC); [2015] 1 WLR 3663[1], and said:-

> *"40. So far as the present case is concerned, a number of aspects of this decision seem to me to be relevant:*
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> *(i) In considering whether the House was, at the time of completion, fit for habitation, it is relevant to take into account that it was intended to be not only a new build but a modern house in design. It is a fact sensitive question in respect of any particular defect whether the requirements Mrs Vainker had for the House have any relevance.*
>
> *(ii) It is unlikely that a defect that is only aesthetic or inconvenient would render a dwelling unfit for habitation.*
>
> *(iii) There may be a breach of the duty in respect of a defect which means that the condition of the dwelling is likely to deteriorate over time and render the dwelling unfit for habitation when it does so. In that case the dwelling can be said to be unfit for habitation at the time of completion.*
>
> *(iv) In considering whether a failure to carry out works in a workmanlike or professional manner renders a dwelling unfit for habitation at the date of completion, it is appropriate to consider the aggregate effect of defects. However, it must be the case that minor or aesthetic defects which do not contribute, and are not capable of contributing to, unfitness for habitation cannot be relevant in this consideration and damages cannot be recovered in respect of such a defect merely because other defects render the dwelling unfit for habitation."*

4. Jefford J's judgment underlined the strength and power of the cause of action under s.1 DPA:-

(i) a claim under the DPA can often proceed, even though a claim in tort or contract is statute-barred. The Building Safety Act 2022 amendments to the DPA extend limitation under the DPA even further.

(ii) s.6(3) of the DPA states:-

"Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void". (emphasis added)

[1] Daniel Crowley acted for the Defendant in *Rendlesham v Barr*.

(iii) s.6(3) of the DPA can defeat an attempt by a party (often a professional) to rely on a 'net contribution clause' in a standard form contract such as the RIBA terms;

(iv) once there is a breach of the DPA, the damages awarded are not limited to the *"minimum necessary"* to put the dwelling in a habitable condition. But rather the *"recoverable damages should, therefore, be the cost of making the dwelling fit for habitation in the way it would have been had the services been supplied in a professional manner."*

(v) As to general damages for distress and inconvenience, after citing *Rendlesham v Barr*, Jefford J said:-

"654. I take from this the following propositions:

(i) The top of the range (10 years ago) was £3000 per annum.

(ii) It is relevant whether or not the claimant occupies the property and/or has had to move out while remedial works are carried out.

(iii) The claimant is to be treated as a person of reasonable robustness. A particular characteristic of the claimant may be material when, for example, the distress is caused by the presence of children in the defective property.

(iv) It is relevant to consider both the impact of distinct defects and the period of time over which that defect cause distress and inconvenience.

(v) Nonetheless, the court is entitled to take a broad brush approach."

5. The judgment also dealt with a number of other issues which often come up in defects claims including:-

(i) allegations of failure to mitigate; including failure to give the defective contractor the opportunity to come back and remedy its own defective works;

(ii) breaks in the chain of causation;

(iii) contribution between defendants e.g. main contractor and architect under the 1978 Act;

(iv) the effect of pre-action and pre-trial settlements with other parties in a multi-party action;

(v) 'Final Statement' and 'Final Account' under the JCT Standard Form contracts.

6. Vainker v Marbank and Others is essential reading for anyone handling a claim against a main contractor and professionals under the DPA, Building Safety Act 2022 and for defects claims more generally.

A link to the judgment can be found here.

Daniel Crowley and Kate Legh acted for the successful claimants, Mr and Mrs Vainker, instructed by Charlotte Waters of Fisher Scoggins Waters LLP.