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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Defective Premises Act: meaning of "fit for habitation"

Rendlesham Estates plc & Others v Barr Ltd
[2014] EWHC 3968 (TCC)

This was a claim by the owners of 120 flats in two apartment blocks against Barr who built the development for CWC. The stated object of the development was to provide high quality apartments for young professionals. The original tenders came in over budget and as a result significant reductions were made in the quality of the finishes. The project did not go smoothly. Barr had problems with many of its subcontractors. Many of the residents found that when, or soon after, they moved in, the intercom system did not work properly and that there was flooding and damp. Within two or three years numerous additional problems had begun to appear. Some of those defects were within individual apartments, while others were in common parts.

CWC went into administration in 2008. As a result and with the owners having no contract with Barr, the Claimants brought an action under the Defective Premises Act 1972 ("the DPA"), alleging that their flats were not fit for habitation. Barr conceded liability for some of the defects but disputed the appropriate measure of damages. Key to the case was section 1 of the DPA, which states:

"A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty...

...to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

Mr Justice Edwards-Stuart noted that each case would be fact specific. Proof was required in relation to each individual flat as no two owners had the same interest. This meant that the claim could not be pursued as a representative action. That said, the Judge identified the following principles for determining liability:

(i) Each individual flat, together with its balcony, constituted a separate dwelling within the meaning of the DPA;
(ii) The common parts and the basement car park did not form part of any particular dwelling. However, the construction of the common parts and the basement car park constituted work carried out for or in connection with the provision of a dwelling (namely, each flat) so that the duty imposed by section 1 of the Act applied;
(iii) When considering whether a flat is fit for habitation, its condition is to be considered at the date when the work was completed (i.e. the end of any relevant defects liability period);
(iv) The defects in any particular flat must be considered as a whole;
(v) The flat must be fit for habitation by all the types of person who might reasonably be expected to occupy it, including babies and those who suffer from common conditions such as asthma;
(vi) Whether or not a flat is fit for habitation is to be judged by reference to the standards current at the time when it was built;
(vii) If, at the time of completion, the state of a flat is such that a local authority with knowledge of its condition would not approve it as fit for occupation under the Building Regulations, it is probably unfit for habitation;
(viii) The fact that a particular defect which renders a flat unfit for habitation could be remedied at relatively modest cost, does not of itself mean that there is no breach of duty under section 1. That is relevant only to the measure of damages;
(ix) A defect may render a flat unfit for habitation even though both the owner and the builder were unaware of its existence at the time: for example, defective foundations;
(x) A state of affairs that arises only because the owner has not carried out maintenance that a building owner would reasonably be expected to carry out does not mean that the flat was unfit for habitation when completed. However, if the need to remedy the defect would render normal maintenance abortive, the failure to carry out maintenance is unlikely to negate the breach of duty.
(xi) Serious inconvenience may make a dwelling unfit for habitation. For example, a lift in a tower block that was poorly installed so that it frequently broke down could make flats on the higher floors unfit for habitation;
(xii) A risk of failure within the design life of the building of a structural element of the dwelling, which exists at the date of completion (whether known about or not), may make the dwelling unfit for habitation.
(xiii) Evidence of a need to vacate the dwelling in order to carry out work necessary to remedy work that was done in breach of the standard set by section 1 of the DPA, is relevant to the question of fitness for habitation.

On the facts, the Judge found that each flat was unfit for habitation due to a variety of defects to the common parts and the individual apartments. Therefore the Claimants were entitled to the costs of rectifying the applicable defects. Further, a leaseholder's loss in respect of a defect in the common parts was not limited to his proportion of the service charge covering the repairs. The owner of a flat that was unfit for habitation by a defect in the common parts was entitled to the cost of repairing that defect, albeit that the cost of such repairs could rightly only be enforced once, as only one repair was needed. Finally, the Claimants were entitled to a sum representing the blight on the value of apartments where remedial works were undertaken as well as damages for distress and inconvenience.

Adjudication: meaning of "construction operations"

Savoye and Savoye Ltd v Spicers Ltd

[2014] EWHC 4195 (TCC)

Spicers engaged Savoye (a French company) and Savoye Ltd (a related British company), together "Savoye", to design, supply, supervise and commission a new automated conveyor system at its existing factory in the West Midlands to fulfil orders for office products. The system comprised conveyors and other equipment for the packing of the products and the printing of labels. The conveyors were attached to the ground floor concrete slab by some 2,000 bolts but the other substantial and/or important pieces of equipment were not all mechanically attached to the floor.

Savoye completed the installation towards the end of 2013; however, disputes arose between the parties regarding payment to Savoye and the quality and performance of the installation. Ultimately Savoye gave notice of adjudication. Spicers objected to the jurisdiction of the adjudicator on the basis that the works were not "construction operations" within the meaning of section 105 of the HGCRA. The adjudicator's non-binding opinion was that he had jurisdiction and proceeded to find that Spicers should pay Savoye approximately £828,000 plus VAT, interest and his fees.

When Spicers failed to pay, Savoye commenced enforcement proceedings in September 2014. However, Mr Justice Akenhead refused the application for summary enforcement on the basis that there were triable factual issues and because he felt that a site visit was necessary. The expedited trial still took place promptly on 3 December 2014.

There were two issues that the Judge had to consider. First, was the conveyor system sufficiently attached to the floors so as to give rise to a proper conclusion that it was "forming, or to form, part of the land" for the purposes of section 105 of the HGCRA? Second was section 105(1) engaged in that the installation of the conveyor system represented "construction operations"?

Mr Justice Akenhead's decision is, of course, very specific to the facts of the case and the construction and purpose of the conveyor system in question. Nevertheless, it provides useful guidance on the definition of "construction operations" and the meaning of "forming, or to form, part of the land" for the purposes of section 105 of the HGCRA and highlights that section 105(1)(b) includes the provision of industrial plant within the definition.

In addition, the Judge noted that section 105 mentions "forming, or to form, part of the land" as a part of the definition of "construction operations". He formed the view that whilst the law relating to fixtures in the context of the law of real property casts useful light on whether the item of work forms part of the land, it is not a pre-condition for the purposes of section 105:

"Whether something forms part of the land is a question of fact and this involves fact and degree … [it] is informed by but not circumscribed by principles to be found in the law of real property and fixtures …"

Furthermore, in relation to the object or installation forming part of the land, one should have regard to the purpose of the object or installation in question.

Where machinery or equipment is installed on land or within buildings, particularly if it is all part of one system, regard should be had to the installation as a whole, rather than each individual element on its own. Simply because something is installed in a building does not necessarily mean that it is automatically a fixture or part of the land.

The evidence, in the view of the Judge was clear that the conveyor system was attached to the concrete floor slab on the ground floor and the raised and rising conveyors to the steelwork forming part of the mezzanine; in addition, at the mezzanine level, it was attached by bolts to the floor. The real question was whether the conveyor system taken as a whole was sufficiently attached to the floors and underside of the mezzanine floor as to give rise to a proper conclusion that it was forming or intended to form part of the land. Mr Justice Akenhead held that the conveyor system did form part of the land for the purposes of section 105:

"a) There were extensive and substantial fixings (by bolts) of the system to the body of the building… There were large numbers (in the thousands) of bolts drilled into the floors…;

b) The conveyor system is very substantial and large. It covers a large section of the ground floor and a significant part of the mezzanine floor…;

c) The conveyor system was clearly intended, both subjectively and objectively, to be relatively permanent and to perform a key role in the warehouse…;

d) …

e) The fact that some of the elements comprising the system … were not as such mechanically attached to the floor does not undermine the conclusion…

f) The fact that parts of the system are relatively easily removable does not itself weigh particularly heavily against the conclusion which I have reached…"

The Judge found that it follows from the above that section 105(1) of the HGCRA was engaged and that the installation of the conveyor system did represent "construction operations". Mr Justice Akenhead accordingly held that the adjudicator had jurisdiction to decide the dispute and enforced the decision.

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