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The construction & energy law specialists

Fire Safety and Tall Buildings - Recent Cases

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Introduction

1. Surprisingly, whilst everyone is aware of the issues which the construction industry has had post-Grenfell with cladding, fire barriers etc, recent cases before the Courts have resulted in Claimants for the most part failing to recover any compensation. This note looks at the reasons why.

First Port Property Services Limited v The Various Long Leaseholders of Cityscape[1]

2. The flat owners of 95 apartments in a number of blocks received a service charge bill for circa £2.4m relating to the replacement of cladding (which was regarded as a significant fire risk), together with the costs of a waking watch. The flat owners challenged the bill on the basis that it was not a repair or maintenance cost, but rather the block as originally constructed was defective. The flat owners also challenged the waking watch fees alleging they were not payable under their leases and/or were unreasonable.

3. The Tribunal held:

   3.1 The Leases in question referred to the need for "*renewing or otherwise treating as necessary*" the blocks, the obligation to keep the buildings in "*good and substantial repair order and condition*" as well as "*rectifying or making good any inherent structural defects*". This went beyond the costs of a simple repair and wear and tear. The fire risk from the cladding meant that blocks were clearly not "*in good and substantial repair order and condition*" and therefore the management company was obliged to carry out the replacement of the cladding, and the flat owners would have to pay for it under their leases.

   3.2 Similarly, the waking watch costs were to be paid by the flat owners as they again fell within the Leases' provisions relating to "*the requirements and directions of any competent authority*" – here this was the London Fire Brigade.

4. This First Tier Tribunal case illustrates a key point – in disputes between flat owners and the Landlord, it is normally the terms of the Lease that decides who will pay.

The Lessees and Management Company of Heron Court v Heronslea and Others[2]

5. In this case the flat owners and the management company brought claims against the original developer, the main contractor who originally constructed the building, the provider of the NHBC Buildmark Insurance Policy and significantly also the Approved Inspector. The estimated costs of the remedial scheme were circa £3m but as the tenants and management company (unsurprisingly) did not have a contract with the Approved Inspector, the claim was brought pursuant to the Defective Premises Act 1972 ("the Defective Premises Act").

1. [2018] UKFTT RP-LON-00AH.
2. [2019] EWCA Civ 1432.

6. The Defective Premises Act provides that "*A person taking on work for or in connection with the provision of a dwelling owes a duty … to every person who acquires an interest (whether legal or equitable) in the dwelling … to see that the work which he takes on is done in a workmanlike or … professional manner with proper material so that as regards to that work the dwelling will be fit for human habitation when completed*". [3]

7. Here, however, the Court of Appeal found that the Defective Premises Act did not apply to the Approved Inspector as they did not make a "*positive contribution to the design or construction of a building*", and approved of the Technology and Construction Court's statement whereby an Approved Inspector's "*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*".

Sportcity 4 Management Limited and Others v Countryside Properties (UK) Limited[4]

8. This case concerned the Sportcity Living Complex which consisted of around 350 apartments in a number of blocks. There was a dispute as to when the blocks were completed and a claim was made by the Management Company of the blocks for what were described as "*life threatening defects in the design and/or construction of the cavity barriers and fire stopping measures*".

9. The Leases for the blocks were somewhat complicated as they included not only the Management Company and the flat owners, but also the Landlord and Countryside – Countryside were the developers. The Management Company raised a number of legal points in pursuit of their claim:

9.1 Under the Leases the Landlord covenanted with the Management Company and the flat owners that the blocks would be completed in accordance with plans and specifications approved by the Local Planning Authority – it was alleged they were not. The Leases also contained the usual covenants re "*quiet enjoyment*".

The Leases were complex, certain rights that would normally be reserved to the Landlord were reserved to Countryside, and the purchase price was paid to Countryside who also approved the terms of the Leases (there was a separate Development Agreement between Countryside and the Landlord).

The Court, however, found that even though the Leases gave Countryside rights which would normally be the preserve of the Landlord, this did not mean that Countryside were the Landlord for the purposes of the Leases. Significantly, the Landlord as registered with the Land Registry was not Countryside.

9.2 The Management Company also relied upon the Defective Premises Act which provided that any claim must be brought before the Courts within 6 years of when the dwelling was completed or, if the claim related to rectification work, the 6-year period would begin from when the rectification work was finished.

3. Section 1(1).
4. [2020] EWHC 1591.

There was, however, an issue as to whether the blocks were completed in 2007 or 2010, but even using the later date a limitation period of 6 years meant that a claim would have to be brought by 2016, but it was not.

However, the arguments did not stop there. Further remedial work had been undertaken in 2014 and there was an inspection of the property in August 2017 which failed to highlight the defects. (The Defective Premises Act can apply to omissions, as well as advice.)

However, the Court found that whilst the Management Company could bring a claim within 6 years of the Defendant's acts or omissions which took place in 2014 or 2017, this did not extend the limitation period for the original construction of the building which was completed in (probably) 2010 – the limitation period for the original construction expired 6 years later in 2016. The Court had no evidence before it as to any wrong doing during the remedial works of 2014 and the inspection of 2017.

9.3 Finally, the Management Company also brought a claim for negligence in tort against the Defendants, but this was quickly dismissed by the Court – the cost of remedying defective buildings is essentially economic loss and, save for negligent advice, economic losses cannot be recovered under the tort of negligence.

Conclusion

10. It is surprising in the light of publicity from the Hackitt Review and widespread criticisms of the building industry when it comes to cladding etc., that all three cases resulted in flat owners and management companies failing in their claims against Developers, Approved Inspectors etc. The key point is, a claim for a defective building by a flat owner etc. who is not a party to a favourable lease, building contract, collateral warranty etc, can prove to be very difficult.

11. That said, we are involved in a number of claims regarding allegedly defective cladding, missing fire barriers, excessive voids etc. For the most part these claims are normally underpinned by an agreement between the Claimant and the Defendant or, on occasions, the Claimant taking an assignment of the benefits of the underlying building contract in order to enhance their prospects of success.