Daniel Crowley wins in the Court of Appeal

"Fit for habitation" under the Defective Premises Act 1972

A Note on Bole and Van den Haak v. (1) Huntsbuild Ltd and (2) Richard Money (trading as Richard Money Associates)

20th October 2009

1. The Court of Appeal gave a judgment on 20th October 2009 which gives guidance on the approach to assessing fitness for habitation under the Defective Premises Act 1972 ("DPA") and the proper measure of loss.

The Background

2. In 1999, the First Defendant, Huntsbuild Ltd ("Huntsbuild") sought recommendations from the Second Defendant Richard Money Associates ("RMA") as to the foundations to be built for a new build property.

3. RMA then provided a site investigation report and recommendations with regard to the depth of foundations, in particular, with respect to retained and newly planted trees.

4. However, in breach of NHBC Standards Chapter 4.2 "Building near trees", the recommendations and, in particular, the plan of the foundations, did not specify the precise required depths of foundations to take into account the trees which had been removed from the site prior to construction of the house. In particular, a willow tree had been removed from within the planned footprint of the house.

5. The foundations were dug and the house was built. The Claimants, Mr and Mrs Bole, bought the newly built house.

6. The house then developed cracking.

7. Mr and Mrs Bole sued Huntsbuild for breach of contract and breach of s.1 of the DPA. They sued RMA for breach of s.1 DPA.

8. The trial Judge (HHJ Toulmin CMG QC) found that the house suffered cracking because of heave. The heave occurred because of the inadequate foundations. The foundations were inadequate because they did not take account of the trees that had been removed from the site prior to construction of the house. The Claimants were awarded damages of £218,616.91 representing the assessed reasonable cost of remedial works and associated costs/losses (alternative accommodation/general damages etc).

Cracking

9. HHJ Toulmin CMG QC then analysed the evidence of the cracking and its impact on Mr and Mrs Bole and said:

> *"179.In all the circumstances, applying the test of whether the house was unfit for habitation in the sense of being unsuitable for its purpose, I have no hesitation in finding that the house, as built, was unfit for habitation under section 1 of the DPA in that it was built with unstable foundations which resulted in movement and cracking and other defects caused by heave."*
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> 12. He therefore gave judgment for the Claimants against both Defendants. The Judgment is reported at (2009) 124 Con LR 1.

DPA

10. S.1(1) DPA states:

"A person taking on work for or in connection with the provision of a dwelling (whether a dwelling is provided by the erection or 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."

11. HHJ Toulmin CMG QC referred to and analysed:

(i) The Law Commission Report (Law Com No. 40) entitled *"Civil Liability of Vendors and Lessees for Defective Premises"* which led directly to the DPA; and

(ii) The previous authorities including:

(a) Batty v. Metropolitan Property Realisations Ltd [1977] 7 BLR 1 (CA)

(b) D&F Estates Ltd v. Church Commissioners for England [1989] 1 AC 177 (HL)

(c) Andrews v. Schooling [1991] 3 All ER 723 (CA)

(d) Thompson v. Clive Alexander [1992] 59 BLR 87 (TCC)

(e) Bayoumi v. Protim Services Ltd [1996] 1 WLR 785 (CA);

(f) Mirza v Bhandal 22.4.99 (QBD); and

(g) Alderson v Beetham [2003] 1 WLR 1686 (CA)

and gave the following guidance:

Guidance

"37. On the basis of the authorities, it is not necessary, as contended for by the Second Defendant [RMA]*, that a finding that the premises are in imminent danger of collapse is a necessary precursor to making a finding under the DPA that a dwelling house in unfit for human habitation.*

38. I conclude on the authorities that I must construe the Act with the following considerations in mind:

i) *The finding of unfitness for habitation when built is a matter of fact in each case.*

ii) *Unfitness for habitation extends to what Lord Bridge described as "defects of quality" rendering the dwelling unsuitable for its purpose as well as to "dangerous defects".*

iii) *Unfitness for habitation relates to defects rendering the dwelling dangerous or unsuitable for its purpose and not to minor defects.*

iv) *Such a defect in one part of the dwelling may render the dwelling unsuitable for its purpose and therefore unfit for habitation as a dwelling house even if the defect does not apply to other parts of the dwelling. This is also the case under the Housing Act – see Summers v Salford Corporation.*

v) *The Act will apply to such defects even if the effects of the defect were not evident at the time when the dwelling was completed.*

vi) *In considering whether or not a dwelling is unfit for habitation as built one must consider the effect of the defects as a whole."*

The Appeal

12. RMA appealed the judgment on four grounds:-

(1) (a) In assessing fitness for habitation the Judge wrongly took into account the duration of the remedial work and the period Mr. and Mrs. Bole would need to leave the house for those remedial works to be undertaken;

(b) the Judge wrongly applied a test of suitability for purpose as opposed to fitness for habitation.

(2) The Judge wrongly found the house unfit for habitation without making a ruling about how the individual defects pleaded contributed to this finding;

(3) The Judge wrongly allowed damages for all defects flowing from the defective foundations rather than allowing only those defects which caused the house to be unfit for habitation;

(4) The Judge's finding that the defective foundations had and/or would render the Property unfit for habitation under s.1 DPA was made without any proper basis in fact.

The Court of Appeal

13. Dyson LJ giving the lead judgment in the Court of Appeal said:-

(1) (a) The relevance of the fact that the home owner will need to vacate the property for a substantial period of time while the remedial works are carried out in assessing fitness for habitation will always depend on the facts but where there is a fundamental defect to the structure of the dwelling, the time taken to fix the defect is highly material. Therefore, the Judge was right to have regard to this fact.

(b) "Unsuitable for its purpose" was a phrase used in the Law Commission in its Report recommending the introduction of the Act. It meant the same as "unfit for habitation" and that is how the Judge used it.

(2) The Judge was not obliged to ask whether each defect individually or in conjunction with other defects renders the dwelling unfit for habitation. The Judge is entitled to ask whether, as a whole, the defects in the round render the dwelling unfit for habitation. The Judge was right to consider the defects as a whole especially when all the defects flow from the same defect in design.

(3) Ground 3 was related to Ground 2. It was emphasised that the usual principles of liability for breach of statutory duty would apply which meant that the Claimants' losses had to be of a type contemplated by the Act (although in the instant case no losses were disallowed upon this basis). It was further held that under the DPA principles of foreseeability/remoteness would be applied in assessing quantum. As the defective foundations were the cause of the house being unfit for habitation and led to all the defects, the Judge was entitled to conclude that all the defects pleaded were foreseeable consequences of RMA's negligence.

(4) The extent of the defects in the foundations and the visible defects in the superstructure provided a more than sound reason for the defects to be judged as making the house unfit for habitation.

14. The appeal was dismissed.

Essential Reading

15. Bole and Van den Haak v. (1) Huntsbuild and (2) RMA at trial and on appeal is essential reading for anyone considering a claim under the DPA.

Daniel Crowley of 2 Temple Gardens acted for Mr and Mrs Bole at trial and on appeal instructed by Keith Gaston of Plexus Law

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