UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 137 (LC)
LT Case Number: LRX/93/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF A AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT – service charges – whether cost of roof works not reasonably incurred because management company owed a duty to recover the cost from builder/landlord who let the premises – no duty of care arose – Landlord and Tenant Act 1985 ss. 19 & 20C.

BETWEEN **PEVEREL OM LIMITED** **Appellant**

and

PEVEREL FREEHOLDS LIMITED

First Respondent

and

JONATHAN MACKENZIE AND OTHERS

Second Respondents

Re: Rivers House, Kew Bridge Road, Brentford, Middlesex TW8 0ES

Before: Her Honour Judge Alice Robinson

Sitting at 43-45 Bedford Square, London WC1B 3AS on Friday 7 May 2010

Adrian Carr instructed by Richard Sandler, Company Solicitor for the Appellant
There was no appearance on behalf of the First Respondent
Jonathan MacKenzie and Stuart Doughty for themselves and the remaining Respondents

The following cases are referred to in this decision:

Caparo Industries Plc v Dickman [1990] 2 AC 605

DECISION

1. The Appellant appeals to the Lands Tribunal, with permission, from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel (hereafter "the LVT") dated 20 May 2009 whereby the LVT decided that the cost of roof works at Rivers House, Kew Bridge Road, Brentford, Middlesex TW8 0ES (hereafter "Rivers House") were not reasonably incurred for the purposes of s.19(1) of the Landlord and Tenant Act 1985 (hereafter "the 1985 Act"). The Second Respondents are the lessees pursuant to 999 year leases of flats in Rivers House of which the First Respondent is the current lessor. The Appellant is a party to the leases as Manager of the Rivers House.

2. Rivers House was formerly offices and was converted into flats by the then owner Barratt Homes Limited (hereafter "Barratt") in about 2000. Thereafter Barratt sold the flats on 999 year leases and on 29 June 2001 Barratt sold the freehold of the Rivers House to the First Respondent. From 2002 water began to leak into some of the flats, minor roof repairs were not effective and in 2007 the Appellant commissioned a report from building surveyors to investigate the cause of the leaks. Following this in 2007 remedial works to the roof were undertaken at a cost of £36,561.99 and the Appellant sought to recover this from the Second Respondents through service charge provisions in the leases.

3. The Second Respondents applied to the LVT asserting that they were not liable to pay for the roof works, the cost of which the Appellant should have recovered from Barratt on the grounds that the roof as provided by Barratt when Rivers House was converted into flats was defective. The LVT recorded that

> "The Applicants do not contest the necessity for the work to be undertaken, the quality of the work or the cost of the work, merely their obligation to pay as, in their view, Barratt should meet the cost." paragraph 14

4. The LVT held that the roof failed because of faulty workmanship and/or preparation by Barratt when converting Rivers House (paragraph 28) and that the Appellant had failed to pursue any remedy against Barratt (paragraph 37). It held that although there was no provision in the lease which required the Appellant to pursue Barratt, the Appellant and First Respondent "owe a duty of care to [the lessees] and their complete failure to address the issue of the roof in a responsible manner is a derogation of this duty" (paragraph 36). The LVT concluded as follows in paragraph 38:

> "…the behaviour of [the Appellant] has been less than satisfactory throughout and that it is not reasonable to pass the costs to [the lessees] for work identified as defective and where the costs should have been covered by warranty or guarantee had [the Appellant] taken any reasonable steps to obtain recompense from Barratt."

5. The structure of the leases is that the Manager covenants to carry out the works described in the Sixth Schedule, see clause 6 and the Tenth Schedule. These include

> "Inspecting rebuilding repointing renewing redecorating cleaning or otherwise treating as reasonably necessary and keeping the Maintained Property comprised in the Building and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof." Sixth Schedule Part B paragraph 1

The Lessee covenants to pay the Manager a proportion of the costs of carrying out the works specified in the Sixth Schedule, clause 4.2 and the Eighth Schedule Part One paragraph 2. Part D paragraph 15 of the Sixth Schedule also entitles the Manager to recover

> "any expenses incurred in rectifying or making good any inherent structural defect in the Building or any other part of the Development (except in so far as the cost thereof is recoverable under any insurance policy for the time being in force or from a third party who is or may be liable therefor)."

6. Section 19(1) of the 1985 Act provides

> "Relevant costs shall be taken into account in determining the amount of a service charge payable for a period–
>
> (a) only to the extent to which they are reasonably incurred, and
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> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard and the amount payable shall be limited accordingly."

7. The Appellant submitted that the LVT acted on no evidence when it assumed in paragraph 32 that the conversion of Rivers House would have been undertaken pursuant to a JCT contract and would have included appropriate warranties. The Appellant does not know what terms were entered into between the Second Respondents and Barratt when the leases were sold and what, if any, warranties were given. As Manager, the Appellant has no legal interest in Rivers House and no contractual, tortious or statutory remedies against Barratt. In those circumstances no duty of care to obtain recompense from Barratt can arise and in any event, the test for a duty of care to arise in tort set out in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at pp.617-618 is not satisfied.

8. The Second Respondents accepted the LVT's decision that the terms of the leases do not require the Appellant to pursue a claim against Barratt. However, they submitted that the LVT was correct to find a duty of care existed and without it the Appellant could ride roughshod over the lessees interests. The Appellant as agent for the First Respondent could pursue Barratt in the name of the First Respondent who would have a contractual, tortious or statutory claim under section 1 of the Defective Premises Act 1972 (hereafter "the 1972 Act") as freeholder against Barratt.

9. In my judgment there is no evidence that the Appellant has any right of action against Barratt in respect of the defective roof. Its obligations under the leases relate solely to the management including maintenance of Rivers House and it has no claim against Barratt under

the leases. There is no evidence of any other contractual relationship between the Appellant and Barratt, nor would I expect there to be. In my judgment the LVT was acting on no evidence when it 'assumed' that warranties existed. As to a tortious remedy, I do not consider that any duty of care owed to the Appellant would arise on Barratt's part to provide a sound roof. The Appellant has no interest in Rivers House beyond an obligation to manage and maintain which costs are all recoverable as service charges (subject to the intervention of the 1985 Act). It is not foreseeable that it would suffer any loss as a result of a construction defect in the building. Further, it would not be fair, just and reasonable to impose such a duty over and above the right which already exists for those who would suffer loss as a result, the lessees, to sue under section 1 of the 1972 Act. Neither would the Appellant have a remedy against Barratt under the 1972 Act, again because it has no interest in the building, a pre-requisite, see section 1(1)(b) of the 1972 Act.

10. The Second Respondents submitted that there was a relationship between the Appellant and the First Respondent who would have a claim against Barratt and that the Appellant owed a duty to take action on behalf of the First Respondent. In my view there is at least one significant difficulty with this argument, namely there is no evidence that the First Respondent would have a claim against Barratt. The conversion to flats appears to have been completed and the leases granted before the freehold was acquired by the First Respondent. The usual rule on sale of real property is that the buyer takes the risk of any defects in the property (caveat emptor), subject to any contractual stipulation to the contrary. There is no evidence that Barratt did provide the First Respondent with any warranty or assign the benefit of any warranties to it. Further, in order to make good any claim in tort or under the 1972 Act the First Respondent would have to show it had suffered a loss, and as the Second Respondents accepted at the Tribunal hearing, the only persons who have suffered any loss (or would suffer any loss in these circumstances) are the Second Respondent lessees.

11. What other duty of care could exist? It could be said that the Appellant should have taken active and sustained steps to engage Barratt and encourage it to resolve the issue, short of issuing proceedings. In my judgment no such duty arises. Subject to proving that the defective roof resulted in a dwelling unfit for habitation and the identification of recoverable loss, a lessee would have a claim against Barratt pursuant to section 1 of the 1972 Act. It would not be fair, just or reasonable to impose a legal burden on the Appellant to take action to enforce recovery of such losses when the means to do so are squarely in the hands of the Second Respondents. Further, in so far as there would be no claim under the 1972 Act either because the defect was not such as to render the flats unfit for habitation or because the cost of repairing the roof would be irrecoverable being economic loss, neither would it be fair, just or reasonable to impose a legal burden on the Appellant to try and 'persuade' Barratt to pay for the roof to be repaired when it had no legal liability to do so. This is quite apart from other policy considerations pointing against the imposition of a duty of care in these circumstances, such as defining its ambit in terms of precisely what steps the Appellant was or was not bound to take and the type of agents/managers who would owe such a duty.

12. The Second Respondents may well be right that the Appellant and First Respondent have a legal relationship which they have done nothing to elucidate and the LVT clearly found that the Appellant had approached the defective roof problems in a less than satisfactory way.

However, for the reasons already given I do not consider that assists the Second Respondents in their argument that the Appellant owes a duty of care arises to take some form of action against Barratt.

13. In the light of my decision a question arises as to the order made by the LVT that the Appellant's costs of defending these proceedings are not to be met by the Second Respondents under the leases pursuant to section 20C of the 1985 Act. Although there is no reference in the Appellant's appeal to this part of the LVT's order the appeal has always been against the LVT decision as a whole rather than being limited to a specific part of it. Further, in paragraph 41 the LVT state that "In view of the Tribunal's findings, it considers that the [Second Respondents] were justified in bringing these proceedings" and "it would be appropriate to make an order under section 20C" clearly indicating that the Second Respondents' success on the merits of the claim was an important factor in making the order. In circumstances where the substantive appeal is allowed there must be a discretion to deal with the consequences of that so far as section 20C is concerned. Both parties indicated they were happy for me to deal with this and not remit the matter to the LVT.

14. Paragraph 40 of the LVT decision indicates that it took into account the parties conduct as well as the outcome in its section 20C decision. It is also clear that the LVT took a dim view generally of the Appellant's conduct in dealing with the defective roof problem. The Second Respondents' argument before the LVT relied on Part D paragraph 15 of the Sixth Schedule to the leases and although that argument was unsuccessful, I consider it was a reasonable point to have taken. Further, in my judgment it would be wrong for the Second Respondents to be prejudiced because the LVT decided the case on a different point from the one argued resulting in the need for an appeal. However, it was not necessary for the Second Respondents to contest this appeal and although they asked for the decision to be dealt with in writing I consider that it was reasonable for the Appellant to want an oral hearing in the light of the fact the appeal was contested. Accordingly the LVT's decision that the Appellant's costs of the LVT proceedings are not relevant costs for the purposes of determining the amount of any service charge payable will stand and I make a further order to the same effect in respect of the Appellant's costs of the Lands Tribunal proceedings up to and including 9 March 2010, the date the Lands Tribunal notified the parties there would be an oral hearing.

15. Accordingly the appeal is allowed in part. There is no need for the case to be remitted to the LVT, the Second Respondents' claim that the cost of the roof works was not reasonably incurred fails and the Appellant's costs of the LVT proceedings and Lands Tribunal proceedings up to and including 9 March 2010 are not relevant costs for the purposes of determining the amount of any service charge payable. Neither party made any other application for costs.

Dated 12 May 2010

Her Honour Judge Alice Robinson