

■ ■ Court of Appeal considers “fit for habitation” under the Defective Premises Act 1972 Bole v Huntsbuild Ltd & Richard Money Associates

On 20 October 2009 the Court of Appeal gave judgment dismissing the appeal of the Second Defendant, Richard Money Associates Structural Engineers, from the judgment of HHJ Toulmin CMG QC. The decision is of considerable practical importance as after almost 40 years in force the concept of “fit...for habitation” under the Defective Premises Act 1972 (DPA) has been given consideration at appellate level.

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. 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. However, in breach of NHBC Standards Chapter 4.2 “Building near trees”, the recommendations on 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.

The Claimants, Mr and Mrs Bole, bought the newly built house. The house developed cracking and they sued Huntsbuild for breach of contract and breach of s 1 of the DPA and RMA for breach of s 1 DPA. The Judge 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.

Section 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.”

HHJ Toulmin CMG QC at first instance analysed the evidence of the cracking and its impact on the Claimants and found that in all the circumstances, applying the test of whether the house was unfit for habitation in the sense of being unsuitable for its purpose, it was, as built, unfit for habitation under s 1 DPA because it was built with unstable foundations which resulted in movement and cracking and other defects caused by heave.

Four separate grounds of appeal were advanced by RMA, although as was observed by Dyson LJ

they were in one sense one ground put in varying ways: what was the true and proper meaning of “fit... for habitation” under s 1(1) of the DPA?

Their Lordships referred to the relevant passages of the 1970 Law Commission report which led to the Act and noted that the expression “suitable for purpose” was to be seen as being synonymous with “fit... for habitation”, and that there was no other relevant purpose that occupation as a domestic dwelling. The effect of the Court of Appeal’s decision is that the test is to be construed straightforwardly and esoteric speculation should not be necessary. It was held that HHJ Toulmin had been right to emphasise the length of time that the Claimants would need to vacate the property for remedial works. The period of time for works was not alone conclusive, but was highly relevant in circumstances where the physical damage had been caused by a “fundamental defect” caused by RMA’s breach of its duty under the Act. It was held that the Judge had been entitled to and was right to view the damage to the property cumulatively when considering the concept of “fit... for habitation”. It was neither necessary nor appropriate to view items of damage individually.

The common law rules as to damages would operate in a claim for breach of a statutory duty so that principles of remoteness of damage could apply, and similarly it was necessary to consider the types of loss contemplated by the Act itself: neither of these bases operated to reduce the Claimants’ damages (being based on an assessment of reasonable remedial costs).

While it might be argued that the concept of “fitness for purpose” in the context of a construction professional’s duties might somehow equate to a performance warranty (and override a defence that the professional was entitled to exercise reasonable skill and care in the performance of his duties) neither the first instance decision nor the decision of the Court of Appeal provides a basis for such an approach under the DPA (and such arguments were not asserted at first instance or in the Court of Appeal).

Bole and Van den Haak v (1) Huntsbuild Ltd and (2) Richard Money (trading as Richard Money Associates) [2009] (TCC); Court of Appeal [Dyson, Pill and Longmore LJ] 20 October 2009

Keith Gaston of Plexus Law acted on behalf of the Claimants.

22 October 2009

Contact details: Keith Gaston T: 01206 222256 E: keith.gaston@plexuslaw.co.uk