

Real estate

CLYDE&CO

Bulletin

Summer 2015

Contents

Introduction
Page 1

New regulations on minimum energy efficiency standards ('MEES') for commercial properties: landlords and tenants beware!
Page 2

Variations to development agreement found to breach EU public procurement rules
Page 4

TUPE update: Shared property management services and outsourcing
Page 5

Real Estate Finance in 2015: The rise of non-bank lenders
Page 6

Court fee hikes
Page 8

The Deregulation Act 2015 – The impact on residential landlords
Page 9

Tenants beware: acting separately from the Landlord in relation to Party Wall Act proceedings could leave you exposed to payment of the Landlord's legal fees through service charge
Page 10

No contract? The Defective Premises Act 1972 may assist!
Page 12

Welcome to the Summer edition of the Real Estate Bulletin.

In this issue, we look at real estate matters from a different perspective with articles by colleagues from across the firm including Clyde & Co's banking and finance, employment and EU regulation and competition teams, as well as recent key developments affecting the property industry:

- New regulations on Minimum Energy Efficiency Standards for commercial properties – the clock is ticking
- Property developers entering into contracts with public authorities beware: variations to development agreement could breach EU public procurement rules and invalidate the agreement
- The application of TUPE (Transfer of Undertaking Regulations) to shared property management services and outsourcing
- The rise of non-bank lenders in the real estate market
- The impact of recent Court fees increases on property related claims
- Further changes (unrelated to tenants' deposits) brought by the Deregulation Act 2015 to Assured Shorthold Tenancies and their implications for residential landlords
- An interesting Court decision allowing a landlord to recover its legal fees in respect of a dispute with adjoining owners through service charge
- Finally, a recent case highlighting how the Defective Premises Act may enable a property owner to still make recovery against a building contractor even if a contractual claim is not possible

We hope that you find the real estate bulletin an informative and useful read.

Should you have any feedback or suggestions for future topics, please contact article authors or realestate@clydeco.com. Similarly, to hear more from our real estate group, please don't hesitate to email us providing your areas of interest.



New regulations on minimum energy efficiency standards ('MEES') for commercial properties: landlords and tenants beware!

New regulations on minimum energy efficiency standards (known as 'MEES') for privately rented commercial properties in England and Wales have been passed and come into force on 1st April 2016. MEES will have a significant impact on commercial landlords, and consequently tenants, of properties that have a poor energy efficiency rating, i.e. below an 'E' rating, under an Energy Performance Certificate (EPC). In broad terms an EPC is required whenever a property is bought or let.

The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (MEES)

MEES form part of the Government's broad strategy to improve the energy efficiency of buildings and to meet its national and international climate change targets. The Government estimates that 18% of privately rented commercial buildings have an 'F' or 'G' energy rating and so fall below the minimum standard required. Similar regulations have been made for residential properties but this article focuses on commercial properties.

MEES introduce two important deadlines for commercial landlords:

- From 1st April 2018, it will be a criminal offence for landlords to grant new leases (including renewals and extensions of leases to existing tenants) of properties that fall below the minimum 'E' rating; and
- From 1 April 2023, landlords will be in breach of MEES if they continue to let, under existing leases, properties that falls below the minimum 'E' rating.

Landlords will need to carry out energy efficiency improvements to properties to upgrade their EPC rating to the minimum standard within these deadlines (subject to limited exemptions and qualifications). Those that don't could face hefty financial penalties.

What steps should landlords take?

- If they have not done so already, identify any properties with an EPC below an 'E' rating and put in place a plan for complying with MEES. A programme of works may be necessary to upgrade a poor EPC rating;
- Review existing leases to check whether they reserve rights of access for the landlord to carry out any planned improvement works and whether the cost of such works can be recovered in whole or part from the existing tenants;
- Possibly consult/negotiate with existing tenants to agree a plan for complying with MEES. However, there is no statutory obligation for the tenant to consent or co-operate with the landlord. In fact, for landlords, there is an exemption from the obligation to meet the minimum energy standard where the tenant's consent to works cannot be obtained. This means it may be in both parties' interests for the tenant to refuse consent to the landlord's proposals;
- Use any void periods to carry out improvement works before re-letting; and
- If granting new leases that will continue beyond 1st April 2023, include rights for the landlord to carry out any future works needed to comply with MEES and, ideally, to recover the costs from the tenant.

What steps should tenants take?

- Review existing leases to check:
  - if approached by a landlord wishing to carry out improvement works, the landlord has the necessary rights under the lease to do so or whether it requires the tenant's consent. Tenants will want to minimise, where possible, the disruption of landlord's works;
  - whether the landlord is entitled to charge the tenant for the cost of any improvement works, e.g. through the service charge. This will depend upon how widely the service charge is drafted and the nature of the works. Most conventional service charge provisions will allow the landlord to recover the costs of 'repair' or 'maintenance' but not 'improvement' or 'replacement'. A landlord cannot generally recover the cost of upgrading kit such as air-conditioning and boilers that is still in working order.
- If considering a new lease of a property with a poor EPC rating bear in mind that the landlord, over time, is likely to need to carry out improvement works to comply with MEES. Raise enquiries with the landlord about any proposed improvement works. If the tenant is not prepared to cover the cost of any such works, include a specific exclusion in the lease.
- When negotiating a new lease, watch out for provisions imposing tight controls on the tenant's use of the property to prevent it from doing anything which could lower the EPC rating, e.g. from a change of use or alterations. Ensure the lease remains flexible enough to meet the tenant's business needs.
- Avoid any obligation to repair, reinstate or yield up the property to a specific minimum EPC rating. Going forward, it is expected that the methodology used to set EPC ratings could change with higher standards being introduced.

Comment

This is a new area of law and it remains to be seen how landlords of affected properties will react to MEES. However, whilst the regulations do not bite until 2018 at the earliest, well advised landlords will be considering their options for improving the energy efficiency of low-rated properties now. Tenants need to be aware of the potential impact of landlords' improvement works. Whilst it may be in a tenant's interest to have an energy efficient building it is unlikely to be prepared to meet the entire cost and to suffer any disruption to its business from such improvements works.



Sarah Brimacombe
Real Estate Professional Support Lawyer
T: +44 20 7876 4234
E: sarah.brimacombe@clydeco.com



Variations to development agreement found to breach EU public procurement rules

Property developers who enter into contracts with public authorities in relation to regeneration and similar projects should be aware that material changes to such development contracts could invalidate them.

Under the EU public procurement rules, where material changes are made to a contract awarded by a public authority, particularly those which shift the economic balance in favour of the contractor, the contract should be re-advertised in the Official Journal of the EU ('OJEU'). The English High Court has held that variations to a development contract agreed by Winchester County Council but not advertised in the OJEU were 'material' and therefore in breach of the EU public procurement rules, so forcing the Council to halt its plans (*R (on the application of Gottlieb) v Winchester County Council* (11 February 2015)).

The variations to a wide ranging development agreement included the expansion of retail development space by 50%, which had become available as a bus station originally envisaged was no longer required – as a result of a decision of the bus operator Stagecoach – and removal of a requirement to provide 35% affordable housing.

The Court held that these were changes to essential terms and altered the economic balance of the contract in favour of the developer. The Court stated 'The fundamental change which the parties intended to achieve was to increase the potential profit to the Developer so as to make the scheme viable (ie. to achieve more than the 10% threshold return). Both parties believed the original contract was no longer viable.'

As regards the question of whether the outcome would have been different but for the breach, the Court held that it was not necessary to point to actual bidders who might have come forward, but rather, whether a realistic hypothetical bidder would have bid for the contracts.

The Court also found that a clause authorising variations was broad and unspecific thus breaching the principle of transparency. Such clauses should provide bidders with information which would enable them to assess the potential scope for variations when tendering.

Finally, it is worth noting that the claimant was a resident and local councillor involved in the consideration of a development through its various stages. The Public Contracts Regulations 2015 (and their predecessor 2006 Regulations) allow only an 'economic operator' – a potentially competing contractor - to bring proceedings for breach of the Regulations. There is no such restriction in judicial review cases, though claimants must be able to demonstrate 'sufficient interest'. Mr Gottlieb's membership of the authority certainly increased that interest.

Comment

Where variations are contemplated, legal advice should be sought on whether they are 'material' hence their conformity with the EU public procurement rules. It may also be the case that the authority should issue a Notice in the OJEU making such changes public, thus reducing the time limits for potential challenges.

Variations, including price revision options, may be permitted where they are provided for in the initial procurement documents and they state the scope of possible modifications and conditions where they may be used. Variations may also be made where their value is below both the threshold for works contracts (approximately £4.3 million) and 15% of the initial contract value (10% for service and supply contracts). In both cases, the Regulations provide that variations must not alter the overall nature of the contract.

Finally, unforeseen additional works are permitted where their value does not exceed 50% of the value of the original contract and where a change of contractor would either not be feasible or would result in duplication of costs.



John Milligan
Partner
T: +44 20 7876 5451
E: john.milligan@clydeco.com



TUPE update: Shared property management services and outsourcing

Property management companies must now consider the Transfer of Undertakings Regulations (TUPE) when tendering for or terminating property management services contracts.

When a property management service is retendered, the staff may transfer to the new service provider under the "service provision change" rules in TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006). We also know that splitting the services on a retender can sometimes circumvent the effects of TUPE so that staff employed by the original service provider do not transfer. Similarly, when the client's identity changes following a service provision change, TUPE will not apply. However, what about when a service which is shared by multiple clients (such as separate resident management companies in a large housing complex) is retendered? Does TUPE apply?

A recent case indicates that it may well do. In *Ottimo Property Services Limited v Duncan*, a property management company, Ottimo, provided its services to various residents' management companies. Each of those companies operated separate blocks of residential housing at a village complex. The Site Maintenance Manager based in the village was employed by the service provider, Ottimo. When another management company acquired the property management contracts from Ottimo, he lost his job as it was understood that TUPE did not apply.

An employment tribunal said there had been no TUPE transfer because, although TUPE could have applied in relation to each individual management contract with each separate client, the rules did not allow for a number of contracts with different clients to be aggregated together to make one service provision change.

The Employment Appeal Tribunal (EAT) considered that the tribunal had interpreted the TUPE rules too literally; TUPE could apply even if the service to be transferred was provided to a group of clients. This would not be so in every case though – for TUPE to apply, the identity of the clients (i.e. here the residents' management companies) must remain the same before and after the change. In addition, there must be a "common intention", on the part of all the clients, that following the service provision change, the activities will be carried out by the transferee. The EAT said this common intention would be easier to establish if there was a single umbrella contract between a group of clients and the service provider, rather than separate contracts, as was the case here. The case is going back to the tribunal to consider the question of common intention and whether TUPE did in fact apply.

What this case means for property managers

This decision has ramifications for property management service providers and the staff employed by them. The case establishes for the first time the general principle that TUPE can apply even where there are a number of clients to whom a service is provided. Now this principle has been established, it will be important for property management services companies to consider TUPE on a case by case basis when tendering for or terminating property management services contracts.

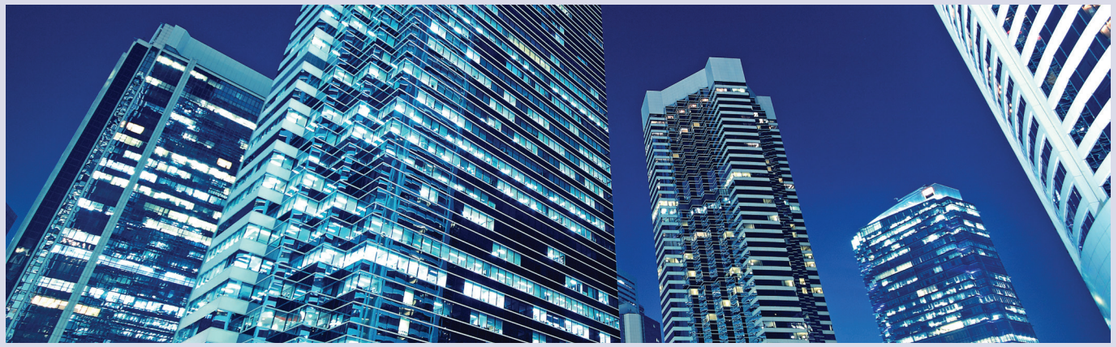
Equally, landlords and investors will need to have TUPE in mind when buying/selling real estate. The Ottimo case suggests that fragmentation of contracts remains a means to increase the prospects of TUPE not applying. However, this will not always align with the commercial efficiency of combining contracts/providers. Therefore, a strategic and holistic approach to each transaction is recommended.



Mark Hammerton
Partner
T: +44 (0) 161 240 2774
E: mark.hammerton@clydeco.com



Ruth Bonino
Employment Professional Support Lawyer
T: +44 20 7876 6282
E: ruth.bonino@clydeco.com



Real Estate Finance in 2015: The rise and rise of non-bank lenders

The funding landscape in the real estate finance space has changed dramatically since the financial crisis. Traditional banks withdrew from the market - crippled by exposure to bad real estate debt - leaving a significant liquidity gap as real estate lending dried up. With banks nervous to lend (or in some cases unable to) an opportunity arose for funds and other non-bank lenders to take advantage of this liquidity gap and offer alternative funding solutions to borrowers.

Now, in 2015, as banks continue to face the challenge of increased regulatory demands and the need to deleverage balance sheets, non-bank lenders have become major players in the real estate finance market. It is estimated that almost a quarter of all new lending in the real estate market in 2014 came from non-bank lenders such as insurance companies, hedge funds, private equity investors and debt funds. Indeed respondents to a Loan Market Association survey on "which lending source will demonstrate the greatest growth in 2015" suggested debt funds (32.4%) as the greatest source, followed by banks (21%), pension funds (19.9%), insurers (15.5%) sovereign wealth funds (8.2%) and others (at 3%).

What has driven this growth and what makes non-bank lending attractive to corporates?

- **High returns -** Non-bank lenders are drawn to the real estate market by the prospect of high returns over the long term (10+years) for their investors which compare favourably with other fixed income products such as gilts. Property is viewed as a relatively stable long term investment.
- **Risk appetite -** Crucially they also have a greater risk appetite, and are prepared to partner corporates where they see added value in the long term. Indeed a non-bank lender may take a strategic equity role in addition to providing the finance on real estate investment or development projects. It is this "big picture" thinking that makes non-bank lenders attractive to corporates, as they can feel confident that their and their funder's interests are aligned.
- **Competitive terms -** For corporates, non-bank lenders can offer competitive terms, which take into account corporates' needs and offer a responsive, flexible and innovative approach, which contrasts sharply with big banks' lengthy credit committee processes.

Where does this leave the banks? Will this growth in non-bank lending continue?

Whilst it is true that traditional banks have cut lending and focused on regulatory compliance and deleveraging their loan books, this has meant that they are now putting themselves back in a position to return to the market. Indeed post crisis banks were unwilling to lend more than 60% of the value of a property. That figure is now edging closer to 70% which indicates that banks are starting to get their appetite for real estate lending back, albeit on more cautious and disciplined terms, with emphasis placed on cash flow and the refinancing risk at the end of the tenor rather than valuation.

As for the non-bank lenders it should be remembered that their first priority is their investors. Property can offer a high return over a number of years and is an attractive and stable investment. Yet it could be argued that whilst non-bank lenders have brought increased liquidity into the real estate markets they have done so only in relation to lending which offers the best return for their investors. This is why non-bank lenders prefer a fixed rate, backed by loan documentation which restricts prepayments or, where prepayments are permitted, come with make-whole provisions. These are all designed to ensure that the expected rate of return from the investment is fully realised over the full term of the loan.

Non-bank lenders have undoubtedly helped close the liquidity gap, however they have not replaced banks: they are simply finding the space where the banks have retreated and taking advantage of opportunities which arise and provide a good return for their investment. It is unlikely for example that non-bank lenders would provide overdrafts and revolving facilities to borrowers as these are far too uncertain in terms of return.

The future

The funding landscape in the real estate finance space has changed dramatically since the financial crisis. Non-bank lenders have become major players in the real estate finance market, but banks are cautiously returning to it. Going forward it is likely we will see a highly diversified market place, with different lenders focusing on different sectors with different drivers and challenges. Perhaps banks will focus on more vanilla lending whilst non-bank lenders may focus on more complicated structures where there is potential for a significant return for their investment. Either way, it is clear that non-bank lending is now very much part of the real estate finance market.



Andrew King
Associate
T: +44 20 7876 4188
E: andrew.king@clydeco.com



Court fee hikes

On 9 March 2015, Court fees for commencing civil proceedings increased significantly. The increase affects claims to recover sums over GBP 10,000. The fee is now calculated at 5% of the value of the claim, up to a maximum fee of GBP 10,000 for claims over GBP 200,000. This represents a dramatic 421% increase where the highest payable fee used to be GBP 1,920 for claims over GBP 300,000.

While it may at first seem that only the highest claims will be affected, this increase will in fact have an impact on many in the property industry. Notably, it is not uncommon for dilapidations claims in relation to commercial properties to exceed GBP 200,000. In such cases, the increased fees will not only put pressure on commercial landlords but also on their tenants, from whom the landlord will ultimately seek to recover the costs of proceedings including Court fees.

With fees this high, parties may be more likely to turn to alternative dispute resolution methods such as mediation to avoid the costs of proceedings. However, once issued, the increased upfront costs may have the opposite effect with some parties being inclined to get their "money's worth", which could get in the way of settlement.

Claims for the recovery of rental arrears are also likely to be affected by the increase as a GBP 10,000 claim would not be exceptional for commercial premises. Landlords are more likely to bear the burden of Court fees in this respect if the tenant is already unable to pay the rent and the prospects of recovering costs of proceedings may be scarce.

Unfortunately, the bad news does not stop there, as the Government has further plans for increased fees which will have a direct impact on the property industry. The proposals are to raise Court fees in relation to proceedings for the recovery of land from GBP 280 where proceedings are commenced in the Country Court to GBP 355. Again, this will primarily affect landlords who are bringing proceedings to evict tenants in arrears or are seeking to evict trespassers, as in both situations the landlord will have little prospects of recovering any costs. This could also potentially have a direct impact on the tenancy terms offered to tenants if the increase is seen by landlords as a barrier to eviction.

The Ministry of Justice's consultation on these further proposals is now closed and the Law Society, along with other bodies in the property industry have voiced their concerns over these further increases. There remains to be seen whether the proposals will go ahead notwithstanding these objections.



Armel Elaudais
Associate
T: +44 20 7876 5561
E: armel.elaudais@clydeco.com



The Deregulation Act 2015 – The Impact on residential landlords

The Deregulation Act 2015 (the "Act") was passed on 26 March 2015 and contains a number of changes that will impact on landlords of residential property.

As is now widely known, earlier this year the Act imposed some crucial changes to the legislation relating to tenancy deposits. This subject has received rather a lot of coverage, so in this article we look at the other changes brought about by the legislation. Some of these will take effect on 1 July (Sections 37-39) and the remainder on 1 October 2015. The Act will initially apply to Assured Shorthold Tenancies ("AST") created after that date and to all ASTs from 2018.

Retaliatory Evictions (Section 33)

The provisions relating to retaliatory evictions are intended to address instances where a landlord serves a Section 21 notice seeking possession in response to a tenant having made a complaint about the condition of the property. Under the Act, a valid Section 21 notice cannot be served where:

1. A tenant has made a written complaint to the landlord concerning the condition of the property;
2. A landlord has not responded within 14 days or the response is inadequate (i.e. the landlord does not set out a proposed course of action and a reasonable timescale); and
3. A local authority has served an enforcement notice.

If an enforcement notice is served, a landlord will be unable to serve a Section 21 notice for a period of six months (although there are some exceptions under Section 34, notably where the condition of the property is due to the tenant's breach). Whilst the new provisions clearly offer extra protection to tenants against retaliatory evictions, a landlords' ability to recover possession of their property is further restricted.

Timing and form of a Section 21 notice (Sections 35-39)

A landlord will no longer be able to serve a Section 21 notice within the first four months of the contractual term of the tenancy. This is to stop landlords and their agents serving notice at the commencement of a tenancy with a view to being able to terminate it at their convenience. Further changes mean that landlords may not be able to serve a valid Section 21 notice if they are in breach of legislation relating to the condition of the property, health and safety of occupiers and energy performance.

A new prescribed form of Section 21 notice is expected and there will no longer be a requirement for the date specified in the notice to be the last day of the period of the tenancy. Crucially, Section 21 notices will have a "shelf life" of just six months. Following the expiry of the six-month period, should a landlord wish to issue court proceedings, a fresh notice will need to be served.

Rent Refund

The last notable change is that, where a Section 21 notice has been served and a possession order is granted, Section 40 will give the tenant a statutory right to seek a refund of rent paid in advance for the period after determination of the tenancy.

Comments

A Section 21 notice will no longer necessarily be the most obvious and straightforward route to possession for residential landlords.

Louise Pearson
Legal Executive
T: +44 20 7876 5705
E: louise.pearson@clydeco.com



Tenants beware: acting separately from the Landlord in relation to Party Wall Act proceedings could leave you exposed to payment of the Landlord's legal fees through service charge

In *Assethold Limited v Watts [2014] UKUT 0537 (LC)* the Upper Tribunal (Lands Chamber) held that costs incurred by a landlord in forcing an adjoining property owner to comply with the Party Wall Act 1996 ("the PWA 1996") were recoverable from the leaseholders of the affected building. This is a reminder for tenants currently involved in potential disputes alongside their landlords against third parties.

The Facts

Assethold Ltd ("the Landlord") was the head lessor of a block of flats in London. Mr Watts and his fellow lessees ("the Tenants") were the leasehold owners of 13 of the 14 flats in the block. The block's flank wall was built on the boundary with the neighbouring property which was owned by Freetown Ltd ("the Developer").

The Developer served notices on the Landlord under Sections 2 and 6 of the PWA 1996, informing them of its intention to exercise its right to carry out works on the boundary between the two sites as part of the development of the adjoining land. Notices were also served on the Tenants.

Despite the Landlord's suggestion for the Tenants and the Landlord to use the same surveyor, the Tenants instructed their own who reached an early settlement with the Developer's surveyor and agreed a party wall award under the PWA 1996.

The surveyor acting for the Landlord found it more difficult to reach an agreement with the Developer. Before an agreement was reached the Developer commenced works on the adjoining land, including trial excavation for new foundations adjoining the wall of the Landlord's building. Consequently, lengthy and protracted litigation ensued and the Landlord obtained an injunction against the Developer

The Landlord sought to recover its costs from the Tenants.

The lease contained standard provisions requiring the Tenants collectively to pay for annual expenditure reasonably incurred for providing services, including repair and maintenance of boundary walls. Crucially, a second general provision extended the definition of services to include doing "*whatever acts were necessary in the reasonable discretion of the Landlord to preserve the safety and amenity of the building*". The Tenants denied that litigation with a third party fell within the scope of the clause.

Decision

The Upper Tribunal, overturning the decision of the Leasehold Valuation Tribunal, considered that the costs in respect of pursuing the litigation against a third party were not recoverable under a general repairing and maintaining obligation but fell within the general words concerning the costs of taking steps for the maintenance, safety, amenity and administration of the building. It did not matter that the clause made no specific reference to legal costs.

In the Court's view, the proper question was not whether the salient paragraph contained specific words enabling recovery of the relevant costs, but whether the costs in question had been incurred for the purposes mentioned in the paragraph. If the costs were incurred in connection with an act, matter or thing done for one of those purposes (proper maintenance, safety, amenity and administration of the building), the costs were recoverable.

Comments

The decision will be of concern to tenants who are involved in potential disputes alongside their landlords against third parties.

Although this case turned on the interpretation of a particular lease, it illustrates how the wording of the charging provision was examined. It shows that the normal rules of contractual interpretation apply to leases, having regard to the context of the clause and its apparent commercial purpose, and that there are no special rules of interpretation when interpreting service charge clauses.



Armel Elaudais
Associate
T: +44 20 7876 5561
E: armel.elaudais@clydeco.com



Elgan Rees Williams
Trainee Solicitor
T: +44 20 7876 4253
E: elganrees.williams@clydeco.com



No contract? The Defective Premises Act 1972 may assist!

The Court recently gave judgment in the case of *Rendelsham Estates Plc & Others v Barr Ltd* [2014] EWHC 3968 (TCC). This case highlights that the Defective Premises Act 1972 ("the DPA") may sometimes assist a property owner to make recoveries against a building contractor where a claim under a contractual relationship is not possible.

The Facts

The case involved the owners ("the Claimants") of 120 flats in two apartment blocks in Leeds. Throughout the building works, reductions in the specification were made in order to achieve cost savings so that lesser quality material and finishes were used within the construction of the blocks. As a result, following completion, the Claimants suffered flooding, damp ingress and that the intercom system within the apartments was not working. In the years that followed, significant further problems arose including leaks, mould and condensation.

The Claimants issued a claim against Barr Limited ("Barr") being the building contractor, who had built the blocks on behalf of the developer, City Wall Limited ("CWW"). The Claimants were prevented from bringing a claim directly against CWW as CWW had entered into administration in February 2008. Further, the Claimants did not have the benefit of new home warranties.

The Claimants were unable to bring a contractual claim against Barr as they did not have a direct contractual relationship. The claim was therefore brought under the DPA on the basis that the apartments were not fit for habitation.

The case involved a detailed consideration of the DPA and in particular, Section 1 of the DPA, which provides:

"(1) 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—

(a) if the dwelling is provided to the order of any person, to that person; and

(b) without prejudice to paragraph (a) above, 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, 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…"

Judgment

The trial was conducted on the basis of eight lead apartments and in order to determine the claim, the Court had to consider the following:

(i) The meaning of a dwelling;

(ii) The meaning of "in connection with the provision of a dwelling"; and

(iii) How fitness for habitation was to be determined.

Dwelling

The Claimants alleged that both blocks together or even one block could constitute a dwelling. This argument was rejected however the Court found that each individual apartment, together with its balcony, was capable of constituting a dwelling.

In connection with the provision of a dwelling

The Court found that works to the structural and common parts of both blocks were works done "in connection with the provision" of each of the apartments, on the basis that each owner had an interest in and a financial responsibility for maintenance and repair of the structural and common parts as well as a right of access to the common parts.

Fit for habitation

Justice Edwards-Stuart stated that for a dwelling to be fit for habitation, it must, on completion: "be capable of occupation for a reasonable time without risk to the health and safety of the occupants: where a dwelling is or is part of a newly constructed building, what is a reasonable time will be a question of fact (it may or may not be as long as the design life of the building); and be capable of occupation for a reasonable time without undue inconvenience or discomfort to the occupants."

He provided some useful criterion for determining fitness for habitation which included:

"When considering whether or not an apartment is fit for habitation, its condition has to be considered at the date when the work was completed (which I consider extends to the end of any relevant defects liability period)."

"The fact that a particular defect which renders an apartment 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."

He also considered that the apartment must be fit for habitation by all types of person who might reasonably be expected to occupy it (including for example, pregnant women or babies) and that it was not right to consider the defects in isolation but instead whether the dwelling as a whole was unfit for habitation (which may include defects not evident at completion). He did however note that the application of the proposed criterion would be very fact-specific.

The Court found that each of the eight lead apartments were unfit for habitation due to the variety of defects to the apartments and to the common parts. However, the Court found that the claim could not be pursued as a representative action as proof would be required for each individual apartment (and indeed, what rendered one apartment unfit for habitation may not affect another).

Barr conceded liability for some of the defects but disputed the sum of damages claimed. It argued that each owner's claim for the cost of works should be limited to the share of the cost of works that the owner would pay by way of additional service charges. The Court disagreed and found that each of the eight owners was entitled to the full cost of repairing the defects. Justice Edwards-Stuart commented that Barr's argument would lead to an unjust result in so far as awarding an owner only its share of the service charge would make the occurrence of the works dependent on other owners agreeing to fund the balance. Should they refuse, the works would never be carried out. The Court eliminated Barr's risk in respect of multiple recoveries by holding that the Court's award was to be conditional on the sum being enforced against Barr only once.

The Claimants were therefore entitled to (i) the costs of rectifying the defects, (ii) a sum which represented the blight on the value of the apartments and (iii) damages for distress and inconvenience.

Conclusion

The judgment in *Rendelsham Estates Plc & Others v Barr Ltd* shows that there may be some circumstances in which the absence of a contractual claim will not prevent owners from recovering damages from a building contractor. The DPA will however continue to be limited to defects which render a building unfit for habitation and so in practice, only more serious cases will lead to a recovery in these circumstances.



Rebecca Noble
Associate
T: +44 20 7876 4299
E: rebecca.noble@clydeco.com

Clyde & Co real estate specialists

Strategic and commercial in our approach, our real estate group provide clients with specialist legal advice across the whole property "life-cycle" from the initial acquisition, development, and financing through to the end sale of real estate, and landlord and tenant disputes. Working with a wide range of real estate clients across the UK and internationally, we understand the real estate industry from all angles. We provide advice across all transactional and contentious real estate services. These include:

- Acquisition, disposal and project structuring
- Finance and investment
- Planning
- Post completion occupier and landlord services
- Leasing
- Refurbishments and construction
- Dispute resolution

Our integrated team works across legal disciplines with supporting areas such as construction, tax and environment assisting our core real estate specialists.

Contact us: realestate@clydeco.com

Visit us: www.clydeco.com

What they say:

"They provide an excellent service. They are a large international law firm but manage to effectively maintain personal relationships and go beyond what is required."

Chambers 2015: Real Estate

"The lawyers are creative, commercial and adaptable in finding solutions."

Chambers UK 2015: Real Estate

"The team springs into action incredibly quickly."

Chambers UK 2013: Real Estate

Further advice should be taken before relying on the contents of this Bulletin.

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority.

© Clyde & Co LLP 2015

Clyde & Co LLP

CC007748 - June 2015