Approved Inspectors do not owe a duty under the Defective Premises Act 1972

The Court of Appeal’s decision in The Lessees and Management Company of Heron’s Court v NHBC Building Control Services Limited [2019] EWCA Civ 1423 (“Heron’s Court”) reaffirms that Approved Inspectors do not owe a duty under Section 1 of Defective Premises Act 1972.

Background

The Court of Appeal judgment in this case was handed down on 14 August 2019 and upholds the decision of Waksman J at the first instance.

The first instance decision was discussed in our February 2019 article entitled “Claims against Approved Inspectors – the latest position”. In this article we explained the role of an Approved Inspector (“AI”) and the court’s position that there is a high hurdle for claimant building owners/occupiers to overcome to bring a successful claim in tort against an AI.

By way of a brief summary, the Respondent, an AI under Part II of the Building Act 1984, certified that a block of flats in Hertfordshire materially complied with the Building Regulations on their completion in 2012. It was alleged by the Appellants, who were the lessees of the flats, that the flats did not comply with the Building Regulations and that as a result the AI was in breach of a duty owed to the lessees under s.1 of the Defective Premises Act 1972. The Respondent had applied to strike out the claim on the basis that no duty was owed under that provision.

The Defective Premises Act 1972 (“the Act”)

S.1 of the Act provides that:

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.”

The Allegations

It was submitted by the lessees at both first instance, and on appeal, that the meaning of s.1 of the Act extends to an AI because their work is “in connection with” the provision of dwellings and, because of this, there was a responsibility on the AI to ensure that the flats were built in compliance with building regulations. It was further alleged, that as the AI willingly takes on this work, there is a contrast between the position of the AI and the position of the local authority, who gains its Building Control function from Part I of the Building Act 1984.

The AI responded that its work did not fall under the natural meaning of “work in connection with the provision of a dwelling” as this was work to provide the bringing into existence of the dwelling. Rather, it was job of the AI to
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ensure, so far as can reasonably be achieved, that the building complied with the Building Regulations of the time. The House of Lords judgment in Murphy v Brentwood (1991), in relation to local authorities not owing a duty of care under the Act, was relied upon to argue that an AI performs extensively the same functions and should not be treated differently.

The Judgment of the Court of Appeal

The decision of Waksman J was upheld. The arguments made by the lessees were rejected and those made by the respondent AI were accepted.

In his lead judgment, Hamblen LJ said, at paragraph 43, that:

“An AI… has no statutory power to influence the design or construction of a building in any way, save to stipulate that it must comply with the law. In certifying, or refusing to certify, plans and works, the AI is not engaged in the positive role of the provision or creation of the relevant building, but performs the essentially negative regulatory role of checking for compliance against prescribed criteria.”

Therefore, Waksman J was correct to decide that an AI did not fall within the meaning of s.1 of the Act.

Hamblen LJ held that the Murphy v Brentwood judgment was a “highly persuasive authority that a local authority does not owe a duty under s.1 (of the Act) in the exercise of its building control functions”. The Court of Appeal accepted that, due to the similarities between an AI and the statutory regimes governing the building control functions of local authorities, the AI was correct in its submission that it was “difficult to see how these activities amount to “work for or in connection with the provision of a dwelling” when carried out by an AI, in circumstances where they do not when carried out by a local authority.” The submission that the AI’s position was different as it willingly took on the work was also rejected.

Comment

The upholding of the first instance judgment in this case will be welcomed by AIs and their professional indemnity insurers.

Although we have certainly seen it argued in pre-action correspondence, it was noted by the Court of Appeal that it is “unlikely that so many legal advisers, advocates and judges” would have misinterpreted the position that an AI does not owe a duty of care under s.1 of the Act.

Whilst it is likely that claims will continue to be made against AIs, this decision reinforces the difficulties claimants face bringing such claims.

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