Legal Briefing

Desmond Edward Jenson and Sarah Jean Jenson v Spencer Roy Faux

[2011] EWCA Civ 423, The Master of the Rolls, Lord Justice Etherton and Lord Justice Longmore

Section 1(1) of the Defective Premises Act 1972 ("DPA 1972") provides that:

> "*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 … to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner … so that as regards the work the dwelling will be fit for habitation when completed.*"

In this case, the question before the Court of Appeal was whether or not refurbishment works to a property can be so extensive, that the dwelling is then considered a new dwelling, as required by the DPA 1972 and subsequent case law.

The Facts

In 2003, the freeholder of 105 Leathwaite Road, Battersea, London ("the Property") carried out works to the Property including:

- remodeling the loft area (including extending it to support a new glass structure containing an office and guest bedroom);
- remodeling the first floor to change a bedroom into a second bathroom;
- gutting the ground floor in its entirety (including replacing the kitchen with a larger one and replacing part of the external wall); and
- refurbishing the coal cellar in the basement into a shower room, laundry room, cinema and indoor gym.

The freehold engaged Spencer Roy Faux ("SRF") to provide services as an interior specialist and project manager.

In 2007, Mr & Mrs Jenson purchased the Property. Ultimately they commenced proceedings against SRF, pursuant to the DPA 1972, as they claimed to have suffered loss as a result of damage caused by flooding to the new basement, allegedly due to problems concerning the waterproofing.

SRF issued an application for summary judgment, claiming that s1 of the DPA 1972 only applies to the provision of a new dwelling and that here, the house was the same dwelling both before and after the refurbishment. Therefore, it did not owe the duties required by the DPA 1972, to Mr & Mrs Jenson.

Mr. Justice Ramsey, in the Technology and Construction Court, found that the question as to whether or not SRF had provided a dwelling was a matter of fact and degree, unsuitable for summary determination, because it could arguably be maintained that the identity of the new dwelling was different from the old dwelling. SRF appealed to the Court of Appeal.

The Issue

Did the works carried out by SRF amount to "the provision of a dwelling" under s1(1) of the DPA 1972?

The Decision

The Court of Appeal disagreed with Mr. Justice Ramsey in the lower Court and held that it was not arguable whether or not the identity of the dwelling had changed. The works of the extension or refurbishment would have to have been much more substantial than they were in this case before it could be deemed to be "arguable".

The Court noted that whilst there were undoubtedly changes to the existing loft and cellar, the ground floor and first floor were approximately the same size and the use was largely for the same purpose as before. It was however recognised that there would be circumstances in which refurbishment works would amount to "the provision of a dwelling" and that the cost of the works would not be indicative:

> *"…The extent and cost of the works (we were told that they cost £400,000 in 2007) will not, in any event, be decisive. There may be cases in which a small amount of work might be needed to create a separate one-floor dwelling which would thus fall within section 1 of the 1972 Act; but there can be very extensive works to a house or dwelling which will not make it a dwelling whose identity is "wholly different" from before."*

The Court allowed the appeal, commenting on the fact that they have been given a half day for the argument, which allowed for a detailed consideration of the photographs and plans, while Mr. Justice Ramsey had only been allotted an hour and a half to determine not merely this issue but also an issue about representation.

Comment

The Court of Appeal has confirmed that residential refurbishment works are unlikely to fall within the ambit of the DPA 1972. Therefore, buyers beware and take note of the Court's following advice:

> *"…there are good reasons why caveat emptor has been the rule in house purchases for many centuries. Buyers are always able to have surveys done as Mr & Mrs Jenson did in this case."*

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