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Neocleous & Anor *v* Rees (2019) EWHC 2462

By Jonathan Toulson – page 3

MR *v* Commissioner of Police for the Metropolis [2019] EWHC 1970 (QB)

By Timothy Deards – page 4

We consider the impact of the Homes (Fitness for Human Habitation) Act 2018

Are the volume of housing disrepair claims about to rise?

By Alan Thomas – page 5

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Welcome

Welcome to liabilityMatters, the publication that looks at key case law and discusses the trends we're seeing in the liability claims we're handling, and in the wider claims marketplace.

In this third issue we discuss the potential for housing disrepair claims to increase following the passing of The Homes (Fitness for Human Habitation) Act 2018. With the heightened obligations on landlords under the Act – to ensure properties are "fit for habitation" rather than simply "in repair" – landlords have been warned.

We also explore email signatures and whether that truly represents 'signing' to bind an agreement, and we remind readers that redress can be more than financial compensation and how an offer of nothing now seems to be valid.

We hope you enjoy this issue and, as ever, if there are subjects you'd like to see covered, or if you have any comments regarding the content, we'd be delighted to hear from you.

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Neocleous & Anor v Rees (2019) EWHC 2462

Is an electronic signature sufficient to bind agreement?

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Judge Pearce in the High Court ruled that the sender's name on an email, even when automatically generated, confirmed a 'clear intention' and served to authenticate it.

The claimant was involved in a land dispute and the defendant solicitor emailed confirmation of agreed settlement terms with a sign off *'Many thanks'* followed by his auto-generated name and contact details.

This was acknowledged by the claimant's solicitor and confirmation of the agreement was provided. The defendant subsequently applied to have the case re-listed for hearing averring that terms of settlement had not been agreed after all.

The claimant contended that the exchange of emails through solicitors amounted to a binding contract of compromise under the terms of the *Law of Property (Miscellaneous Provisions) Act 1989*. The defendant contended there was no enforceable contract as the emails were not signed by the parties hence formalities required by section 2 were not met. The defendant said that the signature should be handwritten or on a facsimile version.

The defendant solicitor said that he did not add his name at the bottom of his email only that it was automatically added as it was at the end of every email he sent. The claimant disagreed and argued that the typed name, automatically generated or not, amounted to the document being 'signed'.

The Judge ruled that the claimant was entitled to the order for performance of the contract of compromise and he expressed the view that when a sender stores their name in the 'signature' function on emails then they do so intending to sign every email.

Comment

In finding for the claimant, the Judge considered what 'signed' means to an ordinary person. As the defendant solicitor added *'Many thanks'* and then relied upon the automatic sign off text generated by his Microsoft Outlook settings, this 'strongly suggested' to the Judge that there was reliance on such and intent of association and authentication. In the Judge's mind a deal had clearly been agreed by respective solicitors and it seemed the defendant then wished to raise a technical argument to renege upon same.

It has become more common in recent years for parties to use automatic sign off functions in their electronic communications. Whilst this was a land related dispute particular to the *Law of Property Act*, it may have wider implications and serves as a reminder that automatically generated text can still count as effective proof of agreement. The recipient may be entitled to aver, in the absence of contract disclaimers, that there was both intent and understanding provided by the 'sender' in these circumstances.

MR v Commissioner of Police for the Metropolis [2019] EWHC 1970 (QB)

Alternative redress and offers of nothing

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The claimant was awarded damages for false imprisonment and assault after being arrested on suspicion of harassment, only to be released without charge. He was granted anonymity as he was "well known in international financial circles".

The claim was issued in December 2010 and in May 2011 the defendant made a part 36 offer of £4,000 and provided a draft letter of apology.

The claimant rejected the offer on the basis that he travels extensively in the course of his work and on entry to certain countries he would have been obliged to declare the fact of his arrest, albeit the arrest did not result in a prosecution.

In September 2012, the claimant also made a part 36 offer of £5,000, on condition that the police admitted liability, as it was clear he wished to "clear his name". A further offer was made by the claimant in May 2013 for £5,000 but on condition that the defendant admitted unlawful arrest and ensured that all records of his arrest be removed from police records. The police rejected that offer 13 months later.

Surprisingly, three years later, the claimant once again made a further part 36 offer to settle for no damages, but an admission of liability and reasonable costs.

Six months on, the defendant invited the claimant to a without prejudice discussion. The defendant offered to provide a letter, which the claimant could show to any authority confirming that no action was taken to prosecute him following his arrest.

The claimant did not accept or reject the offer and the matter went to trial in June 2018. Her Honour Judge Baucher awarded the claimant damages of £2,750.

HHJ Baucher made no order as to costs. She ruled that it would be unjust for the defendant to recover its costs despite the claimant not beating an initial part 36 offer – because the claimant's motivation was not financial, but also it would be unjust to have to pay costs "when the defendant could not or would not make the admission".

On appeal, Mrs Justice McGowan found the offer to forgo a financial remedy if he could obtain the liability admission was "a significant concession and therefore a genuine part 36 offer". This engaged CPR 36.17 and meant the claimant was entitled to his costs from the expiry of the 21-day offer period.

This was not unjust even though the claimant failed to respond to the offer of a without prejudice discussion. The judge's view of the offers and counter offers made before July 2017 was "entirely a matter within her discretion and no valid complaint can be made of that view". "She was entitled to reach the decision she did as to the position before the making of a good and genuine part 36 offer which was not accepted by the respondent."

With regards to the claimant's failure to respond to the offer of a without prejudice discussion, the judge considered it did not have any direct effect on the course of the litigation, as the defendant had no intention of making the admission sought.

Comment

Can we offer nothing? The answer is clearly yes and an offer of nothing can be a valid Part 36 offer.

It was clear from the outset of this case that the claimant mainly wanted to clear his name. Unfortunately, to do so, he was required to pursue the litigation to trial. The claimant was never going to obtain the admission he wanted through pre-trial negotiation.

Of note is that in cases where the claimant is seeking an admission of liability or apology, defendants are able to ensure some costs protection by making an offer to admit liability, even if the offer does not include any damages. Essentially, if you don't accept the claim for damages in a case, you can offer an apology or admission of liability and nothing else!

What should not be forgotten is that a claimant will often seek redress in other forms apart from financial compensation. A claimant may feel that they need an apology or admission to move on and will wish to know that certain errors will not happen again. Such 'redress' can be worth more than money to a claimant in some situations. This is worth remembering when negotiating both pre and post litigation.

Are the volume of housing disrepair claims about to rise?

We consider the impact of the Homes (Fitness for Human Habitation) Act 2018

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Following on from our September edition where we discussed the *Court of Appeal Defective Premises Act* case of *Rogerson v Bolsover District Council*, we now consider recent changes to the Landlord and Tenant Act (LTA). This follows the introduction of the *Homes (Fitness for Human Habitation) Act 2018*, which will have an impact on claims for 'disrepair'.

As advised by the charity 'Shelter', rental accommodation, in both the social and private sectors, is not always fit for purpose, with many renters described to be living in unsafe conditions. According to the 2015/2016 English Housing survey, there were over one million properties with a Category 1 hazard under the Housing Health and Safety Rating System (HHSRS), which is defined as a *"serious and immediate risk to a person's health and safety"*.

With this as a backdrop, and with an effort to improve upon the housing stock, the Government passed *The Homes (Fitness for Human Habitation) Act 2018* that came into force on the 20 March 2019. The Act amends sections 8 to 10 of *The Landlord and Tenant Act 1985* inserting additional sections.

It will apply to all new tenancies of a term of less than 7 years (including new periodic tenancies) granted on or after the commencement date as well as to all tenancies that began as a fixed term before the commencement date but become a periodic tenancy after the commencement date.

What does the Act do?

Prior to the 2018 Act, landlords were required to keep properties "in repair", as opposed to being "fit for habitation". If a property has a defect that is not classed as 'disrepair' because the property has never been in a better condition (such as inadequate ventilation that leads to excessive condensation), the landlord was not necessarily obliged to improve its condition under the LTA. The 2018 Act seeks to close this loophole.

As set out in the Act this cannot be avoided or contracted out of by the landlord, nor can any contractual penalty be levied on the tenant for relying on the covenant. The Act supplements s.11 LTA 1985 and requires that the property let remains fit for human habitation.

The amended s.10 provides a definition of fitness of 'for human habitation'. We anticipate that this will inevitably be a matter for interpretation on the facts of the case but will likely be compared to the current list of 29 HHSRS hazards. Regard will need to be given as to whether a property is unfit, and whether there is a risk of harm to the health or safety of the occupiers.

Liability for unfitness – Does the notice doctrine still apply?

We are reasonably confident that the doctrine as set out in *O'Brien v Robinson* [1973] will still apply given there is no express provision in the Act dealing with notice to the landlord.

In saying the above, for any unfitness arising from the landlord's retained parts (common parts or exterior of a building of which the dwelling is part), the landlord will be deemed to be on notice as soon as the unfitness arises, and liable after a reasonable time to remedy the defects – *British Telecommunications Plc v Sun Life Assurance Society Plc [1995] and Edwards v Kumarasamy [2016]* refers.

There are exceptions to the landlord's duties under the Act:

- The landlord is not responsible for unfitness caused by the tenant's failure to behave in a tenant-like manner, or that which results from the tenant's breach of covenant.
- The landlord is not obligated to rebuild or reinstate the dwelling in the case of destruction or damage by fire, storm, flood or other inevitable accident.
- The landlord is not obligated to maintain or repair anything the tenant is entitled to remove from the dwelling.
- The landlord is not obligated to carry out works or repairs which, if carried out, would put the landlord in breach of any obligation imposed by any enactment, which would include things like breaching planning permission, or listed building consent etc.
- Where the needed works require the consent of a third party (e.g. a superior landlord or freeholder) and the landlord has made reasonable endeavours to get that consent, but it has not been given.

Comment

These changes are likely to have a positive impact on the condition of housing stock and that can only be a good thing for tenants in dealing with bad landlords.

Time will tell how this change in the law will impact the volume of claims for injury attributed to housing disrepair. For our part, we believe an increase is almost inevitable now that a landlord can't argue as part of the defence that the property was in the same state of repair at the start of the tenancy. It is reassuring however that the notice doctrine remains and that other defences are available.

liability**Matters**

About us

We're a specialist liability practice trusted by many of the world's leading insurers, brokers and corporate clients to protect their interests – and those of their customers – when the unexpected happens.

Leading our clients expertly through the claims process, we help mitigate risk and claims spend, protecting our clients' brands, reputations and commercial relationships.

We apply market leading technology to improve the customer experience, settle claims faster and identify fraud. Our digital thinking never stops, we're always developing new technology to make claims more transparent and easier for everyone.

Upcoming industry events with us:

- 28-29 October – ALARM conference Scotland
- 5 November – Cyber Breakfast briefing
- 6 November – Onshore energy conference
- 6-7 November – speaking at the BDMA conference
- 12 November – FAS and MCL Global client reception
- 14 November – sponsoring the I Love ClaimsHome Claims Conference
- 26 November – AIRMIC dinner

Contact us

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For more information about the work done by our liability team, download the liability claims services brochure here.

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