



## LEGAL BRIEFING

### *Harrison and Other v (1) Shepherd Homes Ltd (2) National Housebuilding Council (3) NHBC Building Control Services Ltd*

[2011] EWHC 1811 (TCC), Mr Justice Ramsey

#### *The Facts*

Shepherd Homes Ltd ("Shepherd") entered into separate sales contracts with each purchaser in respect of 94 houses on a development on a former landfill site in Hartlepool. The properties were constructed between September 2001 and February 2004. Defects appeared in a number of the properties and it soon became apparent that this was a development wide problem caused by defective/inadequate piled foundations. The home owners started proceedings against Shepherd. The properties had cover under the Buildmark scheme operated by the National House Building Council and the supervision of the work was carried out by NHBC Building Control Services Ltd.

#### *The Issues*

The key issues raised at trial included Shepherd's obligations under the sales contracts (including Shepherd's express or implied obligations, and whether the Unfair Terms in Consumer Contracts Regulations 1999 and the Unfair Contract Terms Act 1977 applied to the sales contracts), whether the owners had complied with the notice requirements under the NHBC Buildmark cover, whether Shepherd was liable under the Defective Premises Act 1972, the proper measure of damages in respect of the defects and whether the owners were entitled to damages for loss of amenity, distress and inconvenience.

The decision is lengthy (121 pages) and wide-ranging. For this reason, this case note deals only with the proper measure of damages in respect of the defects (in particular whether this should be based on reinstatement costs or diminution in value) and whether the owners were entitled to damages for loss of amenity, distress and inconvenience.

#### *The Decision*

The court identified the following general principles when considering an award of damages for defective premises and any associated damages for loss of amenity, distress and inconvenience:

- (i) There will generally be an award of the cost of reinstatement provided that reinstatement is reasonable;
- (ii) Reinstatement will be unreasonable if the cost of reinstatement would be out of all proportion to the benefit to be obtained;
- (iii) The question of reasonableness has to be answered in relation to the particular contract;
- (iv) It is not necessary for recovery of the costs of reinstatement to show that the claimant will reinstate the property but the intention to reinstate may be relevant to reasonableness;
- (v) If reinstatement is unreasonable then the measure will generally be diminution in value;
- (vi) Where reinstatement is unreasonable and there is no diminution in value then the court may award damages for loss of amenity;

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- (vii) There is a general rule, subject to exceptions, that a claimant cannot recover damages for injured feelings for breach of contract;
  - (vii) One of the exceptions is that where the object of the contract is to afford pleasure, relaxation, peace of mind or freedom from molestation such damages are recoverable;
  - (ix) In cases not falling within that exception, damages may be recovered for physical inconvenience and discomfort caused by the breach and mental suffering directly related to physical inconvenience and discomfort;
  - (x) To demonstrate physical inconvenience or discomfort, the cause of that inconvenience or discomfort must be a sensory (sight, touch, hearing, smell etc) experience; and
  - (xi) Any damages under either of the heads are modest.

The court considered whether the claimants' loss should be measured by reference to the costs of reinstatement (which involved repiling the foundations) or by way of the diminution in value of each property. In this case, the court held that the proper measure of damages was the diminution in value and not the cost of reinstatement works. The basis for the court's decision was:

- (i) The engineering experts agreed that from a structural engineering point of view the cracking and movement would not warrant those works. With a few exceptions, the cracks were well below any feature which engineers would normally be concerned about and were aesthetic in nature. Even in respect of the worst affected property, the court accepted the expert evidence that there was only a low probability of significant movement in the foundations and in respect of all other properties the probability was extremely remote. On this basis, it was not reasonable to provide entirely new foundations;
- (ii) If damages were awarded in respect of remedial works the court held that most of the claimants would simply sell their houses and use the money to move elsewhere. In reality, the main problem was that the investment in the house, which was the main asset for most of the claimants, had become less valuable than the asset in which they had originally invested;
- (iii) Even though some of the houses on the development had previously been repiled this did not justify the same remedial works being carried out to the remainder of the properties;
- (iv) The cost of new piling would be out of all proportion to the loss suffered given that the external and internal damage could be made good at little cost; and
- (v) Whilst there may be some uncertainty as to whether the properties would suffer further movement in the future, these risks were minimal and were properly compensated not by carrying out remedial work but by the assessment of diminution in value.

In respect of the claim for loss of amenity, the court held that damages were not appropriate on the basis that the sales contracts did not contain a term to the effect that object of the contract was to give "pleasure, relaxation of peace of mind" and nor should such a clause be implied.

In respect of the claim for distress and inconvenience the court awarded £150 per year on the basis of the visible defects, the problems with the levels to the paths and driveways, the need for investigations, surveys and monitoring and "other sensory aspects" arising from the defects in the properties.

#### **Comment**

The case represents extremely useful guidance as to the assessment of damages in respect of defective construction work. Whilst the starting point will usually be the cost of reinstatement, claimants still have a number of other hurdles to clear. If the cost of

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reinstatement is unreasonable then the measure of damages will be by reference to the property's diminution in value and not the reinstatement costs.

This case is also a timely reminder for aggrieved employers that whilst living and dealing with defective building work can be a stressful and inconvenient experience, this is not one that generally results in a significant award of damages.

**David Bebb**  
**September 2011**