Falcon Chambers

In this series of articles, we aim to highlight 3 of the most interesting cases in our field decided in the past month. This month: when new points can be raised on appeal, compliance with tenants' rights of first refusal, and the costs of dispensing with consultation requirements in the context of the Building Safety Act.

NOVEMBER 2023

All Money Matters Ltd T/A TFC Home Loans v Azhar [2023] EWCA Civ 1341

Summary

The Court of Appeal declined to interfere with a judge's decision not to allow an appeal because the issue raised was a 'new point' despite the point being explored in the evidence and submissions at trial.

The appellant had approached the respondent for assistance in obtaining a loan. The parties entered into an agreement which contemplated the completion of 'confirmation of instructions' documentation; if an offer of finance was made which reflected those instructions, a fee would be payable by the appellant.

The parties corresponded about possible finance options, but the appellant ultimately made other arrangements. The respondent issued proceedings seeking payment of the fee.

The respondent's original pleaded case was that the respondent had accepted an offer of finance. The appellant filed a defence limited essentially to denying that fact. The respondent's evidence, however, advanced a different case, namely that an offer of finance had been procured, and it was not necessary for the offer to have been accepted for liability to have arisen.

At the commencement of the trial, the judge allowed the Respondent's application for permission to amend the particulars of claim to bring them in line with the witness evidence. There was no application to amend the defence, and the trial proceeded.

During the course of the trial, the judge asked questions about the confirmation of instructions documentation. Counsel for the appellant built upon that questioning in submissions, arguing either that the confirmation of instructions needed to be contained in a particular form of letter and was not, or that there was no sufficient documentation generally.

The judge found that the fee was payable. The appellant appealed on the basis that the judge had given insufficient weight to the lack of a 'confirmation of

instructions letter'. A circuit judge considered this a new point and declined to allow it to be taken on appeal.

The Court of Appeal dismissed the further appeal against the decision of the circuit judge.

Why it's important

As Lewison LJ's leading judgment explains, there is a 'spectrum of newness' when considering new points which may or may not be permitted on appeal. This case provides a helpful illustration of a point falling the wrong side of the line, even though the point was raised during the trial.. There had been nothing to put the respondent on notice of the point before the beginning of the trial, and had the respondent wished to assert, for example, that any requirement for a particular form of letter had been waived, different evidence may have been required.

The case is also useful in highlighting that the grant of permission to appeal on a particular ground does not preclude the Respondent from arguing that the ground raises a 'new point' which the Appellant should not be permitted to pursue.

FSV Freeholders Limited v SGL 1 Limited [2023] EWCA Civ 1318

Summary

The Court of Appeal determined that offer notices under s.5 of the Landlord and Tenant Act 1987 were valid; if the landlord proposed to enter into a wider transaction, it was correct to sever it and state the terms relating to the particular building in the notice.

The case concerned a number of blocks of flats. Block A was one building for the purposes of the 1987 Act; blocks B, C and E were a second building; and the Act did not apply to block D. The respondent's predecessor in title proposed to sell all 5 blocks to the respondent at a price of £1.6m, on terms including the payment of a deposit and procuring of a court order. Offer notices were served on the qualifying tenants of block A and blocks B, C and E, specifying only the purchase price as apportioned for the relevant building.

No acceptance notices were served, and the sale proceeded. The tenants then served notice under s.12B of the Act, requiring the purchaser to make a disposal to them. The respondent, the incoming purchaser, issued proceedings seeking a declaration that the Act had been complied with.

The Court of Appeal, upholding the decision of the judge at first instance, found that the notices were valid.

Why it's important

This decision determines that where a disposition involves multiple buildings, the offer notices only need to contain the key terms of the transaction as they relate to each individual building, and not the terms of the overall transaction.

Given tenants' ability to compel a disposition to them of property disposed of in breach of the Act, purchasers will be keen to know that its provisions have been complied with. Similarly, for sellers, failure to comply with the provisions of the Act without reasonable excuse is a criminal offence (in respect of which the first prosecution was recently brought: readers may be interested in this note[1]). It is therefore important for all concerned that there is clarity about the Act's requirements.

Readers who frequently deal with the 1987 Act may also be interested in another decision this month, *S. Franses Limited v Block 6 Ashley Gardens Roof Gardens Limited* [2023] EWHC 2880, dealing with numerous issues concerning consideration under the Act and the court's exercise of discretion. A summary of the judgment can be found here.[2]

Adriatic Land 5 Limited v The Long Leaseholders at Hippersley Point [2023] UKUT 271 (LC)

Summary

The Upper Tribunal determined that the costs of an application for dispensation with the consultation requirements imposed under s.20 Landlord and Tenant Act 1985 were costs capable of falling within paragraph 9 of schedule 8 of the Building Safety Act 2022, such that the landlord could not recover them through the service charge.

The appellant was the landlord of a block of flats which required significant fire safety works. The appellant applied for an order dispensing with the requirement for consultation, on the basis that the works were extremely urgent. The First-tier Tribunal granted that application, and of its own initiative also made an order under s.20C of the 1985 Act that the costs of the application could not be recovered through the service charge. The FTT later reviewed that decision, removing the s.20C order, but applying instead a condition to the grant of dispensation that the appellant not recover its costs via the service charge.

When granting permission to appeal against the FTT's reviewed order, the Upper Tribunal directed that the court would also consider the issue of whether the costs were irrecoverable under the provisions of the 2022 Act, potentially being costs *'of*

[1] https://www.falcon-chambers.com/news/first-prosecution-under-the-landlord-and-tenant-act-1987-what-happened

[2] https://www.falcon-chambers.com/news/s-franses-limited-and-another-v-block-6-ashley-gardens-roof-gardens-limited-and-others-2023

legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect.'

The Upper Tribunal determined that:

1. The FTT's decision to impose the costs condition was flawed, both as a matter of substance and procedurally. It had been made without a proper opportunity for submissions, and there was no prejudice to the leaseholders which ought to be mitigated by attaching conditions. There was no principle that a costs condition should be attached to every dispensation application. Remaking the decision, no such condition would be imposed.
2. The costs of the application were not recoverable from the qualifying tenants by way of service charges by virtue of the provisions of the 2022 Act; that conclusion was unaffected by whether they had been incurred before or after the Act came into force.

Why it's important

This is the first occasion on which the Upper Tribunal has considered the provisions of the Building Safety Act, and it usefully highlights the impact of the provisions in the Act on the recoverability of legal costs via the service charges.

In his careful and detailed judgment, the Chamber President expressed his view that '*What might be seen as unfair results are, it seems to me, simply a reflection of life in the new world of the 2022 Act.*' The findings about the way in which the scheme of the Act is found to apportion liabilities will be of considerable significance to both landlords and leaseholders alike.

The judgment is also of note beyond the Building Safety Act context for the guidance given about the correct approach to the costs of dispensation applications, and the imposition of conditions.

STEPHANIE TOZER K.C.

FERN SCHOFIELD