Duty of Landlord under the Occupiers Liability Act 1957 (Essex and others v Davies and others)

17/12/2019

Property analysis: In this decision of the High Court, on appeal from the County Court at Central London (HHJ Roberts), the rule in Cavalier v Pope [1906] AC 428, that a landlord is not an occupier of demised premises, was confirmed. It applies even where the landlord regularly maintains the demised premises. The well-known but controversial rule in Cavalier is entrenched and was binding on the County Court judge. He was wrong to distinguish it on the grounds that he did. The appeal of the two landlords was accordingly allowed and the claims against them dismissed. Appeals by all three defendants on the level of award for general damages, and interest on costs pursuant to CPR 36.17(c), failed. Written by Craig Carr, barrister (for the first and third defendants/appellants), at 7 Bedford Row.

Essex County Council and others v Davies [2019] EWHC 3443 (QB)

What are the practical implications of this case?

The case confirms, as is set out in a number of other decisions (*Rimmer v Liverpool City Council* [1985] QB 1, [1984] 1 All ER 930, *Boldack v East Lindsey* DC (1999) 31 HLR 41, *Drysdale v Hedges* [2012] EWHC 4131), [2012] All ER (D) 345 (Jul), that a damages claim against a landlord for failure to maintain does not arise under the Occupiers Liability Act 1957 (OLA 1957). The duty of a landlord was previously contained in OLA 1957, s 4, but that section was repealed and replaced by the Defective Premises Act 1972 (DPA 1972). *Cavalier v Pope* is not capable of being distinguished if the landlord does nothing more than act in the capacity of landlord.

The rejection of the secondary aspects of the appeal (on quantum and costs), highlights the difficulty challenging awards of general damages (the test in *Flint v Lovell* [1953] 1 KB 354 is whether the award is an entirely erroneous estimate of the damage) or Pt 36 Interest, where the trial judge has a wide discretion and the appeal court a limited basis to interfere with the costs order.

What was the background?

The claim was concerned with nine claimants who alleged that they were exposed to carbon monoxide over a two-year period (Nov 2010–Nov 2012) at their workplace, Havering College (the College). The workplace was demised by the Governing Body of Sawyers Hall College (Governing Body) owner of the premises to August 2012 and then Essex County Council (Essex) owner thereafter. The carbon monoxide leaked from a blocked boiler in a boiler room in the basement beneath (but excluded from) the demised premises. It was common ground that the landlord was the occupier of the boiler room and responsible for maintaining the boiler.

The claimants alleged that all three defendants were liable as occupiers under OLA 1957. Additional allegations of employers' liability were made against the College. The College accepted it was the occupier of the demised premises. Relying on the rule in *Cavalier v Pope*, Essex and the Governing Body denied owing the duty of an occupier in respect of the demised part of the property.

Following a six-day trial at which all issues of duty, breach and quantum were contested, the judge found for the claimants on all issues. Distinguishing *Cavalier v Pope*, he found that Essex and the Governing Body were, along with the College, occupiers. Awards of general damages ranging from £7,000 to £15,000 were made to each claimant, broadly in accordance with the length of carbon monoxide exposure. Six of the claimants beat Pt 36 offers they had made to two of the defendants. They were awarded indemnity costs, a 10% uplift on general damages and 10% interest on both damages and costs.

What did the court decide as to the liability of the landlords?

The appeal of the landlords on liability was allowed on the basis that the judge below had been wrong to distinguish *Cavalier v Pope*. It was noted that the sole cause of action was based on the OLA 1957 (not DPA 1972) and it was found to be 'established (and binding) law that a landlord (acting qua

landlord) does not owe a duty of care at common law or under the OLA 1957 to its tenant or visitors of its tenant (in short, he is not an occupier owing duties when acting qua landlord)'.

Each ground relied on by the trial judge distinguishing *Cavalier v Pope* was addressed:

- OLA 1957, s 1(3)(a), not in fact pleaded or argued by the claimants, did not apply. The claimants did not 'visit' the boiler
- it was wrong to distinguish *Cavalier v Pope* on the basis it was dealing with residential, not commercial, premises
- the joint representation at trial of Essex and the Governing Body was irrelevant to the question of whether they were occupiers under OLA 1957
- there was nothing to support the contention found by the judge (albeit not pleaded by the claimants) that a local authority assumes a duty to maintain premises demised to a private tenant by a grant-maintained school
- the fact that caretakers working at the school undertook regular maintenance at the college, did not displace the *Cavalier v Pope* rule given it expressly applies when a landlord accesses premises to undertake maintenance/repair
- the question of who employed those caretakers was irrelevant to the question of occupation under OLA 1957

Therefore, the claim against Essex and the Governing Body should have been dismissed. Any claim under OLA 1957 lay solely against the College.

What did the court decide as to damages?

The appeal of all defendants on general damages was refused. While the awards might be generous, the approach by the trial judge to quantification was found to be exemplary. They could not be disturbed on appeal.

The trial judge awarded interest on costs (at the maximum amount allowed) on the basis that the defendants had argued every point in the claim, and that the evidence of Essex and the Governing Body was found to be wholly misleading and untruthful (principally in respect of the issue of who employed the caretakers). It was argued on appeal that the award of interest was disproportionate and excessively penal in circumstances where the claimants did not fall to be compensated for being out of pocket given the litigation was funded by conditional fee agreements. Noting the wide discretion of the trial judge, and his view of the poor conduct of the defendants/appellants, this aspect of the appeal was also refused.

Case details

- Court: High Court, Queen's Bench Division
- Judge: Saini J
- Date of judgment: 12/12/2019

Craig Carr is a barrister at 7 Bedford Row. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.

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