Avril & Hilda Alderson v Beetham Organisation Ltd [2003] Adj.L.R. 04/02

On appeal from TCC Liverpool District Registry HHJ MacKay (Sitting as a Deputy Judge) before Aldous LJ; Judge LJ; Longmore LJ. 2nd April 2003

JUDGMENT : Lord Justice Aldous :

1. With permission of this Court, Mrs Hilda Alderson and her daughter, Avril Alderson , appeal the decision and order of 3rd October 2002 of HHJ MacKay sitting as a deputy judge of the High Court. By that order the judge struck out the claims of the Aldersons as they were statute barred.

2. The issue between the parties concerns the construction of section 1(5) of the Defective Premises Act 1972 which sets the limitation period in respect of the statutory duty imposed by the Act upon developers and others who take on work in connection with the provision of dwellings.

3. The facts have not as yet been determined, but the background is not in dispute. In 1994, 1 Livingstone Drive North, Liverpool 17 was developed by the respondents, Beetham Organisation Ltd . The development, a conversion of the property into flats, was completed around the end of May 1994.

4. By a written agreement dated 6th January 1995, Mrs Alderson agreed to purchase a leasehold interest and on 23rd January she became the lessee of Flat 1 for a term of 125 years. She paid £48,000. At the same time, a lease of Flat 2 was granted to Avril Alderson for a similar term and for a similar price. Both flats were in the basement.

5. On 27th April 1995 Avril Alderson noticed black mould and fungus growth on the bedroom walls of both flats. She complained and on 4th May 1995 she met on site Beetham 's work manager, a Mr Allmark, where it was agreed that there appeared to be a problem. Following that meeting, Avril Alderson met the respondent's works foreman, Mr Alfred Grant, to discuss remedial works. The works foreman recommended relaying the flagstones outside the flat at an angle to the external wall and also laying extra drainage pipes under the pathway running alongside Flat 1. Between 12th and 30th May those works were carried out.

6. On 31st May 1995, the Aldersons moved into their flats. In September 1995 Flat 1 was flooded by water seeping in, such that the fire brigade had to attend. That resulted in Mr Allmark carrying out further work, but it did not prevent the damp. The Aldersons consulted solicitors who instructed Mr Dears, a chartered surveyor. He inspected the flats in October and November 1995. He reported that the flats had been constructed in breach of the terms of the Defective Premises Act 1972. In his view, the premises had not been made habitable as the subterranean accommodation of the flats had not been properly tanked and therefore did not have adequate damp proofing. He advised removal of all fittings so that substantial alterations could be carried out to provide adequate tanking. He recommended that the Aldersons should be compensated for their purchases and indeed should receive further compensation for the considerable disturbance and inconvenience caused after they moved into the flats.

7. Mrs Alderson and her daughter took no legal action until 19th January 2001. On that date they both issued proceedings. As the allegations were for all relevant purposes the same, I will consider the proceedings as having been consolidated from the start. The particulars of claim alleged breach by Beetham of an implied obligation to provide quiet enjoyment and also a breach of the duty provided by section 1 of the Defective Premises Act 1972. Damages were claimed due to water penetration and the need to carry out repairs to the damp proofing. The defence disputed that there was an implied obligation of quiet enjoyment between the Aldersons and Beetham . It went on to admit that, as developer, Beetham owed to the claimants a duty pursuant to section 1 of the Defective Premises Act, but pleaded that the cause of action for breach of that duty had accrued on completion of the dwelling, namely on the 25th May 1994. It went on to allege that the claim for breach of duty under the 1972 Act was statute barred in that the claim, commenced on 19th January 2001, was more than six years after accrual of the cause of action.

8. The allegation that Beetham was liable for breach of an implied obligation for quiet enjoyment was struck out. There followed an application notice dated 13th February 2002 in which Beetham sought to strike out the rest of the particulars of claim upon the basis that the claim was statute barred. That issue came before the judge and resulted in his order of 3rd October 2002, which struck out the claims of the Aldersons as being statute barred.

9. The relevant parts of section 1 of the Defective Premises Act 1972 are as follows:

*"**1. Duty to build dwellings properly.***

(1) 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 –

(a) if the dwelling is provided to the order of any person, to that person; and

(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

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

(5) Any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963, to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished."

10. It is accepted that the limitation period in respect of the main development expired some time in May 2000 and thereafter any claim in respect of it was statute barred. However the argument addressed on behalf of the Aldersons was that the relevant limitation period did not run from completion of the original building works, but started from the time when the developer carried out the further ineffective works in May and September 1995. Thus the relevant limitation period of 6 years did not expire until May 2001 at the earliest. The judge rejected that argument. He said:

"10. It seems to me that the words of the section are quite conclusive. Section 1(5) of the Defective Premises Act states that the exemption and limitation period is extended to take into account further work and the claimant has a cause of action in respect of the further work. It does not provide a claimant with a justification for the court exercising the view that the limitation period is extended in respect of all works carried out which were not, in fact, the subject matter of the further work and so in this case, regrettably, I find against the claimants and this case is therefore statute barred."

11. Mr Musaheb on behalf of the Aldersons submitted that the judge had wrongly construed section 1(5) of the 1972 Act. He submitted that that section required consideration not only of the further work that was carried out, but also of the reason why the developer came back to do the further work. Thus where a developer does further work to rectify the work that he has already done, but fails to rectify the defective work, the limitation period in respect of the cause of action in relation to the defect runs from the further work which failed to rectify the defect. He did not assert that the cause of action which arose under the proviso of section 1(5) of the 1972 Act applied in respect of all the work the builder had carried out prior to completion, as he accepted that it only applied in relation to that part of the original work that the further work was supposed to rectify.

12. Mr Musaheb drew to our attention **Andrews v Schooling** [1991] 1 WLR 783. In that case the plaintiff was the owner of a 199 year lease of a flat in premises which had been developed in Essex. The plaintiff sought compensation under the 1972 Act because of damp coming from the cellar. The defence was that the development had not included work done on the cellar and therefore section 1 of the 1972 Act did not apply. That defence was rejected by the Court of Appeal. Balcombe LJ said at page 789: *"Thus supposing that the owner of a plot of land instructs a builder to erect a dwelling house on a plot. The builder erects the house but fails to include a damp course. Without the damp course the house, when completed, is not fit for human habitation because of rising damp. I cannot conceive that Parliament could have intended that in those circumstances the builder would be free from any duty under section 1(1). And what, I ask forensically, in those circumstances would be the need for the exception (and the exception to the exception) under subsection (2)?*

But it seems to me that subsection (4) is conclusive in favour of the construction that includes nonfeasance within the scope of the duty. Again suppose a not infrequent case: a developer who is professionally qualified, e.g. an architect or surveyor, instructs a builder to erect a dwelling house or to convert an existing house into a number of separate dwellings. His instructions are detailed, but make no provision for inclusion of a damp course, which is necessary if the dwelling is to be fit for habitation when completed. The builder will be exempt under subsection (2). But the developer, who will not have physically done any work, is to be treated under subsection (4) as a person

who has taken on the work. In those circumstances there can be no difference between the acts of commission and acts of omission."

13. Mr Musaheb submitted that if a developer was liable for failure to do work, as the Court of Appeal held in ***Andrews*****,** then it was appropriate that the word *"**further work***" in the proviso in section 1(5) should be construed as including both acts of commission and acts of omission.

14. Mr Edwards-Stuart QC for Beetham submitted that the proviso in section 1(5) was not a provision which had the effect of extending the limitation period of 6 years in respect of original defects in all cases when later work was done to cure the defects. If Beetham had carried out work to rectify the defective tanking and the damp proof membrane, and had done that work in such a way that the dwelling was not fit for habitation, then a new cause of action would have accrued in relation to the defective tanking and damp proof membrane. That is not what happened. Beetham did no work to the tanking or the damp proof membrane. The further work was to rectify the position of the flagstones and the external drainage and the proviso only applied to that work. As that work had been carried out competently and was not the cause of the alleged damage, the Alderson's claim had to fail.

15. I will come back to those submissions, but before doing so I will look in more detail at what was done. The relevant evidence before the court consisted of witness statements from the Aldersons, the reports of Mr Dears and a witness statement from Mr Frost, the chairman of Beetham, and a supplemental statement of Avril Alderson .

16. Mrs Alderson explained in her witness statement that on the night of 4th September 1995 there was heavy rain. Her flat flooded with the result that the fire service were called out and they removed all the heavy water and sodden carpets. On 5th September Mr Grant of Beetham came to inspect the damage and later Mr Allmark attended. She said that the only work that was done was to the flagstones.

17. Avril Alderson said that she went to the flats on 27th April 1995. She found mould and fungus growth on the walls of both bedrooms. She made arrangements to meet Beetham's works manager Mr Allmark on 4th May. It was agreed that the flats were damp and that there appeared to be problems with the damp proof course. She lent the keys of the flats to him to enable redecoration of the bedrooms. She understood that Beetham thought that the way the flagstones were laid was probably the cause of the damp. The flagstones were relaid and extra drainage pipes installed.

18. Mr Frost said that the flats were not tanked, but instead a waterproof barrier, which he referred to as a Newton system, was installed. He said that he recalled that the Aldersons had made numerous complaints about damp. Mr Frost also recalled the events of September. He said that Mr Allmark advised that the cause of the flooding was a broken downspout. Water had penetrated the external brickwork and got behind the Newton system. The pressure of water had caused a breakdown of the Newton membrane possibly at its junction with the asphalt floor. The result was that Beetham did work on the exterior. At no time did Beetham undertake any work of a remedial nature to the damp proof membrane and asphalt flooring, nor did they subsequently undertake such work.

19. The correspondence is of interest. Letters of complaint were written by the Aldersons in July 1995. It seemed that around August 1995 they instructed solicitors to act for them as on 15th August their solicitor wrote about "*the apparent failure of the damp proof course*" which, it was said, was causing increasing damage to the property and required to be rectified immediately. On 7th September Mr Frost wrote to Mrs Alderson : *"I am very sorry to learn from my colleague Mr Allmark of the catastrophe following torrential rain on the night of 5th September. Mr Allmark has carried out extensive works to remedy the cause of such flooding and ensure that there will not be a repeat of such incidents."*

20. From Mr Dear's report, it appears that the cause of the damage in both flats was the failure of the Newton system. In essence the damp proofing system failed. That made the flats uninhabitable. It seems that Mr Frost may be right that extensive works were carried out in May and September with the purpose of preventing damp affecting the flats. That work consisted of relaying flagstones, providing extra drainage and mending a downpipe. That work was not defective in itself, but it did not prevent ingress of water and the flats remained unfit for habitation. No work was carried out on the Newton system or the asphalt floors.

21. I come back to the 1972 Act. Section 1 imposes a duty of care upon persons who take on work for or in connection with the provision of a dwelling. The duty owed is to see that the work is done in a workmanlike manner with proper materials so that, as regards that work, the dwelling will be fit for habitation when completed.

22. In the present case it is accepted that a duty was owed, and if the report is correct, there was a breach of that duty in that the flats were not fit for habitation due to damp. Thus the Aldersons had a cause of action under section 1 of the Act that was carried on during the development. The cause of action in respect of the work expired in May 2000.

23. Section 1(5) sets a limitation period of 6 years from completion, but contains a proviso where work is done after completion *"**to rectify the work … already done**"*. The work referred to as "already done" must be a reference to the work referred to in section 1(1). Thus the first question that has to be decided is whether the work done by Beetham in May and September 1995 was to rectify the work already done.

24. What was the work *"**already done**"* which it is alleged the further work sought to rectify? There were complaints of damp in May 1995 and after the rain on 5th September 1995. The evidence shows that the further work was done with the intention of rectifying (to rectify) defects in the damp proofing so as to make the flats fit for habitation.

25. The proviso of section 1(5) goes on to set a six year limitation period, for the cause of action in respect of the further work, from the date when the further work was completed. But that is confined to "a cause of action in respect of that further work". Mr Edwards-Stuart reminded us that the words of the proviso did not refer to a problem that needed to be solved. The proviso did not provide a further 6 year period because of a failure to find out the cause of a problem nor of a failure to provide a solution to the problem once found. The proviso only applied to further work that was carried out. If it was carried out properly then there was no breach of duty. That, he submitted, was exemplified by considering a case where there were two causes for a dwelling failing to be fit for habitation. For example, where cracks in walls were due to inadequate fixing of the roof trusses and also inadequate foundations. If the builder knew the problem (the cracks) and corrects one of the causes using good materials and in a workmanlike manner, the proviso could not provide a cause of action in respect of the failure to correct the second cause (inadequate foundations) and any action in respect of the further work would fail as it was carried out properly.

26. The decision as to whether the proviso in section 1(5) applies is likely to depend upon the particular facts. I have therefore not found it difficult to refrain from deciding whether the proviso applied to the case postulated by Mr Edwards-Stuart. However it would not be surprising if Parliament had intended to provide a fresh cause of action to recover for breach of the duty to provide a dwelling fit for habitation when there were two causes and only one was rectified. It would be odd that a builder who does half a job in a workmanlike manner should not be liable for failing to rectify the problem which caused the house to be unfit for habitation, whereas a builder who attempted to do a whole job could be liable.

27. I accept that the proviso does not refer to work done to rectify the problem; but it does refer to *"**further work to rectify the work**"*. The word "***rectify***" suggests that there was a problem. That problem must be either a failure to carry out the work in a workmanlike manner or a failure to use proper materials. Thus it would seem appropriate that the proviso should apply to all the further work carried out for the purpose of rectifying a failure to adopt workmanlike practices or a failure to use proper materials or it may be a combination of both. Such a conclusion is consistent with the ***Andrews*** case.

28. It is correct that the work done by Beetham was not carried out on the Newton System or other damp proofing and it would seem that the problem could only have been solved by doing so. However it was the damp which rendered the flats unfit for habitation. What was the reason for the further work? It was to rectify the damp problem which was the cause of the flats being unfit for habitation. That as I have said, was due to a failure to carry out the development in a workmanlike manner or with appropriate materials. In those circumstances there is every reason to conclude that Parliament intended that there should be a fresh cause of action for breach of the duty to provide a dwelling fit for habitation when the further work did not rectify the original work as intended. No doubt the action is only *"**in respect of that***

further work", but that further work has to be for the purpose of rectifying the original work carried out in a breach of the statutory duty.

29. The Aldersons' action is in respect of the work carried out in May and September 1995 and therefore the 6 year limitation period provided by the proviso in section 1(5) does not expire until May 2001 at the earliest. That work was carried out to rectify the failure to provide adequate damp proofing. It was accepted for the purpose of the appeal that it failed to rectify the original work and therefore the Aldersons could properly claim to be entitled to recover for the failure of the further work to rectify the original work.

30. I would allow the appeal, set aside the order of the judge and remit the case back for trial.

Lord Justice Judge:

31. I agree with Aldous LJ. I shall add a few words of my own, because we are disagreeing with the trial judge, and because of the potential importance of the issues debated in argument.

32. The limitation provisions provided by section 1 (5) of the Defective Premises Act 1972 arise at distinct stages, in relation to specific causes of action. The person subject to the obligations created by s1 (1) of the Act is required to see that the work for which he is responsible is done in a workmanlike or professional manner, with proper materials, and so that when completed, the dwelling is fit for habitation. If thereafter he carries out additional work to rectify the work already done, although s1 (5) does not say so expressly, the statutory obligation relating to the standard and quality of workmanship and materials applies equally to the remedial work as it did to the original work. Hence my view that there are two separate causes of action, the first relating to the quality of the original building work, and the second to the quality of the remedial work. For the purposes of the first cause of action, time starts to run when the dwelling is completed, and, for the second, when the remedial work is finished.

33. These arrangements make good practical sense. On occasions, defects in the building will not emerge until close to the expiry of the limitation period, and arranging and completing any necessary remedial work will be time-consuming. As an alternative to immediate litigation, the person to whom a duty is owed under s1 (1) may agree that the original builder or craftsman should remedy the defect, without running any risks in relation to limitation periods.

34. Accordingly, in relation to a claim arising from remedial work, two questions must be addressed. The first is whether its purpose is indeed rectification of defects in the original work. If it is, the second question which arises is whether the quality of the remedial work attains the prescribed statutory standards. The answer to both questions is fact-specific. In deciding the second question, the debate is not about or between misfeasance and nonfeasance, or action and inaction. Either may suffice, and the builder may be liable for omitting to do work which, for the purpose of rectifying work already done, it would be workmanlike to do (**Andrews v Schooling and Others** [1991] 1WLR 783). If, for example, the remedial work relates to a plumbing defect, it is unlikely that any link with a failure to observe and rectify an unidentified problem in the roof will be established. On the other hand, where the prescribed standard relating to damp has not been attained, liability may arise when, in the course of remedial work, the true cause of the problem with damp is not addressed, so that the remedial work is not carried out in a workmanlike way, and the dwelling house remains unfit for habitation. In such circumstances, time starts to run, not when the building is completed, but when the remedial work is finished.

35. I agree that on the facts as they are known to us, this appeal should be allowed.

Lord Justice Longmore:

36. Section 1(1) of the Defective Premises Act 1972 imposes a statutory obligation on a person to whom it applies (e.g. a builder or developer) to see that work, which he takes on for or in connection with a dwelling, is done not only in a workmanlike or professional manner with proper materials but is also done:- *"so that as regards that work the dwelling will be fit for habitation when completed".*

Mr Edwards-Stuart QC for the defendants submitted that this was an extension to the common law which would only have implied such an obligation into a contract between a building owner and a builder to build or complete a dwelling on the building owner's own land. Now under the 1972 Act a

builder or developer owes the statutory obligation, regardless of contract, to any person who acquires an interest in the dwelling and regardless of the ownership of land on which the dwelling is built.

37. Section 1(5) of the Act then contemplates there may be two causes of action. First, there is a cause of action for breach of the duty imposed by section 1(1) of the Act. That cause of action is deemed to have accrued at the time when the dwelling was completed. That may be some time before a potential claimant has acquired his interest. Secondly, there is a cause of action for breach of the statutory duty if the builder or developer *"does further work to rectify the work he has already done"*; in such a case, the cause of action *"in respect of that further work shall be deemed . . . to have accrued at the time when the further work was finished"*.

38. For the purposes of the preliminary issue, both parties accept:-
(1) that the two dwellings in the present case were susceptible to damp because the damp proof system was defective and that the dwellings were thus not fit for habitation when completed;
(2) that the defendants (to whom the Act applies) did further work to rectify the damp;
(3) that the defendants misdiagnosed the problem and, instead of rectifying the damp proof system, relaid surrounding flagstones and laid new drainage pipes;
(4) that the work done was done in a workmanlike and professional manner with proper materials, but did not rectify the damp which continued to exist.

Mr Edwards-Stuart submits that there is no cause of action "in respect of that further work" because that work done was itself done properly. There might be an extra-statutory obligation in tortious (or, if appropriate, contractual) negligence but no such allegation is pleaded; on the assumed facts there is, he submits, no second cause of action under the 1972 Act. I cannot agree.

39. The first cause of action contemplated by section 1(5) includes a cause of action against the builder or developer for failing to see that the work is done so that the dwelling will be fit for habitation. The proviso to section 1(5) says that if *"a person who has done work . . . does further work to rectify the work he has already done, any* ***such*** *cause of action in respect of that further work"* (my emphasis) accrues when the further work was finished. "***Such***" cause of action refers back to the words *"any cause of action"* at the beginning of section 1(5) and, therefore, includes a cause of action for failing to see that the work is done so that the dwelling will be fit for habitation. If that failure still exists after the further work done to rectify the work already done, it is a failure for which the statute gives a remedy and the cause of action in respect of that failure is a cause of action in respect of that further work and accrues when the further work is finished.

40. Take the common law position of a house-owner who contracts with a builder to build a house. The builder is obliged to build a house fit for habitation, see **Hancock v Brazier** [1966] 1 WLR 1317, 1332F per Lord Denning MR. If the house is not fit for habitation because it is damp and if the builder comes to rectify the work that he has done but fails to eliminate the damp because he misdiagnoses the cause of the damp he will be liable for that failure. It would be surprising if, in such circumstances, the house-owner did not have a second cause of action for failure to rectify the work previously done in such a manner that the house will be fit for habitation cf [1966] 1 WLR at page 1325E per Diplock LJ. Whatever the ordinary common law might be, however, there is no doubt that the 1972 Act grants a second cause of action and, on the facts here to be assumed, the second cause of action arises out of the failure properly to rectify work already done, since the damp proof system was not properly rectified despite efforts made to do so. It is, therefore, a "*cause of action in respect of that further work*" and accrued in May 1995 at the earliest. These proceedings are thus brought in time.

41. I agree, therefore, with Lord Justice Aldous and Lord Justice Judge that this appeal should be allowed.

Order: Appeal allowed; order to be set aside and the case remitted back to the trial judge for trial; the respondent to pay the appellant's costs of the appeal and below, such costs to be the subject of a detailed assessment in default of agreement; the order requiring the appellant's solicitors to show cause is set aside; Community Legal Services assessment. (Order does not form part of the approved judgment)

Mr K. Musaheb (instructed by D.P. Hardy & Co) for the Appellants
Mr A. Edwards-Stuart QC and Mr I. Swan (instructed by Bullivant Jones) for the Respondent