

Real Estate
Case Law Update
Rosling King LLP



Background to the Case

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In 2002 planning permission was granted (and subsequently renewed in 2006) to Mr Colin Smith, the owner of the freehold site at Waters Edge (and the father of the Defendants) to erect 40 holiday homes on the site. Mr Colin Smith (the “**Landlord**”) entered into a development agreement, for laying out and developing the 40 units, with each unit to be sold “*off-plan*” with a developer. The purchase monies were to be divided between the Landlord (granting a 999 year lease to the purchaser) and the developer, which would enter into a building contract with the purchaser for the erection of the unit on each plot.

The development agreement provided for the developer to incorporate a Management Company for the future management of the Common Parts, and subject to a clause within this agreement, it was agreed that on the sale of the last unit the Landlord would transfer the Common Parts to a Management Company. Each lease granted contained a clause setting out the various obligations on the Management Company regarding the repair and condition of the Common parts and the management of the site, subject to Clause 7 which contained a provision allowing the Landlord to carry out these obligations if the Management Company defaulted. All leases were granted on substantially the same terms.

In December 2018 the Landlord died and subsequently his children (the “**Defendants**”) were registered as the proprietor of the freehold site and inherited the Landlord’s obligations under the leases.

In May 2009 the developer went into voluntary liquidation, at a time when various parts of the development remained unfinished, with the Management Company being dissolved and struck off shortly after.

Following these events the tenants of the 24 completed units on the site formed a management committee to assume the role of the dissolved Management Company and decided to take on the responsibility of finishing the outstanding works on the site. They appointed a surveyor to provide a schedule of works and to oversee the tender process. The Defendants subsequently invoked Clause 7 within the Lease to carry out the works themselves and recover the costs from the tenants, requesting payments within certain time frames

Wild Duck (the “**Claimant**”), the tenant of five plots on the site, claimed that the Defendants were in breach of an implied term contained within the leases not to prevent the Management Company from carrying out its obligations. Whilst the Defendants accepted that the leases contained this implied terms they argued that they were not in breach, as their actions were permitted by the clause 7.

The Judge dismissed the claim and held that no act or combination of actions of the Defendants had the effect of preventing the Management Company from complying with their contractual obligations. In addition the Judge also held that, despite the Management Company nearly completing their tender process, there was still substantial further process to

be made as no contractor had been appointed and no arrangements for funding the completion of the Outstanding Works had been made. Due to this the Defendants were entitled to conclude that the Management Company's failure to perform allowed them to undertake the works themselves.

The Management Company appealed, claiming that there had been no failure to perform and that the Defendants had acted outside the scope of Clause 7.

The Appeal

The Court of Appeal found in favour of the Defendants and dismissed the appeal. With regards to the claim that there had been no failure to perform the Court of Appeal found that there was a failure to perform on behalf of the Management Company. Little progress had been made in relation to the outstanding works following the Developer's liquidation. The Court of Appeal confirmed that by appointing a surveyor and beginning the tender process they were, at most, preparing to carry out their obligations, not actually doing so. Therefore, there had been a failure to perform and the Defendants were justified invoking the provisos contained in Clause 7.

Secondly the Court of Appeal found that, although the Defendants were not strictly entitled to attach conditions to the works being carried out (in particular the demand for payment within a certain time) the Defendants were still acting within the scope of the provisions set out in Clause 7.

Comment

This case serves as a reminder of the confusion that can arise following a developer becoming insolvent during the construction of a development.

It is usually the case that, when a property is sold off plan, an agreement will be entered into and this agreement will contain build obligations on the developer. Completion will take place a set number of days following practical completion. It can also be the case, when the completion of a single unit within a development occurs, for the common parts of the development to remain unfinished. It is important for the conveyancer acting to ensure that their client's position is protected.

Wild Duck Limited v Smith [2018] EWCA Civ 1471 differed as the Leases of the units were granted before construction of the development began and therefore a significant cost of finalising and carrying out the outstanding works to the common parts would fall to the tenants of the completed units and such a burden would have an impact on the tenant's investments along with the future marketability of the tenant's property.

For further information, please contact [Ann Ebberson](#) or the Partner with whom you usually deal.