IN THE WESTMINSTER MAGISTRATES' COURT

REGINA (on the prosecution of London Borough of Newham)

-v-

CHAPLAIR LIMITED

Reasons

1. The Defendant is summonsed for the following offence:

   Between 1st April 2021 and 5th July 20201 (sic), having been served with an improvement notice dated 3rd September 2020 which became operative on 24th September 2020, you failed to comply with that notice in that you did not begin the remedial action specified in schedule 2, paragraphs 1 to 25 of the notice (**relating to the external facades of the Lumiere Building, 544 Romford Road, London E7 SAY**) by 2nd November 2020 and complete it by 31st March 2021.

   CONTRARY to Section 30 (1) and (3) of the Housing Act 2004

2. The summons makes clear that this prosecution relates only to the external facades. As the prosecution put it 'the summons relates to the second phase of Chaplair's failure to complete them by 31 March 2021.'

3. The prosecution (hereinafter, the LA), say that 'Subsequent inspections on ..... 8th April 2021, 27th April 2021, 18th May 2021 revealed that, although some mitigation measures had been put in place, they were incomplete and no works had commenced on the removal of hazardous cladding materials. '

   They say that the improvement notice had not, therefore, been complied with by the final completion date of 31st March 2021.

4. No issue is taken with the validity of the Improvement Notice.

5. I remind myself that the burden of proof falls upon the prosecution and they generally must prove their case beyond reasonable doubt, in other words, so that I am sure.

   In this particular case, the Defence relies on the statutory defence as at para 7 below. As regards this, the Defence must prove to the court, on the balance of probabilities,

that it had a reasonable excuse for not having done so pursuant to section 30(4) of the Housing Act 2004

Had the relevant works been completed by 31st March 2021?

6. The Defence, on the first day of trial indicated that they did 'not put the prosecution to strict proof that there was no compliance of the enforcement notice by the 31.03.2021' having previously indicated that the prosecution were indeed put to strict proof.

7. In any event, I am sure that the said inspections revealed that the required work has not been complied by the required date. This is, as the defence, state not an issue in dispute.

The Statutory Defence

8. The Defendant company argues that they ***had a reasonable excuse for failing to so comply***, pursuant to s.30(4) Housing Act 2004.

9. As a matter of law, the reasonable excuse must be objectively reasonable.

10. Per s.15(6) of the 2004 Act, such a defence of 'reasonable excuse' should not ordinarily raise matters that could have been the subject of an appeal against the notice.

    Any such appeal must be made to the First Tier Tribunal within 21 days of service of the notice. Permission may be sought to bring an appeal after that period, *per* Schedule 1 Part 3 para. and s.14(3) of the 2004 Act.

The Defence Argument

11. The Defence say: 'The timeline was delayed, primarily because Chaplair and Willmott Dixon were unable to reach agreement on the JCT contract terms. As described above, Willmott Dixon unilaterally proposed unacceptable amended contractual terms and thereafter refused to negotiate on those terms.

    Regardless of any amendments subsequently proposed by Chaplair, it was reasonable for Chaplair to follow the legal advice it was given about whether it could enter into contract with Willmott Dixon on Willmott Dixon's proposed terms. Ultimately, this meant that Willmott Dixon had to be replaced as the preferred contractor. '

    They also argue that there were funding issues and Network Rail had to agree to certain works which caused legitimate delay.

12. They argue they could not reasonably have complied with the notice before the required date because of the above issues.

The Relevant Evidence & Analysis

13. It is common ground that there was no statutory appeal against the terms of the Improvement Notice which, I should add, on the evidence was the only tool the LA had to remediate the cladding issue after Grenfell.

14. Whilst not a bar to pursuing the statutory defence, the Defendants could have argued against the terms of the notice at any time. Even if not initially within 21 days, I find they could have later sought permission upon the basis of the various issues as they unfolded. Whilst I agree that a failure to appeal is not fatal, I find it is a consideration in considering the reasonableness of the Defendant's actions, especially as they were advised by professionals throughout, both Chartered Surveyors and lawyers (though I note the limited retainer).

15. The Defendant (via its agent Salter Rex) did send an email to the LA in October 2020 for an 'extension of time' to comply. The request was overlooked by the LA but Ben Preko at Salter Rex stated in oral evidence that by December, 'in our mind, they weren't giving us an extension.' I disagree with the assertion, they were left hanging as suggested in closing submissions, to the contrary Rex Salter.

16. It is suggested that the failure to consider the application to vary was unfair and inequitable'.

    Insofar as any attempt (if there be one) to draw a distinction between Salter Rex and the Defendant company is concerned, I should state that a company can only act through human actors, their 'people' and officers. They had instructed Salter Rex to manage the block and whilst it is, of course, the criminal liability of the Defendant company that I must consider, they cannot avoid their legal responsibility through any attempt to blame their agents.

    Whilst not argued in explicit terms, it is important that the company understands that Salter Rex, as agents, were acting for and/ on behalf of the company and for the purposes of this case are effectively as one.

17. The Defendant company / Salter Rex did not raise the variation again and I find that they could not have been mislead in any way. Indeed, David Heasman, in oral evidence stated that 'they didn't get it' and 'didn't pursue it.'

    In evidence, it is clear they took the silence to be a refusal and were not mislead by the LA into thinking that they had their blessing in their non-compliance.

18. In terms of the argument that the LA could have itself granted an extension of time, Ian Dick stated in oral evidence that the LA were not fully clear on the funding issues and the project appeared to them to be on track till the December.

I find no clear evidence that the Defendant had clearly appraised the LA of the various issues such that they could properly and unilaterally have 'just granted an extension'. I find there was simply insufficient information being supplied to the LA for them to unilaterally vary and extend time.

19. Ian Dick, on behalf the LA stated that by December 2020, he was of the view that there was no way the time limits could be complied with. The LA contemplated the possibility of having to intervene and take over the building. They had concerns by December 2020 and certainly by 14.01.21, they were aware but that there was no contractor and there was disagreement on the contract but they were given no start date and unable to consider a revision.

20. Any criticism of the LA of a failure to unilaterally vary, is in my view, unfounded. The reasonable course would have been a detailed and direct appraisal of the situation to the LA with actual proposals. I find that never happened. Rather, there was ambiguity, lack of clarity and a lack of communication.

21. I deal at this point with suggestion that the LA through Ian Dick acknowledged 'the multiple difficulties that Chaplair faced and that said that provided Chaplair could demonstrate it was making good progress, LBN would not prosecute Chaplair.' I heard evidence on point from David Heasman and Philip Eyre.

22. It is submitted that a formal refusal of the application by the LA would have given rise 'to an obligation to point out the right to appeal and how that appeal could be made.'

23. David Heasman made it clear that it was not an undertaking by the LA but only an impression that he got. It might have been nieve of him, but if it could be seen that they were making genuine progress, they wouldn't prosecute.

    Philip Eyre, the solicitor at Glovers stated in oral evidence 'Then, he said, I heard him say, if Chaplair seen to make reasonable progress, then there wouldn't be a prosecution.' Mr Eyre's attendance note of 14 January makes no mention of that and no correspondence thereafter, makes mention of the same. He however added that it was not an undertaking or a promise, it was as not as high as that. He later described it as an 'impression.'

    Any such indication is not recorded in any of the various minutes of that 14 January Teams meeting.

    I note the defence case statement drafted through Glovers makes no mention of that.

24. Ian Dick, on point, stated that no such indication was given and that minutes make clear that the work needed to be completed by 31 March. Indeed, he re-iterated that the 'council was working in a vacuum of knowledge.'

25. I have to say I found Mr Dick compelling in his evidence and frustrated by the way that Chaplair interacted with the LA.

I have no doubt that he wanted to be supportive and would have appeared so, bearing in mind the alternative was that the LA would have to take over the building and carry out the remedial works themselves. That was a course they would have preferred not to adopt though were fearful that is what would happen in this case.

My Eyre may well have not been focussing on that aspect as it was beyond his retainer and he appeared to be vague in his precise recollection.

Nothing in correspondence or minutes confirms that it was said. Indeed, minutes were amended after the meeting to include reference to the possibility of future legal proceedings.

None of the above supports the defence assertion. Indeed, the amendment secured by Ian Dick on behalf of the LA rather suggests he had enforcement still very much in mind.

26. I however find that no indication was ever given at the 14 January meeting that there would be no prosecution in the terms suggested by the Defendants. I reject that defence argument.

27. I deal next with whether the time for compliance itself was too short. I accept that when the notice was issued the time period might not have been felt too short and hence no immediate appeal lodged at the First Tier Tribunal.

28. Along the way, various issues arose including the change of contractors due to legal advice from Philip Eyres on the revision of contract terms. The main contractor now sought to exclude its liability for the design and consequential losses having previously been the 'design and build contractor' under what had been, previously, the standard terms & conditions for such terms.

29. Philip Eyre, in his evidence, made clear that he was instructed on contractual matters and had no knowledge of the Improve Notice. He stated, in oral evidence, that the evidence, he gave was on options without knowing that there was a time limit and criminal sanction for non-compliance with an Improvement Notice. He stated that was never a factor in his advice though he added he would have given the same advice had he known as 'contractual issues trump' the non-compliance.

30. It may well have been that the advice from a contractual perspective would have been the same but had Glovers Solicitors known about the risk of criminal prosecution, they would have been bound to give advice on the risks of criminal sanction and give advice in that context. Whilst clients ordinarily ought to consider advice from their solicitors, I am left in no doubt that Messrs Glovers would have been required to give their contractual advice in that context and advise on options bearing that in mind. They could not ignore, in giving advice, the realities of an Improvement Notice even if that were not within their strict retainer. I find there to be a significant and serious failure by the Defendants in the instructions they gave to their solicitors. Philip Eyre conceded

that the contractual revisions would now mean that the main contractor, Wilmott Dixon, might now seek to evade contractual liability by blaming sub-contractors. The revision would mean that they would have to be joined making litigation more complex but he also accepted there would be liability insurance against which a claim could be made if any party ceased in business. Whilst I do not go behind the advice given, had Glovers known of the time limits for the work to be completed, it is impossible to envisage them not giving further advice and highlighting the consequences of delay and options.

31. As Philip Eyre, himself stated, 'it is open to a client to ignore advice'. I agree, especially where the client has further relevant knowledge of the risks of following legal advice that the solicitor is oblivious of.

    Whilst ordinarily, I might well say it is reasonable to follow legal advice, in these circumstances, the Defendant is unable, in my view to satisfy me that he was reasonable in doing so.

32. There was undoubtedly, delay in funding from government. The scheme post-Grenfell was new and a response to the issues that followed. Nonetheless, I am satisfied that it was open to the Defendants to seek the costs from the occupiers / tenants/ landlords and serve a s.20 notice. They were, perhaps, in their mind, compassionate in not doing so and sought government instead.

    One cannot, however, ignore the urgency of the works that were needed and urgently. Whilst it worked out in the end, there was no initial funding available for the works that needed to be undertaken. The Defendants had choices to make, and in my view, have failed to satisfy me that they made the reasonable one.

    I agree with the prosecution; they took a risk or a 'gamble' that the government would eventually pick up the bill.

33. The Defendants have failed to satisfy me that the decision to wait it out till government funding became available, was reasonable, bearing in mind the real danger that was posed to the occupiers of the building.

34. The fact is that because of all of the delay due to the above, especially change of main contractor, the necessary consents / licences from Network rail were delayed. In my view any inability to therefore complete the works as a result is due entirely to the decisions made by the Defendants and only once Lawtech, the new contractor, was on board. It is speculation that there would have been any problematic delay had those decisions not been made. It cannot amount to a reasonable excuse in the circumstances.

Decision

35. The prosecution have satisfied me so that I am sure that a valid Improvement Notice was served and that the Defendant company did not carry out the required remedial works relating to the external facades within the required period.

36. The Defendants have failed to satisfy me that they have reasonable excuse in failing to comply with the Improvement Notice.

37. I therefore find Chaplair Ltd guilty of the offence.

Tan Ikram CBE DL
Deputy Senior District Judge

18 October 2023