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Personal Injury Newsletter

Roundheads and Cavaliers

Andrew Hogan

24 The Ropewalk, Nottingham, NG1 5EF | **Tel:** +44 (0) 115 947 2581 | **Fax:** (0115) 947 6532
DX: 10060 Nottingham 17 | Email: clerks@ropewalk.co.uk | www.ropewalk.co.uk

One issue that arises from time to time in personal injury litigation is the question of whether an injured claimant must look to the tenant or landlord of premises where she sustained her injury in order to seek redress through a personal injury claim.

In the seminal decision of *Wheat -v- E Lacon and Co* [1966] A.C. 552 it was held that there could be more than one occupier of premises who may therefore owe the common duty of care to visitors under section 2 of the Occupiers Liability Act 1957, but the case also noted the principle known as the rule in *Cavalier -v- Pope*, which had been partially overruled by section 4 of the Occupiers Liability Act 1957, which was then itself repealed and replaced with the Defective Premises Act 1972.

The recent decision of the High Court in Essex County Council & Ors -v- Davies & Ors [2019] EWHC 3443 (QB) (12 December 2019) is a salutary example of the application of the rule and how careful consideration must be given to the question of what duties might be owed to an injured claimant in a landlord/tenant situation, particularly where factually there is scope to blame multiple parties as defendants.

The case involved an appeal from a very experienced judge and before that, noted personal injury practitioner at the Bar, HH Judge Roberts in the County Court at Central London and the appeal lay, as they do these days, not to the Court of Appeal, but to the High Court and was heard by Mr Justice Saini.

The facts of the case were summarised this way:

1. *This is an appeal against a number of orders made by His Honour Judge Roberts ("the Judge") consequent upon his judgment ("the Judgment") in favour of the Respondents in respect of their claims for injuries arising out of carbon monoxide poisoning.*

2. *These injuries were suffered by the Respondents when employed on the premises of the Second Appellant ("the College"), the tenant of Sawyers Hall Lane Campus in Brentwood, Essex ("the Premises"). The Third Appellant ("the Governing Body") was the landlord of the Premises until 31 August 2012 and the First Appellant ("Essex CC") was the landlord of the premises from that date onwards. The Judge held all three Appellants liable to the Respondents for damages.*

The issue was described by the High Court as follows:

3. *The main issue of law which arises on appeal is the scope of the well-known, but controversial, principle in Cavalier v Pope [1906] AC 428 (HL) which was itself drawn by the House of Lords from the earlier statement of Erle C.J in Robbins v Jones (1863) 15 C.B. (N.S):*

   "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term: for, fraud apart, there is no law against letting a tumbledown house, and the tenant's remedy is upon his contract if any."

The County Court judge had found for the claimants against the defendant landlords:

5. *The Judge decided that the principle in Cavalier v Pope did not stand in the way of the Respondents succeeding in their claim under the Occupiers Liability Act 1957 ("the 1957 Act") against the two*

landlords, Essex CC and the Governing Body who he found to be "occupiers" for the purposes of the Act. The Judge distinguished Cavalier v Pope and the main issue before me is whether he was right to do so. I will call this the "Cavalier v Pope Appeal". The College (the tenant of the Premises) does not appeal against the Judge's finding that it was liable as an occupier under the 1957 Act. So, whatever the outcome of the appeal the College will be liable to the Respondents for damages.

The High Court noted that the pleadings had been limited below:

17. *Before turning to consider the issues argued before me in more detail, it is appropriate to identify the shape of the Respondents' case based on the pleadings below. It was common ground that the sole cause of action being pursued against the First and Third Appellants was based on the 1957 Act and a breach of the duty owed to visitors under*
that Act. Specifically, the Appellants pleaded that each of the Respondents was an occupier of the Premises and that they, the Claimants, were visitors to the Premises. The First Appellant (Essex CC) and Third Appellant (the Governing Body) pleaded that they were simply landlords (at different times) of the Premises and were not "occupiers" owing the material duties under the 1957 Act.

18. *I pause here to emphasise that there was no case pleaded by the Respondents that there were other duties owed by the First and Third Appellants to the Respondents such as for example under common law negligence or the Defective Premises Act 1972.*

The reasons that the judge found the landlords were liable was as follows:

23. *Standing back from the detail, it seems that the following points were identified by the Judge as material to the Judge's conclusion that Essex CC and the Governing Body*
owed duties as occupiers:

    i) *As regards Essex CC, maintenance of the premises, including the boiler and heating system was undertaken by it (paragraph 141i). Maintenance was of the entire site i.e. Part A and Part B (paragraph 153). Essex CC had access to Part A and would regulate /check the radiators there (paragraph 155, 157).*

    ii) *In cross-examination witnesses (caretakers employed at the school) stated that they were employed by Essex CC (not the Governing Body) prior to 31 August 2012 (paragraph 141 ii – v), which was contrary to the (misleading) case Essex CC had advanced at trial (paragraph 152).*

    iii) *Essex CC carried insurance in respect of the Premises (paragraph 141 vi).*

    iv) *Essex CC was a Local Education Authority (paragraph 141 vii and 150 vi) and by this 'assumed a duty to maintain the premises' (paragraph 154). I pause here to note that no authority or statutory provision is cited to support this assertion (nor indeed was any such material cited to me on the appeal) and I do not consider it to be established.*

v) *In light of Wheat v Lacon [1966] AC 552 and Collier v Anglian Water Authority [1983] WL 21836 (CA), there can be more than one occupier of premises (paragraphs 143 – 144).*

vi) *Essex CC and the Governing Body 'presented themselves as one entity throughout the litigation' with common legal representation, insurance, a joint defence, joint expert evidence and lay witnesses (paragraph 150). Essex CC's employees were working with the Governing Body and they were jointly in control of the premises and the boiler room (paragraph 156).*

vii) *Cavalier v Pope was distinguishable as this claim is dealing with a large commercial site (paragraph 157).*

Departing from this reasoning, the High Court judge went on to explain why this was not so:

24. *Although the Judge was clearly entitled to make the findings of fact that he did, those findings did not give rise to a proper basis for distinguishing Cavalier v Pope and the cases following it. In my judgment, it is established (and binding) law that a landlord (acting qua landlord) does not owe a duty of care at common law or under the 1957 Act to its tenant or visitors of its tenant (in short, he is not an occupier owing duties when acting qua landlord). Those results follow from the rule in Cavalier v Pope [1906] AC 428 (HL) at pages 430 and 431.*

25. *The 1957 Act did not alter the rules of the common law as to the persons on whom a duty of care is imposed as an occupier, or to whom it is owed; what it did was to replace different levels of duty owed by an occupier towards different classes of visitor with a uniform "common duty of care" owed to all lawful visitors: see Shtern v Cummings [2014] UKPC 18, per Lord Toulson at [17]. Further, as explained in Clerk and Lindsell (22nd Edition) at para. 12-09, it is established that a landlord who lets premises to a tenant is treated as parting with all control and is not an occupier under the 1957 Act.*

26. *In my judgment, the rule operates even when a landlord undertakes to maintain the demised premises (and indeed if he makes regular use of his rights to enter and maintain a property). Although it is controversial, Cavalier v Pope is a decision of the House of Lords that binds me and bound the Judge. Further, the Court of Appeal in Boldack v East Lindsey DC (1999) 31 HLR 41 noted that Cavalier v Pope was entrenched and remained binding on that court (as it binds me and was binding on the Judge).*

27. *A landlord's duty in tort was previously contained in s.4 of the 1957 Act, long since repealed. It is now to be found in the Defective Premises Act 1972. It is not covered by s.2 of the 1957 Act. See Drysdale v Hedges [2012] EWHC 4131 at paragraphs 74 and 77.*

28. *Accordingly, I respectfully disagree with the Judge in his distinguishing of Cavalier v Pope on the grounds he set out between paragraphs 150 to 157 of the Judgment in finding Essex CC and the Governing Body were occupiers.*

The appeal court went on to explain in detail why the judge's factors did not point to the conclusion that he reached.

The case is interesting as the most recent iteration of the rule in *Cavalier -v- Pope* and as the judge hinted at in his judgment, arguments that there was a duty under the Defective Premises Act 1972 or a common law duty of care which can be argued to exist in any given situation by reliance on the principles of assumption of responsibility was not in issue before him. As a matter of prudence in cases involving multiple potential tortfeasors, unless an alleged duty is unarguable and thus strike-able if pleaded, it is wise to plead a case fully.

Another scenario where concepts of duties of care can become tangled, involves claims on a highway, which is not an adopted highway, so no duty arises under section 41 of the Highways Act 1980. As neither the Occupiers Liability Act 1957, nor the Occupiers Liability Act 1984 will apply in such a situation either, the tort of nuisance may have a particular value to an injured claimant, but one who will doubtless also plead a claim in negligence too.

Another issue on the appeal concerned the judge's finding that due to a part 36 offer being beaten, he would award penal interest at 10.5%. That aspect of the appeal got short shrift, the High Court judge directing himself in accordance with the applicable Court of Appeal authority:

> 44. *The task of challenging costs orders on appeal is a difficult one, as Counsel realistically accepted. The Appellants need to identify an error of law or of principle or some form of irrational exercise of discretion by the Judge. That will be particularly onerous when challenging a decision which simply follows what the rule prescribed as a default. I was taken in some detail through OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195 by Counsel for Second Appellant but do not consider that case to support the appeal. The Court of Appeal held that the power to award interest on costs (and the enhancement of the rate) was not to be exercised on a purely compensatory basis and a court was to be guided by the aim of achieving a fair result for the Claimant.*
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> 45. *As Sir Geoffrey Vos V-C explained (with my emphasis):*
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> > *"36. In my judgment, the use of the word 'penal' to describe the award of enhanced interest under CPR Part 36.14(3)(a) is probably unhelpful. The court undoubtedly has a discretion to include a non-compensatory element to the award as I have already explained, but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example, (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer. But there will be many factors that may be relevant. All cases will be different. Just as the court is required to have regard to "all the circumstances of the case" in deciding whether it would be unjust to make all or any of the four possible orders in the first place, it must have regard to all the circumstances of the case in deciding what rate of interest to award under Part 36.14(3)(a). As Lord Woolf said in the Petrotrade case, and Chadwick LJ repeated in the McPhilemy case, this power is one intended to achieve a fairer result for the claimant. That does not, however, imply that the rate of interest can only be compensatory. In some cases, a proportionate rate will have to be greater than purely compensatory to provide the appropriate incentive to defendants to engage in reasonable settlement discussions and mediation aimed at achieving a compromise, to settle litigation at a reasonable level and at a reasonable time, and to mark the court's disapproval of any unreasonable or improper conduct, as Briggs LJ put the matter, pour encourager les autres*

> 46. *So, as the Chancellor emphasised, all depends on the circumstances of the case and relevant factors include misconduct by the paying party. An additional factor is that an appeal court is highly unlikely to enjoy the benefit of a detailed knowledge of the conduct of the litigation, in contrast to the trial Judge.*

This aspect of the decision could be seen as re-iteration of the existing approach in the context of a discretionary decision by a judge at first instance, which any appeal court would be reluctant to interfere with. It does, however, illustrate how, in any case, where a part 36 offer is beaten at trial, the receiving party should not be shy about seeking the maximum permitted award of interest. Equally, the paying party should be looking to distinguish their case from the sort of factors noted in this one

Andrew Hogan

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The author can be reached at andrewhogan@ropewalk.co.uk.

His blog on serious injury can be found at www.seriousinjurybarrister.co.uk.