Neutral Citation Number: [2014] EWCA Civ 562

Case No: A1/2013/1149

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE TECHNOLOGY AND CONSTRUCTION COURT, QUEEN'S BENCH DIVISION
MR JUSTICE RAMSEY
HT-12-123

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2014

Before :

LORD JUSTICE JACKSON
LORD JUSTICE AIKENS
and
LORD JUSTICE PATTEN

- -

Between :

MANOLETE PARTNERS PLC	**Claimant/ Respondent**
- and -	
HASTINGS BOROUGH COUNCIL	**Defendant/ Appellant**

- -
- -

Mr Steven Gasztowicz QC and **Mr Jack Parker** (instructed by **Hastings Borough Council Legal Services**) for the **Appellant**
Mr Samuel Townend (instructed by **Gaby Hardwicke**) for the **Respondent**

Hearing dates: 22nd November 2013 and 3rd April 2014

- -

Approved Judgment

Lord Justice Jackson:

1. This judgment is in six parts, namely:

Part 1. Introduction

2. This is an appeal by a local authority against a decision that it is liable to pay compensation to the operators of a business on a seaside pier, which the Council had temporarily closed to the public in the exercise of its statutory powers. The principal issue in the appeal is whether the operators of the business on the pier were "in default" within the meaning of section 106 (1) of the Building Act 1984 ("the 1984 Act").

3. The claimant in the action and respondent in the Court of Appeal is Manolete Partners Plc ("Manolete"). Manolete brings its claim as the assignee of Stylus Sports Ltd ("Stylus"). The defendant in the action and appellant in this court is Hastings Borough Council ("the Council").

4. Ravenclaw Investments Incorporated ("Ravenclaw") is a company registered in Panama, which will feature in the narrative. Boss Management UK Ltd ("BM") has acted as Ravenclaw's agent in the UK.

5. As explained later in this judgment, the 1984 Act draws together a number of provisions concerning the construction and maintenance of buildings. Part I provides for the making of building regulations. Part II deals with supervision of construction work. Part III deals with disparate matters concerning buildings. Part IV collects together a number of general provisions.

6. Within Part III of the 1984 Act, section 76 deals with defective buildings and sections 77-78 deal with dangerous buildings. The focus of section 76 is upon buildings which are injurious to health, rather than liable to cause physical injury: see *R v Bristol City Council, ex parte Everett* [1999] 1 WLR at 1180H, per Buxton LJ. Sections 77 and 78, on the other hand, are concerned with buildings which have become dangerous because their structure is failing.

7. Section 77 of the 1984 Act provides:

> "**Dangerous building**
>
> (1) If it appears to a local authority that a building or structure, or part of a building or structure, is in such a condition, or is used to carry such loads, as to be dangerous, the authority may apply to a magistrates' court, and the court may —
>
> (a) where danger arises from the condition of the building or structure, make an order requiring the owner thereof —
>
> (i) to execute such work as may be necessary to obviate the danger or,
>
> (ii) if he so elects, to demolish the building or structure, or any dangerous part of it, and remove any rubbish resulting from the demolition, or
>
> (b) where danger arises from overloading of the building or structure, make an order restricting its use until a magistrates' court, being satisfied that any necessary works have been executed, withdraws or modifies the restriction.
>
> (2) If the person on whom an order is made under subsection (1)(a) above fails to comply with the order within the time specified, the local authority may —
>
> (a) execute the order in such manner as they think fit, and
>
> (b) recover the expenses reasonably incurred by them in doing so from the person in default,
>
> and, without prejudice to the right of the authority to exercise those powers, the person is liable on summary conviction to a fine not exceeding level 1 on the standard scale."

8. Section 78 of the 1984 Act provides:

> "**Dangerous building – emergency measures**
>
> (1) If it appears to a local authority that—
>
> (a) a building or structure, or part of a building or structure, is in such a state, or is used to carry such loads, as to be dangerous, and
>
> (b) immediate action should be taken to remove the danger, they may take such steps as may be necessary for that purpose.

(2) Before exercising their powers under this section, the local authority shall, if it is reasonably practicable to do so, give notice of their intention to the owner and occupier of the building, or of the premises on which the structure is situated.

(3) Subject to this section, the local authority may recover from the owner the expenses reasonably incurred by them under this section.

(4) So far as expenses incurred by the local authority under this section consist of expenses of fencing off the building or structure, or arranging for it to be watched, the expenses shall not be recoverable in respect of any period—

(a) after the danger has been removed by other steps under this section, or

(b) after an order made under section 77(1) above for the purpose of its removal has been complied with or has been executed as mentioned in subsection (2) of that section.

(5) In proceedings to recover expenses under this section, the court shall inquire whether the local authority might reasonably have proceeded instead under section 77(1) above, and, if the court determines that the local authority might reasonably have proceeded instead under that subsection, the local authority shall not recover the expenses or any part of them.

(6) Subject to subsection (5) above, in proceedings to recover expenses under this section, the court may –

(a) inquire whether the expenses ought to be borne wholly or in part by some person other than the defendant in the proceedings, and

(b) make such order concerning the expenses or their apportionment as appears to the court to be just,

but the court shall not order the expenses or any part of them to be borne by any person other than the defendant in the proceedings unless it is satisfied that that other person has had due notice of the proceedings and an opportunity of being heard.

(7) Where in consequence of the exercise of the powers conferred by this section the owner or occupier of any premises sustains damage, but section 106 (1) below does not apply because the owner or occupier has been in default –

(a) the owner or occupier may apply to a magistrates' court to determine whether the local authority were justified in

> exercising their powers under this section so as to occasion the damage sustained, and
>
> (b) if the court determines that the local authority were not so justified, the owner or occupier is entitled to compensation, and section 106 (2) and (3) below applies in relation to any dispute as regards compensation arising under this subsection."

9. Section 106 of the 1984 Act is within Part IV of the Act. It provides:

> "**Compensation for damage**
>
> (1) A local authority shall make full compensation to a person who has sustained damage by reason of the exercise by the authority, in relation to a matter as to which he has not himself been in default, of any of their powers under this Act.
>
> (2) Subject to subsection (3) below, any dispute arising under this section as to the fact of damage, or as to the amount of compensation, shall be determined by arbitration."

10. In this judgment I shall refer to the Occupiers Liability Act 1957 as "the 1957 Act". I shall refer to the Health and Safety at Work Act 1974 as "the 1974 Act". The Council relies upon alleged breaches of those two Acts as constituting "default" within section 106 (1) of the 1984 Act.

11. After these introductory remarks, I must now turn to the facts.

Part 2. The facts

12. Hastings is a town in East Sussex with a long and distinguished history. In the Victorian era, following the construction of the railways, Hastings became a popular seaside resort. In 1872 a pier was constructed to improve the leisure amenities available to residents and visitors. That pier is the subject of the present litigation.

13. In the late twentieth century Hastings Pier Company Ltd was the owner of the pier. In 1999 that company went into creditors' voluntary liquidation. Ravenclaw then became the freehold owner of the pier. Ravenclaw let out various units on the pier to companies carrying on business in the leisure sector.

14. By leases dated 14th August and 10th October 2001 Ravenclaw let units C2 and C15 on the pier to Stylus. Stylus operated a bingo hall in unit C2 and an amusement arcade in unit C15. These two units stood at the near end of the pier, which was closest to the town.

15. Clause 5.3 of the lease dated 14th August 2001 imposed repairing obligations on Ravenclaw as landlord. These included "repairing, maintaining and when requisite

modifying or renewing and rebuilding the structure (including the support structure roof structural and load bearing walls structural columns beams slabs and floors and the exterior of the building…".

16. In about 2004 Stylus became concerned about the structural integrity of the pier and commissioned a full structural engineering survey of the pier by Hamill Davies Limited, who produced a report ("the HDL report") in September 2004. Stylus provided that report to Ravenclaw in an attempt to make Ravenclaw carry out the repairing obligations under the leases. In January 2005 Stylus provided the HDL report to the Council in an effort to persuade the Council to act to require Ravenclaw to carry out the required repairs and maintenance.

17. The HDL report revealed that urgent work was required to repair piles at the far end of the pier. These piles were some distance beyond the bingo hall and the amusement arcade. The report also revealed that further work was needed to the structure of the pier in the vicinity of the bingo hall and amusement arcade. This further work was not immediately urgent, but would need to be completed within one year.

18. During 2004 and early 2005 Ravenclaw took no steps to remedy the structural defects. The Council had discussions with Ravenclaw's agents, but these did not result in any immediate action. The structure of the pier continued to deteriorate. Meanwhile the public continued to walk along the pier and to use its facilities. The bingo hall and the amusement arcade remained open for business, as did other units on the pier.

19. In the winter of 2005-2006 Ravenclaw undertook limited works of repair. No details of these works are available, but it is clear that they did not resolve the problems.

20. In May 2006 the Council noted that pieces of metal had fallen from the underside of the pier. The Council served a notice on Ravenclaw requiring it to undertake a survey of the pier structure.

21. In June 2006 the Council received a report which it had commissioned from Gifford, a firm of independent structural engineers. This report identified a number of serious structural defects and indicated that the pier may no longer be safe for public use.

22. In June 2006 the Council became concerned because a big event was due to be held in a nightclub at the far end of the pier on 17th June. Some 500 paying guests were due to attend that event. Also a boot fair was planned. In addition to these events large numbers of people were likely to walk along the pier on sunny days.

23. On 15th June the Council asked BM, as agents for Ravenclaw, to close off the pier to the public. Neither BM nor Ravenclaw complied with that request. On 16th June 2006 the Council closed the pier to the public. The Council achieved this by erecting a barrier across the entrance to the pier with a notice saying "danger keep out". On the same day the Council delivered a letter to each of the tenants of units on the pier. This letter explained that the pier was being closed to the public because the structure was no longer safe to carry large numbers of people.

24. In closing the pier to the public, the Council was exercising its power to take emergency measures under section 78 (1) of the 1984 Act. This closure was a

temporary arrangement, which protected the public until the Council were able to obtain a court order.

25. On 16th June 2006 the Council made an application to Hastings Magistrates Court pursuant to section 77 (1) of the 1984 Act for an order prohibiting public access to the pier until remedial works had been carried out. The Council named Ravenclaw as defendant in the summons which it issued.

26. The initial hearing at the Magistrates Court took place on 21st June 2006. Mr Pooni of BM attended on behalf of Ravenclaw. He had only had two days in which to consider the evidence. A representative of Stylus also attended and explained that his company wished to be involved in the proceedings.

27. The Magistrates Court proceedings were adjourned initially until 9th August and ultimately until 12th September. There are disputes as to who was responsible for such a lengthy delay of the proceedings, but it is not necessary to explore that aspect.

28. The final hearing took place in Hastings Magistrates Court on 12th September 2006. The court made an order pursuant to section 77 (1) (b) of the 1984 Act prohibiting public access to the pier until the necessary remedial works had been carried out. That order was subsequently upheld on appeal, albeit with minor variations.

29. Stylus was understandably anxious that Ravenclaw should carry out the necessary remedial works as soon as possible. Accordingly it brought proceedings in the Chancery Division to compel Ravenclaw to carry out those works. Ravenclaw did not defend the proceedings. On a summary judgment application Stylus obtained an order directing Ravenclaw to carry out the works. Ravenclaw did not comply with that order. The court subsequently made an order permitting Stylus to carry out the works itself and to recover the costs from Ravenclaw.

30. Stylus duly carried out the necessary remedial works to the pier and obtained judgment against Ravenclaw for the costs of those works. Unfortunately Ravenclaw had no assets in this jurisdiction apart from the pier and that was subject to a charge in favour of Irish Nationwide Building Society. Stylus was unable to enforce its judgment against Ravenclaw.

31. Once the remedial works were complete the Hastings Magistrates Court varied its order under section 77 (1) (b) of the 1984 Act, so as to permit public access to the pier. The pier was then re-opened to the public. Stylus resumed operating its bingo hall and amusement arcade at units C2 and C15.

32. Stylus' solicitors notified the Council that it was making a claim for compensation pursuant to section 106 (1) of the 1984 Act. Stylus sought to recover the losses which it had suffered as a result of the closure of the pier between 16th June and 12th September 2006. The Council rejected that claim in correspondence.

33. In late 2011 Stylus went into liquidation. On 3rd January 2012 the liquidator of Stylus assigned Stylus' claim against the Council to Manolete. The Council, having been given notice of the assignment, continued to resist the claim.

34. In those circumstances Manolete commenced the present proceedings.

Part 3. The present proceedings

35. By a claim form issued in the Technology and Construction Court on 19th April 2012 Manolete sought a declaration that the Council was liable to pay compensation pursuant to section 106 of the 1984 Act. Manolete asserted that the Council was liable to pay such compensation in respect of the loss and damage caused to Stylus' business by reason of the Council's exercise of its powers under section 78 of the 1984 Act between 16th June and 12th September 2006.

36. Manolete brought these proceedings pursuant to Part 8 of the Civil Procedure Rules, because there appeared to be no substantial dispute of fact between the parties in relation to liability issues. Any dispute as to quantum of damages would be determined by arbitration under section 106 (2) of the 1984 Act.

37. The Council defended Manolete's claim on a number of grounds. The Council's principal defence ran as follows. Stylus took a lease of the pier after the end of its design life from a company registered outside the jurisdiction. Stylus was aware by 2004 that the pier had serious structural problems. Nevertheless Stylus continued to operate its bingo hall and amusement arcade on the pier. This exposed both Stylus' employees and members of the public to danger. Stylus took no or no adequate steps to ensure that the pier was repaired until 2007. Therefore during 2006 Stylus was in breach of its duties under the 1957 Act and the 1974 Act. Furthermore, if the Council had not closed off the pier to the public, Stylus would have continued to be in breach of those duties. Accordingly Stylus was "in default" within the meaning of section 106 (1) of the 1984 Act. Therefore neither Stylus before the date of assignment nor Manolete subsequently were entitled to recover compensation.

38. The Council advanced a separate defence to the effect that, absent section 78 of the 1984 Act, its conduct did not constitute a tort. Therefore Stylus would have had no cause of action against the Council for fencing off the pier, even if the Council had not invoked section 78.

39. The action was tried by Mr Justice Ramsey, who delivered his reserved judgment on 12th April 2013. The judge held that even if Stylus was in breach of its duties under the 1957 Act or the 1974 Act, that did not constitute "default" within the meaning of section 106 (1) of the 1984 Act. The word "default" in that context meant default in relation to the provisions of the 1984 Act.

40. Accordingly the judge rejected the Council's principal defence. The judge also rejected the argument that, absent section 78, the Council's conduct would not constitute an actionable tort. He also rejected certain other defences advanced by the Council, which are no longer in issue. In the result the judge gave judgment in favour of Manolete. He granted the following declaration:

> "the Defendant is liable to the Claimant to make full compensation under section 106 of the Building Act 1984 for any damage sustained by reason of the exercise by the Defendant of its powers under Section 78 of the Building Act 1984 in preventing all public access to Stylus Sports Limited's premises on Hastings pier between 16 June 2006 and 12 September 2006."

41. The Council was aggrieved by the judge's decision. Accordingly it appealed to the Court of Appeal.

Part 4. The appeal to the Court of Appeal

42. By an appellant's notice dated 1st May 2013 the Council advanced two criticisms of Mr Justice Ramsey's judgment. I would summarise those criticisms as follows:

    i) Stylus was "in default" within the meaning of section 106 of the 1984 Act. The judge erred in holding otherwise.

    ii) The judge erred in holding that, absent section 78 of the 1984 Act, Stylus would have had a good cause of action against the Council. Any action in nuisance which Stylus may have brought against the Council would have been barred by the *ex turpi causa* rule.

    I shall refer to these two lines of argument as ground (i) and ground (ii).

43. The appeal was heard on 22nd November 2013 and 3rd April 2014. Mr Steven Gasztowicz QC appeared for the Council, as he had done in the court below. In the Court of Appeal Mr Gasztowicz was leading Mr Jack Parker, whereas at first instance his junior was Ms Clare Parry. Mr Samuel Townend appeared for Manolete, as he had done in the court below. I am grateful to counsel for their industrious research, as well as their helpful oral and written submissions.

44. The legislation which the court is called upon to construe has its origins in the nineteenth century and has been the subject of various re-enactments and revisions. Where Parliament re-enacts earlier statutory provisions in substantially the same terms, it is legitimate to have regard to those earlier statutory provisions and any judicial decisions concerning them as an aid to construction: see *Bennion on Statutory Interpretation* (fifth edition, 2008), pages 604-607.

45. Before tackling the two grounds of appeal, I shall first review the relevant legislative history.

Part 5. The legislative history

46. During the early nineteenth century there was no uniform system either for regulating the construction of new buildings or for dealing with dangerous buildings. Individual local authorities adopted their own local Building Acts and Improvement Acts. Statutes of national application dealt with matters such as public health and sanitation.

47. The Metropolitan Buildings Act 1844 regulated the construction of buildings in London. Sections 40 to 44 imposed upon the City authorities the power and the duty to shore up dangerous buildings, to obtain court orders for repair and, if necessary, to carry out works at the owner's expense.

48. The Town Improvement Clauses Act 1847 ("the 1847 Act") applied to specified towns outside London. Section 75 of the 1847 Act provided that the Surveyor of Commissioners must, in the case of a building deemed by him to be in a ruinous and

dangerous state, immediately "cause a proper hoard or fence to be put up for the protection of passengers" and thereafter require the owners and occupier to "take down, repair or secure" the building. If such work was not carried out the Surveyor could make a complaint to the justices and obtain an order requiring the owner, or "in his default" the occupier to carry out the works. If no such owner or occupier could be found within the time specified by the justices, the Commissioners could carry out the works themselves "and all the expenses of putting up every such fence, and of taking down, repairing, rebuilding, or securing such building, wall, or other thing, shall be paid by the Owner thereof."

49. The Public Health Act 1875 ("the 1875 Act") was a major piece of Victorian legislation, dealing with numerous public health issues and building matters. Section 157 empowered urban authorities to make byelaws regulating new building works. This provision is the precursor of the modern power to make building regulations. The byelaws made under section 157 sat alongside a variety of Local Improvement Acts and Building Acts, all of which remained in force. Section 160(3) of the 1875 Act preserved and incorporated section 75 of the 1847 Act in respect of dangerous buildings.

50. Section 308 of the 1875 Act provided:

> "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of twenty pounds, the same may at the option of either party be ascertained by and recovered before a court of summary jurisdiction."

This provision for compensation is substantially the same as section 106 of the Building Act 1984. In particular it includes the phrase "in relation to any matter as to which he is not himself in default". This is almost identical to the phrase which the court is required to construe in the present case, namely "in relation to a matter as to which he has not himself been in default". I shall refer to this phrase as it appears in both Acts as "the default proviso".

51. The interpretation and effect of the default proviso arose for consideration in *Hobbs v Winchester Corporation* [1910] 2 KB 471. In that case a butcher sold meat unfit for human consumption. A justice of the peace, exercising his powers under section 117 of the 1875 Act, ordered the meat to be destroyed. The butcher was acquitted of any offence, because at the material time he did not know that the meat was unfit for human consumption. The butcher claimed compensation under section 308 of the 1875 Act. The Court of Appeal rejected the claim holding that the butcher was "in default". It is clear that this default was a breach of the butcher's obligations under the 1875 Act: see Farwell LJ at 481 and Kennedy LJ at 482.

52. Mr Gastowicz for the Council submits that the default proviso in the 1875 Act cannot be confined to breaches of obligations under the 1875 Act. He points out that in many instances a building owner would be in breach of local Building Acts and Improvement Acts. If the local authority intervened in order to protect public safety, it would be absurd if the building owner could recover compensation under section 308. I accept that submission. In my view the default proviso in the 1875 Act was referring to a default under the 1875 Act or related Acts.

53. The Public Health Act 1936 ("the 1936 Act"), like its predecessor half a century earlier, was another piece of major social legislation. Section 58 of the 1936 Act replaced section 75 of the 1847 Act and section 160(3) of the 1875 Act. Section 58 of the 1936 Act is broadly similar to sections 77 and 78 of the Building Act 1984. In particular section 58(3) of the 1936 Act empowered local authorities to take direct action by shoring up or fencing off dangerous buildings.

54. Section 278 of the 1936 Act was a compensation provision in substantially the same terms as section 308 of the 1875 Act and section 106 of the 1984 Act. The wording of the default proviso in the 1936 Act is identical to the wording in the 1984 Act.

55. Section 61 of the 1936 Act was the successor to section 157 of the 1875 Act. This section empowered local authorities to make byelaws regulating building work. Not all local authorities chose to exercise this power. A number of the old local statutes remained in force to regulate building works. In my view a building owner who was in breach of either the old local statutes or the new building byelaws would be "in default" for the purposes of section 278 of the 1936 Act.

56. The Public Health Act 1961 ("the 1961 Act") removed the power of local authorities to make byelaws under section 61 of the 1936 Act. Instead the 1961 Act empowered the Minister to make building regulations. The first set of nationwide building regulations came into force in 1966. At the same time the various local statutes which regulated building works in specific areas were revoked: see the Building Regulations (Local Enactments) Order 1966.

57. Sections 24 and 25 of the 1961 Act gave local authorities powers to deal with dangerous buildings. These provisions covered the same ground as section 58 of the 1936 Act (part of which was preserved) and sections 77 and 78 of the 1984 Act.

58. The 1961 Act did not contain a fresh provision for compensation. Instead it preserved section 278 of the 1936 Act.

59. The Health and Safety Act at Work Act 1974 preserved the pre-existing regimes with some modest amendments. For present purposes, it is not necessary to review the 1974 Act in any detail.

60. The Building Act 1984 consolidated and updated many of the provisions which I have discussed above. Part I of the 1984 Act replaces sections 4-11 of the 1961 Act. This Part empowers the Secretary of State to make building regulations and contains detailed provisions in respect of such regulations. Part II of the 1984 Act provides for the supervision of building work. Part III of the 1984 Act contains other provisions about buildings. Part III includes sections 76-79, which relate to defective and dangerous buildings, as noted in the first Part of this judgment.

61. Part IV of the 1984 Act contains a number of general provisions. These include section 106, the compensation provision which I have set out in the first Part of this judgment.

62. It is significant that Part I of the 1984 Act relates to new building works, including works of alteration and extension. Part III on the other hand contains provisions in respect of existing buildings, whether or not they have been the subject of recent building works. It is also important to note that the 1984 Act is not entirely novel legislation. It contains many provisions which have featured in statutes since the Victorian age.

63. After this review of the legislative history, I must now turn to the first ground of appeal. That raises the question whether Stylus was "in default" within the meaning of section 106 of the 1984 Act.

Part 6. Was Stylus in default within the meaning of section 106 of the Building Act 1984?

64. It is first necessary to consider whether any party was in breach of the Building Regulations made under Part I of the 1984 Act. At the material time the Building Regulations in force were the Building Regulations 2000.

65. Regulation 4 of the Building Regulations 2000 required building works to comply with schedule 1 to the Regulations. Part A of schedule 1 required building structures to be of adequate load bearing capacity. The effect of Regulations 3(2) and 4 was that repair works only came within the ambit of the regulations to a limited extent.

66. It is known that Ravenclaw carried out remedial works in the winter of 2005-2006. There is no evidence as to what those remedial works comprised. Accordingly it is not clear whether they fell within the scope of the Building Regulations. It is not known whether Ravenclaw was in breach of the Building Regulations, although this is a possibility.

67. None of those remedial works were carried out inside the two units demised to Stylus. Nor did Stylus carry out any of those remedial works. Therefore Stylus was not in breach of the Building Regulations.

68. Stylus was not in breach of any other obligation imposed by the Building Act 1984. The party which came under a duty to repair the pier pursuant to the leases and pursuant to section 77 of the 1984 Act was Ravenclaw (the landlord), not Stylus (one of the tenants). The fact that Stylus subsequently stepped in and rectified the defects cannot alter that analysis of the statutory position in 2006.

69. One matter debated in argument was whether Stylus ought on or before 16th June 2006 to have fenced off the front end of the pier, so that the general public could not walk onto it. If Stylus could be criticised for failing to do this, might the Council have been entitled to recover the (no doubt modest) fencing costs against Stylus pursuant to section 78(6) of the 1984 Act?

70. I have come to the conclusion that Stylus cannot be criticised in this respect and would (if sued) have had no liability for fencing costs under section 78(6). First, Stylus was merely one of the business tenants operating on the pier. Stylus had no

entitlement to block off access to the pier generally or to prevent members of the public walking to the premises of other business tenants. Secondly, in June 2006 it was only the Council who had up-to-date expert evidence as to the condition of the pier. The Council never asked Stylus to fence off the front end of the pier. Very properly the Council put that request to the pier owner, Ravenclaw, not to any of the tenants.

71. It follows from the foregoing analysis that in June 2006 Stylus was not in breach of any obligations arising under the 1984 Act.

72. Mr Gasztowicz for the Council contends that Stylus was "in default" within the meaning of section 106 because in June 2006 Stylus was admitting the public to dangerous premises. Stylus was thereby in breach of its duty owed to visitors under section 2 of the Occupiers' Liability Act 1957. Stylus was also in breach of its duties owed to employees under sections 2 and 3 of the Health and Safety at Work Act 1974. Those latter breaches of duty constituted criminal offences under section 33 of the 1974 Act.

73. Mr Townend for Manolete does not accept that Stylus was in breach of either the 1957 Act or the 1974 Act. Leaving that aside, however, he contends that "in default" in section 106 of the 1984 Act means in breach of obligations imposed by or arising under the 1984 Act. Accordingly, the Council's principal line of defence fails for the reasons stated by the judge.

74. On this issue, I prefer the submissions of Mr Townend. It is a principle of construction that any statute should be construed as a whole. Where the same phrase occurs more than once it should generally be construed in the same way on each occasion: see *Bennion* at page 1160. The phrase "in default" occurs in three significant places in the 1984 Act, namely in section 77(2)(b), section 78(7) and section 106(1). In both sections 77(2)(b) and sections 78(7) "default" has a narrow meaning. It clearly refers to a failure to perform obligations under the 1984 Act.

75. This circumstance is a pointer towards construing "default" in section 106 narrowly, namely as meaning breach of an obligation under the 1984 Act.

76. Mr Gasztowicz makes the point that in section 308 of the 1875 Act and section 278 of the 1936 Act the word "default" had a wider meaning. It must have included breaches of a number of other local statutes regulating building works. I accept that argument as far as it goes. On the other hand those other statutes were directed to the same subject matter and were intended to operate in parallel with the 1875 Act and 1936 Act. The position now is different. There are no local bye-laws or parallel statutes directed to the same subject matter as the 1984 Act. The 1984 Act and the regulations made under it are comprehensive. I therefore do not accept that Mr Gasztowicz's historical argument points towards a broad construction of "in default" in section 106 of the 1984 Act.

77. The decision of the Court of Appeal in *Hobbs v Winchester Corporation* (discussed in Part 5 above) suggests that "default" in section 308 of the 1875 Act meant a breach of obligations arising under the 1875 Act.

78. Counsel have referred us to a number of authorities on the meaning of "default" in statutory provisions other than the compensation provision of the 1984 Act and its predecessor statutes. I bear all those authorities in mind, but they do not ultimately affect the outcome of this case.

79. Having considered counsel's competing submissions, I come to the same conclusion as the judge. The phrase "in default" in section 106 of the 1984 Act means in breach of an obligation arising under the 1984 Act. The provision does not require the court or the arbitrator to conduct a wide ranging review of other legislation and the common law in order to see whether the claimant is in breach of any duties arising outside the 1984 Act.

80. Mr Gasztowicz urges that the local authority should not be obliged to compensate Stylus for being prevented from admitting the public to dangerous premises. Whilst I have some sympathy with that argument, this cannot affect the operation of the statutory scheme. The true culprit, Ravenclaw, is outside the jurisdiction and effectively beyond the reach of any enforcement procedures. The court is faced with the familiar problem of deciding which of the surviving parties should bear the loss caused by the culprit. The answer to that question is determined by the statutory scheme.

81. Stylus has acted responsibly at all stages. It did its utmost to compel the landlord to carry out remedial works. Ultimately it stepped into the breach and did the works itself. If the Council had wished to avoid liability to pay compensation under section 106, it could have brought proceedings under section 77 of the 1984 Act sooner and thereby avoided the need to take emergency action under section 78.

82. Finally, on this point, Mr Gasztowicz's general arguments will still be available at the quantum hearing before the arbitrator. The Council will be entitled to argue that even if it had not fenced off the pier, Stylus could have made little use of its two units.

83. Let me now draw the threads together. Essentially for the same reasons as the judge, I conclude that Stylus was not "in default" within section 106 of the 1984 Act. I therefore reject the first ground of appeal. I must now move on to the second ground.

Part 7. Absent section 78 of the 1984 Act, did Stylus have a good cause of action against the Council?

84. The judge dealt with this issue at paragraphs 19 to 27 of his judgment. He began by noting it was common ground that:

> "The Council must do something which, absent the power given to it under s.78 of the 1984 Act, would amount to a good cause of action which would be actionable by the Claimant for the damage suffered."

85. As the judge explained, the rationale for this proposition is that if the Council were entitled to act as it did in any event, it would not need to rely upon section 78 of the

1984 Act. In those circumstances Stylus would not have suffered damage by reason of the Council's exercise of its powers under section 78.

86. The judge held that, absent section 78, Stylus would have had a cause of action against the Council. This was because the Council put a barrier across the access to the pier and closed the pier to the public. The Council thereby interfered with the right of way which had been given to Stylus under the leases. The judge noted that two earlier authorities supported his conclusion namely, *Lingké v Mayor of Christchurch etc* [1912] 3 KB 595 and *Andreas Leonidis v Thames Water Authority* (1979) 11 BLR 16. *Lingké* concerned a claim for compensation under section 308 of the Public Health Act 1875. *Andreas Leonidis* concerned a claim for compensation under section 278 of the Public Health Act 1936. Those statutory provisions are the precursors of section 106 of the Building Act 1984, as explained in Part 5 above.

87. Mr Gasztowicz submits that the judge's conclusion is erroneous. He submits that the *ex turpi causa* rule would have prevented Stylus from bringing a claim against the Council for barring access to units C2 and C15. It would have been contrary to the Occupiers' Liability Act 1957 and the Health and Safety at Work Act 1974 for Stylus to admit the public to those premises.

88. The leading case on *ex turpi causa* is now *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 AC 1339. In that case G suffered post-traumatic stress disorder ("PTSD") as a result of a railway accident caused by the defendants' negligence. Whilst suffering from PTSD he committed manslaughter. G claimed damages in respect of the various losses which he had suffered as a result of that offence and its aftermath. The Supreme Court held that the *ex turpi causa* rule defeated the claim.

89. Lord Hoffmann (with whom Lord Phillips and Lord Scott agreed) stated that the narrow version of the *ex turpi causa* rule defeated G's claims for financial losses caused by his arrest and subsequent conviction. The wider version of the rule defeated G's claim for an indemnity in respect of his liability in damages to the dependants of the deceased man. The wider version of the rule is that a person should not be compensated for the consequences of his own criminal conduct. The precise formulation of the wider version of the rule is not easy, as Lord Hoffmann demonstrated in [54].

90. Let me now return to the present case. Between June and September 2006 the pier was safe for use by a moderate number of people, but was not safe for carrying large crowds. Despite having erected a barrier on 16th June the Council permitted Stylus, the other tenants and their various employees to walk along the pier.

91. As previously explained, the motivation for the Council's closure of the pier to the public on 16th June 2006 was the likelihood of large crowds accessing the pier on and after 17th June for reasons unconnected with Stylus' business.

92. As at 16th June 2006 Stylus had not incurred liability to any member of the public for breach of the Occupiers' Liability Act 1957. Nor can I see any basis for saying that Stylus had committed any breach of the statutory duties which it owed to its employees under the Health and Safety at Work Act 1974. More importantly, however, even if Stylus had committed a breach of the 1974 Act or had somehow

failed to exercise due care towards its visitors, that would not trigger the operation of the *ex turpi causa* rule.

93. If Stylus had sued the council on 17th June 2006 for barring public access to the pier, Stylus would not have been claiming compensation for the consequences of a criminal conviction. Nor would Stylus have been claiming compensation for the consequences of its own criminal conduct, as contemplated in *Gray* at [51]–[54].

94. The short answer to the Council's second ground of appeal is that the default proviso in section 106 of the 1984 Act is the control mechanism which eliminates claims that are unacceptable on grounds of public policy. If a claimant is not "in default" within the meaning of section 106, the *ex turpi causa* rule will not defeat his claim.

95. Having said that, I do accept that the structural condition of the pier will be relevant to the quantum of the claim. The Council will be entitled to argue in the arbitration due to be held under section 106(2) that the loss of profit caused by the Council's conduct must be substantially reduced by reason of the structural condition of the pier. Indeed the Council would be entitled to argue that the quantum is reduced to nil, although on the evidence which I have seen that outcome seems unlikely.

96. Accordingly, I would dismiss the second ground of appeal.

Part 8. Executive summary and conclusion

97. Between 16th June and 12th September 2006 the Hastings Borough Council closed Hastings Pier to the public in the exercise of its powers under section 78 of the Building Act 1984. The claimant, as assignee of one of the tenants operating businesses on the pier, claimed compensation for loss of profits during that period under section 106 of the 1984 Act. The Council defended the claim on the basis that the tenant was "in default" within section of 106.

98. Mr Justice Ramsey rejected that defence and upheld the claim. This court dismisses the Council's appeal. The tenant had no responsibility for the structure of the pier and was not responsible for the defects which had developed. The proposition that the tenant would be in breach of the Occupiers' Liability Act 1957 or the Heath and Safety at Work Act 1974 by admitting the public onto its business premises does not constitute a defence to the claim under section 106 of the 1984 Act. Likewise the Council cannot rely upon those matters as the basis of a defence of *ex turpi causa*. Accordingly, if my Lords agree, the Council's appeal is dismissed.

Lord Justice Aikens:

99. I agree.

Lord Justice Patten:

100. I also agree.