IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
JUDGE IN CHAMBERS
MR. GARETH WILLIAMS Q.C.
(Sitting as a Deputy High Court Judge)

Royal Courts of Justice

Monday, 25th February 1991

Before:-

LORD JUSTICE BALCOMBE
LORD JUSTICE BELDAM
and
SIR DENYS BUCKLEY

MARIA ANDREWS — Respondent (Plaintiff)

v.

KEITH ERNEST SCHOOLING
MICHAEL JAMES CHESTER
MULTIPLEX HOMES LTD.
and
GERALD COPE & CO. (a firm) — Appellants (Defendants)

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters Ltd., Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London WC2A 3RU)

MR. ANDREW GORDON-SAKER (instructed by Messrs Weight Wolny & Trusler, Chelmsford) appeared on behalf of the Appellants (Defendants).

MR. GRAHAM HULME (instructed by Messrs Alison Trust & Co.) appeared on behalf of the Respondent (Plaintiff)

J U D G M E N T

(Revised)

LORD JUSTICE BALCOMBE: From April to August 1986 the first and second defendants were the freehold owners of adjacent Edwardian semi-detached houses at 204 Highview Avenue, Grays, Essex. On 14th August 1986 the freehold of these properties was transferred to the third defendant, a company of which the first and second defendants were directors. Works to convert the properties into flats were undertaken by the third defendant through sub-contractors. Such works commenced before 14th August 1986, i.e., during the period when the first and second defendants were owners. On 7th May 1987 the third defendant granted to the plaintiff a 199 year lease of flat 4, No. 2 Highview Avenue, at a premium of £42,500. The plaintiff had a one hundred per cent mortgage to enable her to pay for that premium. Flat 4 is on the ground floor of the property and includes a cellar. Before the grant of the lease a survey of the flat was carried out by the fourth defendant, a firm of surveyors.

The plaintiff's case is that the flat suffers from penetrating dampness emanating from the cellar. The first to third defendants admit that they carried out extensive works to the flat itself, but say that the only work they carried out to the cellar was painting the walls.

On 30th June 1987 the plaintiff issued a specially endorsed writ in the Queen's Bench Division of the High Court. Against the first to third defendants the plaintiff claims damages under three heads:

(1) Breach of duty under section 1 of the Defective Premises Act 1972.

(2) Common law negligence.

(3) Misrepresentation arising out of a reply to a pre-contract

enquiry.

The plaintiff also claims damages against the fourth defendants for negligence and breach of contract.

All defendants have served defences denying liability.

On 3rd November 1989 the plaintiff issued a summons claiming summary judgment under Order 14, alternatively an interim payment in respect of damages under Order 29, rule 11. That summons came on for hearing before Master Prebble on 15th February 1990. As against the fourth defendant the application for summary judgment was withdrawn at the hearing, that defendant having at the last minute produced an expert's report.

As against the first to third defendants the plaintiff did not seek to rely on misrepresentation as a ground for either summary judgment or interim payment. She relied on her claim under the 1972 Act and on common law negligence. The Master granted all four defendants unconditional leave to defend and made no order on her application for interim payment.

The plaintiff appealed against the Master's order in so far as he did not order interim payment. She withdrew her appeal against the fourth defendant on the day before the hearing of that appeal. The fourth defendant plays no further part in the present story.

The plaintiff's appeal was heard on 13th March 1990 by Mr. Gareth Williams Q.C. (sitting as a Deputy High Court Judge in Chambers). As I have said, there was no appeal against Master Prebble's order giving the defendants unconditional leave to defend. Unfortunately the judge was not referred to the decision of this court in British and Commonwealth Holdings v. Quadrex [1989] Q.B. 842. In order to understand the significance of that omission, I should first state the relevant

provisions of Order 29, rule 11(1)(c). That reads as follows:

> "If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied - ...
>
> (c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent, or where there are two or more defendants, against any of them,
>
> the Court may, if it thinks fit, ..., order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff ..."

I now read paragraph (5) of the head-note in the Quadrex case:

> "That before the court could make an order for an interim payment of damages to the plaintiff under Order 29, it had to be satisfied that the plaintiff would obtain judgment for substantial damages; that where unconditional leave to defend had been granted a court could not be so satisfied and an order for an interim payment was impossible; but that, where a court had only granted conditional leave to defend in circumstances where it doubted the genuineness of the defence, it could be satisfied that the plaintiff would succeed at the trial; ..."

Unfortunately, in ignorance of that decision, the deputy judge applied the wrong test. I refer to his judgment at page 16 of the core bundle, where he said this:

> "Can the plaintiff satisfy me that (1) the plaintiff is likely to succeed and (2) what damages are likely to be recovered and (3) what is a reasonable proportion, just vis-a-vis the plaintiff and the defendants?"

"Likely to succeed" is not enough, and again I refer back to the Quadrex case and the judgment of Sir Nicolas Browne-Wilkinson V.-C. at pages 865-6:

> "... But order 29 (as construed by this court in the Shearson Lehman case [1987] 1 W.L.R. 480) requires the court, at the first stage, to be satisfied that the plaintiff will succeed and the burden is a high one: it is not enough that the court thinks it likely that the plaintiff will succeed at trial".

The judge went on to find that he was satisfied that the plaintiff was likely to succeed in her claim under the 1972 Act

(although he was not so satisfied in respect of her claim in negligence) and he ordered an interim payment in the sum of £7,500 for which the first to third defendants were to be jointly and severally liable. The judge then granted the first to third defendants leave to appeal against his order. Those defendants have so appealed and it is that appeal which is now before us.

Fortunately our task has been made much easier by some sensible concessions made by the plaintiff. Mr. Hulme has conceded:

First, that the decision in Quadrex is binding and that the test under Order 29 is more stringent than that adopted by the judge. In particular he accepts that it is inconsistent to order an interim payment at the same time as an order giving unconditional leave to defend still stands. Accordingly at the outset of this appeal he applied for leave to appeal out of time against Master Prebble's order granting the first three defendants unconditional leave to defend. Had the Quadrex decision been relied on by the defendants at the hearing before the judge, I have no doubt that the plaintiff would then have applied for and been granted leave to appeal out of time against the order granting them unconditional leave to defend. The defendants made it clear in their skeleton argument that they did intend to rely on Quadrex before us. In the circumstances we granted the plaintiff leave to appeal out of time against that order, and treated that appeal as also before us so that we could deal with the matter on its merits and not just on a technicality.

The second concession made by Mr. Hulme was that we could not be satisfied at this stage that the plaintiff would succeed

in her claim so far as it was based on negligence at common law.

Thirdly, he accepted that since the judge had exercised his discretion on a wrong basis the discretion is now ours.

So the issue before us came down to this. Are we satisfied that the plaintiff will succeed at the trial in her claim based under the 1972 Act and that the defence is so shadowy that the defendants should only be given conditional leave to defend, the condition being an interim payment to the plaintiff? As the Vice-Chancellor said in Quadrex at page 866, there is little merit for the sum to be paid into court rather than to the plaintiff, who in this case needs it to help finance the work necessary to make her flat habitable.

The case before us falls under three heads:

(1) As a matter of law, does the 1972 Act apply to a case of non-feasance, or does it apply only to a case of misfeasance?

It is common ground that the defendants did no relevant work to the cellar.

(2) If the Act does apply, are the facts sufficient to establish liability on the part of the defendants?

(3) If both heads (1) and (2) are satisfied, what should be the amount of the interim payment?

The first point then is the construction of the Defective Premises Act 1972, the relevant section of which is section 1:

> "(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.

(2) A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by sub-section (1) above, except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty".

I will read subsection (3) for the sake of completeness although it has no relevance, in my judgment, to the present case:

(3) A person shall not be treated for the purposes of sub-section (2) above as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials, or to a specified design".

Sub-section (4), which is very material for present purposes, reads:

"A person who -

(a) in the course of a business which consists of, or includes providing or arranging for the provision of dwellings or installations in dwellings; ...

arranges for another to take on the work for or in connection with the provision of a dwelling, shall be treated for the purposes of this section as included among the persons who have taken on the work".

Sub-section (5) deals with limitation only and I need not read it.

Mr. Gordon-Saker for the plaintiff, to whom we are much indebted for his able submissions, laid stress on the words in sub-section (1) "taking on work", "to see that the work which he takes on is done", "so that as regards that work the dwelling-house will be fit for habitation". He submits that that language is only consistent with a liability for mis-feasance and cannot include a liability for non-feasance.

Counsel have been unable to find any authority directly in point. The only authority on the Act to which we were referred was Alexander v. Mercouris [1979] 1 W.L.R. 1270, in which this court held that

> "... the duty under the subsection [1(1) of the Defective Premises Act 1972] normally arose when a party to a contract agreed to carry out work and, whether under a contact or not, the duty could not arise later than the start of the work; that further, the duty was a present day duty to ensure that 'the work is done in a workmanlike manner with proper materials so that the dwelling will be fit for habitation' and not a duty to ensure that the work had been completed so that the dwelling was fit for habitation".

Mr. Gordon-Saker accepted that this decision precluded him from taking a point that he would otherwise have wished to argue. Nevertheless it does not affect his main submission that the wording of the section does not apply to non-feasance.

For my own part I would have doubted that this was a correct construction even without the words of sub-section (4). 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 sub-section (1). And what, I ask forensically, in those circumstances would be the need for the exception (and the exception to the exception) under sub-section (2)?

But it seems to me that sub-section (4) is conclusive in favour of the construction that includes non-feasance 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 the 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 sub-section (2). But the developer, who will not have physically done any work, is to be treated under sub-section (4) as a person who has taken on the work. In those circumstances there can be no difference between acts of commission and acts of omission.

Mr. Gordon-Saker sought to rely in support of his submissions on the Law Commission Report (No. 40) on the Civil Liability of Vendors and Lessors for Defective Premises which led to the passing of the 1972 Act. On well-recognised principles we can look at this report to see the mischief which the Act was intended to remedy. That is set out in paragraphs 11, 12, and 14 of the Report of which I now read the relevant provisions:

> "The Present Law
>
> 11. On the sale of premises which include a completed building there is no implied warranty of any kind as to the condition of the premises or their suitability for any particular purpose; and this rule applies where the vendor is himself the builder. Under the doctrine of caveat emptor the prospective purchaser must take the premises as he finds them unless he makes express provision regarding the condition of the premises in his contract with the vendor. In the absence of such a provision he will have a remedy only if he can establish fraud, negligent mis-statement or, under the Misrepresentation Act 1967, non-fraudulent misrepresentation.
>
> 12. The same principle applies in general to the letting of unfurnished premises. In certain lettings of small houses, however, a condition is implied, by section 6 of the Housing Act 1957, that the house is at the commencement of the tenancy fit for human habitation. In the letting of a furnished house or apartment a similar condition is implied at common law as to fitness for occupation at the commencement of the tenancy. ...

Operation of the Law

14. We are not aware of any substantial criticism of the present law as it applies to commercial or industrial premises. In such cases the parties are normally in a position to protect their own interests with the help of their professional advisers. The appropriate terms for inclusion in the contract in such cases are the subject of negotiation. Considerable disquiet has, however, been expressed in recent years as to the operation of the law in relation to the purchase of dwellings".

There is nothing in that to suggest that it was only acts of mis-feasance that were to be covered. Even if we were allowed to look at the rest of the report, it seems to me that it is of no help to Mr. Gordon-Saker. The approach adopted by the Law Commission was to apply the same principles of liability to the builder/vendor or the developer/vendor as to the builder who builds to the order of another. In the latter case an implication of fitness for human habitation would arise, and that would be the case whether the unfitness arose from acts of commission or omission.

Mr. Gordon-Saker's second point on the construction of the Act was that the plaintiff's flat was fit for human habitation when the work of conversion was completed in May 1987, because the problems arising from the damp penetrating from the cellar did not manifest themselves until some short while later. In my judgment there is nothing in this point. If, when the work is completed, the dwelling is without some essential attribute - e.g. a roof or a damp course - it may well then be unfit for human habitation even though the problems resulting from the lack of that attribute have not then become patent. A house without a roof is unfit for habitation even though it does not rain until some months after the house has been completed.

So in my judgment the 1972 Act can apply to a case of

non-feasance.

The facts of this case

The evidence for the plaintiff consists primarily of a report by a chartered surveyor, Mr. Stephen Ansell, who swore an affidavit in February 1990 confirming the accuracy of a report he had made in November 1989. I read from that affidavit paragraph 14 where Mr. Ansell says this:

> "I saw the plaintiff's property less than a year after the plaintiff completed her purchase. At that time it was not fit for human habitation but I have no doubt that the problems giving rise to the condition of the plaintiff's property existed at the time of completion. I regularly inspect flats including basement flats and flats with cellars. I have no hesitation in saying that the plaintiff's property is one of the worst I have ever seen".

Then, from the report itself, and I refer to page 87 of the core bundle, where he says:

> "The external walls of the property continue to be affected by high levels of moisture, due we believe to a combination of condensation dampness and incorrect replastering following damp treatment resulting in contamination of plasterwork by hydroscopic salts in the form of chlorides and nitrates.
>
> The cause of condensation is the result of moisture produced from day to day living, i.e. washing, bathing and cooking etc., but in this property a high degree of the condensation present within the habitable rooms of the property is due substantially we believe to the very damp conditions which existed within the cellar, and that it is the moisture laden air continuously rising up from the cellar via the floors and staircase into the flat which are contributing substantially to the unhealthy conditions which exist. ...
>
> The levels of condensation within the flat are considered to be greatly in excess of those which one would expect from normal habitation and that a significant additional source of moisture exists and this, we consider, is due to continuous evaporation of moisture into the atmosphere of the cellar due to hydrostatic pressure and the lack of an adequate damp proofing system within the cellar leading to the moisture laden air condensing on the cold surfaces within the flat".

Then at page 89, under the heading: "Were the premises rendered fit for human habitation", Mr. Ansell says:

"In order for the property to be fit for human habitation, one of the basic premises is that it shall be free of dampness and, to this extent, albeit that damp treatment was effected, the failure to re-plaster correctly, together with the inherent problems with regard to moisture entering the flat from the basement renders the flat in a damp condition for practical purposes. ...

In my opinion, based upon my inspection of the premises, the property was not and is not reasonably fit for habitation by reason of dampness within the kitchen, bedroom and living room to condensation dampness increased within the dwelling as a result of moisture rising from damp cellar area".

No evidence has yet been put in by the first to third defendants. It seems to me that that is a matter not without significance.

Mr. Gordon-Saker relied on a report by Mr. Ronald Wilde, a chartered building surveyor, put in on behalf of the fourth defendant, and I refer to that report, starting at page 208 of the core bundle. At the foot of the page he says this:

"In Flat 2, Tudor Court, I note that despite the obvious condensation occurring no windows were open in any part of the flat. I have no way of knowing whether this flat is kept constantly heated or whether the plaintiff turns the heating off when she is away from work or otherwise out of the flat".

He deals at some length with the fact that ordinary living conditions create some condensation and then goes on to say:

"It is significant that there is a cellar underneath this flat. As is common with cellars no provision has been made to prevent the passage of water and water vapour from the ground through the cellar walls. Cellars, of course, are not intended to be habitable structures and it is not normal for them to be made dry. If there is no free water penetrating and standing (and I understand that this has never been a problem) then it is normal to use a cellar solely for storing materials which are not water sensitive. Originally, of course, the cellars were provided to store coal which is not water sensitive. ...

... In this cellar, however, there is no effective ventilation (the one air brick which has been provided is totally inadequate and, in any case, I understand that this has been provided only since Ms. Andrews took possession of the flat). The consequence is that the humid air in the cellar will tend to rise into the flat and to raise the general humidity of the air in the flat above. The degree

to which this is causing a problem must not be exaggerated. The air in the cellar is likely to be colder than the air in the flat above and, therefore, to be denser. On the other hand humid air is lighter than dry air so that, for a given temperature, humid air is likely to rise. There is not the data available for me to assess the interaction between these two factors but I believe it is probable that some of the humid air from the cellar finds its way into the flat to contribute to the condensation problem but I do not believe that this alone can be responsible for the condensation which is likely to be the result of Ms Andrew's lifestyle".

Put at its highest, therefore, Mr. Wilde was saying that the cellar alone may not be responsible for the whole of the dampness in the plaintiff's flat. I have, of course, not read into this judgment the whole of the reports of Mr. Ansell and Mr. Wilde. I have myself read them, the material parts of them were read to us, and it is sufficient to say that for my part I am satisfied that the plaintiff can establish liability on the first to third defendants under the 1972 Act. Accordingly I am satisfied that these defendants should be given leave to defend but it should be on the condition that they should make some interim payment to the plaintiff.

The final question is as to the amount of that interim payment.

In May 1987 the plaintiff obtained a quotation from a firm called Dampcure/30 to carry out work to cure the damp problem for a sum (including VAT) of £3,283. Mr. Ansell in his affidavit has stated that that estimate did not provide for all the necessary works. By the time of his affidavit (February 1990) the estimate for doing <u>all</u> necessary works had risen to £10,018.80. The defendants assert that by failing to accept the estimate of May 1987 and to carry out the work then, the plaintiff has failed to mitigate her damage. But the plaintiff had, and has not, the means to do so. I refer to her own

affidavit in the main bundle at page 36. She says:

> "I am a self employed dance teacher. During my last financial year my net income was insufficient to pay any tax and I was constantly overdrawn at the bank. I think that my financial position has improved very slightly this year and my gross income varies between about £100 and £180 per week. The main difficulty during the last financial year was the increasing mortgage repayment cost. I now however receive a financial contribution from Bradley Wilson"-

He is her boy friend -

> "but I am still in arrears with the mortgage. I have no savings and have an overdraft of about £300.00. I am obviously desperate to commence the necessary remedial works but simply cannot afford them. Nor could I raise a further mortgage on the property. I would also like to sell to get something more affordable in order to wipe out the mortgage arrears. I really want a studio, with some live-in accommodation".

She also has a substantial £12,000 claim for chattels in her claim for damages but I leave that claim out of account altogether.

In the circumstances, in my judgment, the figure of £7,500 fixed by the judge was right and accordingly I would order the payment of this sum by way of interim payment to the plaintiff as a condition of giving leave to the first to third defendants to defend this action.

The effect of this judgment is that the plaintiff's appeal against the order of Master Prebble is allowed but the defendants' appeal against the substantive order of Mr. Gareth Williams Q.C. is dismissed.

LORD JUSTICE BELDAM: I agree with the orders which my Lord proposes for the reasons which he has given. In my view, section 1 of the Defective Premises Act 1972 applies to the failure to carry out necessary work as well as to carrying out of it badly. The evidence before the court establishes that the plaintiff's flat was not fit for habitation. That was due to

the manner in which the work undertaken by the defendant for or in connection with the provision of the flat had been carried out. Accordingly the requirements of Order 29, Rule 11 are satisfied because the plaintiff will recover for breach of duty under section 1 at the trial. I agree that the sum of £7,500 is a reasonable sum in all the circumstances and, for those reasons, concur in the judgment of my Lord.

SIR DENYS BUCKLEY: I also agree.

Order: Appeal dismissed, costs before Master to be costs in cause if condition is complied with within 28 days, otherwise judgment with costs; no order as to costs of hearing before deputy judge; plaintiff to have costs of appeal and legal aid taxation; counsel to agree and submit draft order.