Case Nos. FC3 97/5230/B QBENF 95/1454/N

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN's BENCH DIVISION
OFFICIAL REFEREE'S BUSINESS
(Mr. Recorder Dermod O'Brien QC)

Royal Courts of Justice
Wednesday, 12th February 1997

B e f o r e :

LORD JUSTICE NOURSE
LORD JUSTICE MORRITT
SIR IAIN GLIDEWELL

SUSAN BIRKIN — Plaintiff/Respondent

-v-

(1) GUARDWEALD LIMITED (In Liquidation) — Defendant

(2) GREENHILL SECURITIES (DEVELOPMENTS) LIMITED — Defendant/Appellant

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(Official Shorthand Writers to the Court)

MR. F. TREGEAR (instructed by Messrs. Morgan Bruce, London EC4) appeared on behalf of the Appellant Second Defendant.
MR. D. LORD (instructed by the Simkins Partnership, London W1) appeared on behalf of the Respondent Plaintiff.

J U D G M E N T
(As Approved by the Court)

Wednesday, 12th February 1997

LORD JUSTICE NOURSE: I have asked Sir Iain Glidewell to deliver the first judgment.

SIR IAIN GLIDEWELL: This is an appeal by the second defendant, Greenhill Securities (Developments) Limited (which I shall call "Greenhill") against a decision of Mr. Dermod O'Brien QC, sitting as an Official Referee, in one of two actions brought by the plaintiff, Mrs. Birkin, against the first defendant, Guardweald Limited, and the second defendant, Greenhill.

The appeal relates to the action numbered 1994 ORB (Official Referee's Business) 117, in which the Judge entered judgment in a form which covered both that action and indeed the later action (to which I shall refer again in a moment) which, somewhat confusingly, is numbered 1994 ORB 717.

The order, treating both actions as one for this purpose, was:

> "(1) That there be Judgment for the Plaintiff against the First Defendant and the Second Defendant for £14,363.76 plus interest thereon of £3,452.21
>
> (2) That there be Judgment for the Plaintiff against the First Defendant alone for [a further sum which is irrelevant in this appeal]
>
> (3) That there be Judgment for the Plaintiff against the Second Defendant alone for a further £14,717.54 plus interest thereon of £8,286.50
>
> (4) That the First and Second Defendants pay the Plaintiff's costs of these actions, such costs to be taxed if not agreed
>
> (5) That leave to appeal against the aforesaid costs order be refused."

The writ in action No. 117 was issued on 18th December 1991. At the time of the hearing, Guardweald was in liquidation and took no part in the proceedings. There is no appeal against the judgment entered against Greenhill in the other action brought by Mrs. Birkin, No. 717, in which the writ was issued on 26th August 1994. Moreover, the damages awarded in that action were in the same

sum as those awarded in action No. 117. Indeed, as I have made clear, they are the subject of the same order. The appeal in respect of action No. 117 is therefore in relation to the Judge's order for costs alone. Mr. Tregear, for Greenhill, argues that the Judge, in the events to which I am about to refer, should have entered judgment for his client in action No. 117 and should then have ordered the plaintiff to pay the costs of that action.

I summarise the facts and the history of this matter briefly, I hope, but in order that the points can be understood. On 9th March 1988 Mrs. Birkin took an assignment of the leasehold interest in a basement flat at 13 Stanley Mansions, Park Walk, London SW10. That was the residue of the term of 199 years from 25th September 1985. The lessor was Guardweald. Some time after Mrs. Birkin moved into the flat, a damp patch appeared in the hallway. She drew it to the attention of Mr. Nako, the lessor's managing agent, in the spring or early summer of 1989. At that stage nothing was done about it. The damp patches increased and tiles in the kitchen started to bulge and fall off. Mrs. Birkin complained again to the agents, who engaged two firms to investigate and recommend treatment, which they did in September 1989. In short, they recommended some damp-proofing and tanking.

In January 1990 Mrs. Birkin went abroad. When she returned, matters had got worse. There were now signs of fungus as well as substantial damp. In June 1991 the contractors, apparently for the first time, attributed the damp to a leakage from above.

The flat above was leased to a Mr. and Mrs. Lendrum. The structure of the intervening ceiling and floor was as follows. The floor of the Lendrums' flat, consisting of wooden floor boards, was laid on battens. They in turn were laid on steel beams. Between the steel beams there was an infill of clinker, which formed a solid mass, but which, being constructed of clinker, was friable. The plaster forming the ceiling of Mrs. Birkin's flat was applied to the bottom surface of the infill below the beams.

A domestic water pipe serving the Lendrums' flat was attached to the battens. It sprang a leak, presumably some time before the spring of 1989. By the time the matter was fully investigated, the clinker infill was completely saturated and no longer solid. The floor of the Lendrums' flat, the battens to which the floor boards were attached and the water pipe were comprised in the demise to Mr. and Mrs. Lendrum; but the solid structure, consisting of the steel beams and the clinker infill, was not included in any demise.

In September 1990 some works of attempted repair commenced, which merely had the effect of rendering the flat uninhabitable. That work did not progress very far, and it ceased that autumn. On 20th May 1991 Guardweald assigned its interest in the reversion to Greenhill. Mr. Nako remained as Greenhill's managing agent.

On 20th December 1991, as I have already said, the writ was issued in action No. 117. The relief claimed in the statement of claim was:

> "(1) An Order that the First and/or the Second Defendant do effect such remedial works to the Premises as are required pursuant to the matters pleaded above.
>
> (2) Damages."

(3) was a claim against the first defendant only for interest.

Despite the action being commenced and the claim for a mandatory order, no further repair work started until 20th September 1992. The work was not finally completed, the last major item being the fitting out of the kitchen, until 9th April 1993. But the Judge found that Mrs. Birkin could reasonably have resumed occupation of the flat at the end of January 1993 and therefore held that she was dispossessed for 124 weeks from 10th September 1990 to 29th January 1993.

The lease contained covenants by the lessor:

> "(a) To maintain and keep in good and substantial repair and condition;
>
> (i) The main structure of the Building ...
>
> ...
>
> (d) To insure and keep insured the building ... against loss or damage by ... such other risks (if any) as the lessors think fit ...."

with a further obligation which the Judge interpreted as requiring an insurance claim to be made with reasonable speed.

The Judge held that both defendants were in breach of the repairing covenant and the first defendant was in breach of the insuring covenant as he had so interpreted it. The action was argued by counsel on both sides on the basis that the breach of the repairing covenant was one for which a lessor, and certainly Guardweald, was not liable until it had been given notice of the defect and a reasonable time to repair it.

The decision of this Court (my Lord, Lord Justice Nourse's judgment) in British Telecommunications plc v. Sun Life Assurance Society plc [1996] 1 Ch. 69, which lays down a principle which at least arguably establishes that the basis on which this action was argued was not, in the particular circumstances, one in which notice was required, was decided on 28th July 1995, after the judgment, save as to costs, was given in this action.

The Judge concluded that when Greenhill took the assignment of the reversion it was not liable until notice had been given to it of the defect and it had been given a reasonable time to make the necessary repairs. He so decided although, of course, Guardweald had already had notice and time and was already well in breach of covenant. The Judge said:

> "In my view the Second Defendant was entitled to a reasonable time to put right what the First Defendants had failed to do and the First Defendants remain liable until the Second Defendants could and should have done it. I accept from Mr. Pyle [a witness he had heard] that a reasonable time should have been 7 months including 3 months for

> actual execution of the work. Both Defendants are concurrently liable for the repair costs since each should in their respective times have carried them out or prevailed upon the insurers to carry them out. So far as loss of use is concerned the First Defendants will be liable in respect of the period from 10th September 1990 to 20th December 1991 (7 months after they ceased to be the reversioners) while the Second Defendants will be liable for the period from 20th December 1991 to 30th January 1993."

In reaching the conclusion that Greenhill was not liable until it had had notice of the defect and a reasonable time had passed to repair it, the Judge purported to draw an analogy with the decision of Garland J in Duncliffe v. Caerfelin Properties Ltd. [1989] 2 EGLR page 38.

After the judgment had been handed down on 27th July 1995, there was an argument on another day, 31st August 1995, about costs. The Judge recorded Mr. Tregear, for Greenhill, as arguing:

> "... since I have held that there was, as against the Second Defendant, no cause of action sounding in damages until 20th December 1991 and the writ was issued on 18th December 1991, I ought to regard the first writ as prematurely issued and I ought to award the Second Defendant the costs of the action as commenced by the first writ."

That is a succinct and wholly accurate summary and, indeed, it is the argument which Mr. Tregear advanced to us today.

The Judge rejected that argument. His reasons for so doing were expressed in the following words of his judgment:

> "The tenant under the circumstances, as at that point in time [that is to say, on 18th December 1991] would have been fully justified in serving a writ to seek an injunction to compel the landlords to do that which they were already failing to do.
>
> That is what the plaintiff did. She was fully entitled to take the course she did. It makes no difference whatever that the cause of action began to sound in damages a mere 2 days later. In my view there is no real argument for saying that she should not also get her full costs of the action commenced by the first writ against the Second Defendant."

In his forceful and clear argument in this appeal to us today, Mr. Tregear has concentrated on the Judge's rejection of his straightforward argument in the court below. He submits that, although in the pleading in the statement of claim there is a claim for an injunction, that claim was not pursued. Thus, at the time of the hearing this action was in substance a claim for damages at common law and nothing else; and, in awarding damages against Greenhill for the period starting from 20th December 1991, that is how the Judge treated it. Thus, if Greenhill were only liable in damages from 20th December 1991 and there was no other cause of action established against that company, there was no liability at the time when the writ was issued on 18th December; in other words, the writ was issued prematurely.

In my judgment that argument, forceful though I have already characterised it as being, was specious. The injunction was not pursued, for the very good reason that the claim had taken so long to come on for trial that, long though it took for the work to be done, it had been completed some two years before the action finally came on. Had the plaintiff sought to argue the point, I see no reason why, although it would have been futile to grant an injunction, some damages in lieu of an injunction should not have been awarded for the period before 20th December 1991. It was quite apparent, of course, at 18th December that although Greenhill may not strictly have been in breach at that date (though that may be arguable), they could not conceivably have completed the works by the 20th, which, on the Judge's basis, they would have been bound to do. Thus, an injunction would properly have issued and, in lieu of the injunction, I can see no valid reason why damages should not have been awarded.

Mr. Tregear argues that they would have been equitable damages - there was no claim for equitable damages and the Judge did not award equitable damages - and thus that we should not conclude that the judgment could properly be based upon that possibility. That, with respect to him, seems to me to be coming close to forgetting that law and equity have been fused for something over 120 years now.

In my judgment, the Judge's decision in relation to the argument that was advanced to him on 31st August 1995 was not merely sound common sense, it was sound in law as well. For those reasons, I would dismiss this appeal.

We also then had an application from Mr. Lord, on behalf of Mrs. Birkin, for leave to serve a respondent's notice out of time. My Lord, Justice Nourse, indicated this morning that we refused such leave. I now give my reasons for arriving at that conclusion.

The notice of appeal was issued on 5th October 1995. By Order 59, rule 6 of the Rules of the Supreme Court, the respondent's notice should have been served, if one were going to be served, within 21 days thereafter.

The respondent's notice seeks to raise three points. The first is that, contrary to the basis upon which, as I have already said, the whole action was argued, neither notice to either lessor nor time to carry out the work after the giving of notice was required before either lessor was liable to the plaintiff. This can be characterised as the British Telecommunications v. Sun Life point. Secondly, so far as Greenhill is concerned, Greenhill was in breach immediately it took the assignment of the reversion. Whether or not, as a matter of law, notice to Guardweald originally was required, no notice was required to be given to Greenhill, which took the assignment at a stage when Guardweald was already well in breach, as I have said. The argument is that the Judge was wrong to conclude that notice to Greenhill was necessary and time ought to be given to Greenhill to carry out the work. He misinterpreted, it is sought to be argued, the decision in Duncliffe v. Caerfelin Properties Ltd.. The third point depends upon the effect of the claim for the injunction, and I have already dealt with that in giving judgment on the appeal itself.

We were referred to the decision of this Court in VCS Ltd. v. Magmasters Ltd. [1984] 1 WLR 1208. That was a case in which leave was sought to serve a respondent's notice out of time, which was, as this one is, not merely a respondent's notice supporting the decision on other grounds, but was in effect a cross-appeal. In the event in that case the Court thought it right to grant leave, but it did so because it took the view that a note which appeared in the then current edition of the Supreme Court Practice was at least potentially misleading. Giving the judgment of the Court, Sir John Donaldson MR said, at p.1209 F:

> "... it will be recalled, as I pointed out, that a respondent's notice covers three quite different situations. In sub-paragraph (b) it covers the situation to which this note [i.e. the note in the White Book] refers, namely adding further arguments to an existing appeal, but under (a) and (c) it is in reality a cross-appeal. Where it is a cross-appeal, the time limit should, as a matter of logic, be applied in exactly the same way as they are applied to a notice of appeal."

Applying that to the circumstances of this case, we have to consider, amongst other matters, the apparent strength of the arguments which it is sought to advance in the respondent's notice, but in particular we have to consider the time which has elapsed since the respondent's notice should have been entered and the prejudice to either party if leave to issue the respondent's notice is either given on the one hand or refused on the other. Of course, there is prejudice to the plaintiff in that, if she were allowed to enter her respondent's notice and succeeded in either of the first two arguments, then she might well recover a somewhat greater sum by way of damages than that which she had already recovered in the judgment, because the damages could be ante-dated to 20th May 1991.

But as far as the present appellant, Greenhill, is concerned, the detriment is considerable indeed. Not merely will Greenhill suffer the risk of having to pay greater damages - obviously this is a detriment in itself - but they have been deprived effectively of the opportunity of considering whether they should go ahead with their appeal and hence with the cross-appeal. It is a matter of speculation, of course, as to what that company and its advisers would have done. But if it had been faced with a

cross-appeal, and if it had been faced moreover with the judgment in the British Telecommunications case (which, if not reported in full, was certainly available in some form by October or November 1995), then it may be that the company would have decided not to proceed with this appeal, or at any rate would have so arranged matters that it would not have incurred the costs, time and trouble it undoubtedly must have incurred in preparing for the appeal. I regard that as a considerable detriment and in my judgment, because of the very considerable lapse of time, it outweighs the other factors which have been advanced to us in favour of granting leave to enter the respondent's notice.

Solely because this application is so late and because of the detriment that follows from that, I concur in the refusal of leave for the respondent's notice.

LORD JUSTICE MORRITT: I agree.

LORD JUSTICE NOURSE: I also agree.

Order: appeal dismissed with costs; application for leave to serve a respondent's notice out of time refused; appellant's costs of and occasioned by the application for an extension of time to put in the respondent's notice to be paid by the respondent to the appellant.