Neutral Citation Number: [2022] EWCA Civ 1075

Case No: CA-2020-000578 and CA-2020-00579A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT WILLESDEN
HH Judge Saunders
3PA90595

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2022

Before :

LORD JUSTICE BAKER
LORD JUSTICE PHILLIPS
and
LORD JUSTICE EDIS

- -

Between :

ZOHRA KHAN	**Appellant**
- and -	
TARIQ MEHMOOD	**Respondent**
(No.2 Costs)	

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- -

Christopher Mann (instructed by **Shuttari Paul and Co**) for the **Appellant**
Toby Vanhegan and Matthew Lee (instructed by **Duncan Lewis Solicitors**) for the **Respondent**

Hearing dates : 23 March 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on Thursday 28 July 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

LORD JUSTICE BAKER (with whom Lord Justice Phillips and Lord Justice Edis agreed) :

1. On 21 June 2022 we handed down our judgments on a second appeal against the level of damages awarded in proceedings for breach of an implied term to keep a property in repair. As recrafted by the court, there were two grounds of appeal before us. Under ground one, the appellant contended that the circuit judge erred in holding that, despite the defendant's counterclaim stating that the tenancy commenced on 21 March 2011 the district judge had been entitled to award damages for disrepair for a period of about four years prior to that date. Under ground two, the appellant contended that the judge further erred in ruling that the district judge was correct to have increased those damages by 10% by application of the decision in *Simmons v Castle*. We allowed the appeal on ground one but refused it on ground two.

2. Following judgment, we invited the parties to agree the terms of the consequential order. They were unable to do so and therefore asked us to rule on the following ancillary issues: (1) the commencement date for calculation of the judgment sum and (2) costs. This supplemental judgment sets out our brief reasons for our decision on those issues.

Commencement date

3. The appellant contends that damages should be awarded to the respondent for a period of three years and three months. The respondent argues that it should be for three years and five months.

4. The appellant submits that (1) the district judge awarded damages for the period seven years and three months working on the basis of a tenancy commencing in March 2007 and then allowing a two-month "grace" period to allow the appellant time to put matters right; (2) this Court having found that the respondent was only a tenant from March 2011, the consequence was to remove four years from the period of the damages; (3) the appellant's position was clear from the appeal notice whereas it has only been since the draft judgment of this Court was circulated to the parties that the respondent has sought the higher figure; (4) the statement in my judgment that "the damages to which he is therefore entitled are equal to 50% of the rent paid under the tenancy from 23 March 2011" was plainly not intended to be a finding that this was the date from which damage flowed.

5. In reply, the respondent submits that (1) this Court has stated in the judgment that the respondent was entitled to damages equal to 50% of the rent paid under the tenancy from 23 March 2011 and the appellant's contention that it should run from 25 May 2011 is contrary to the judgment; (2) it was also contrary to the grounds of appeal and skeleton argument on the basis of which permission to appeal to this Court was granted; (3) the appellant did not raise this issue at the hearing of the appeal and had she done so the respondent would have objected; (4) the argument that there should be a "grace" period has no validity because the appellant had more than sufficient time to carry out the repairs before the tenant became the tenant in March 2011.

6. In our view, the damages should commence on 23 May 2011. Although the judgment refers to damages being paid from 23 March 2011, the issue of the "grace" period was not argued before us and in the circumstances we consider that the district judge's ruling

on this point should remain unaltered. We are not persuaded by the respondent's argument that we should depart from the district judge's ruling on this issue on the grounds that the appellant should have carried out repairs before the respondent became the tenant.

Costs

7. On the costs of the appeal, the appellant contends that, having succeeded on ground one, she has "won" the appeal. Although the respondent succeeded on ground two, the quantum of additional damages retained as a result of the *Simmons v Castle* uplift was very low. Consequently, there should be no departure from the usual rule that the unsuccessful party pays the costs. Although a greater proportion of court time was taken up by argument on ground two, the greater proportion of costs incurred in this case was on ground one. The additional costs incurred on the *Simmons v Castle* issue were "pretty negligible". In any event, it was the HLPA who took the lead in arguing that point.

8. The appellant also seeks an order for the costs of the first appeal before the circuit judge. Had she been successful before the circuit judge, as she should have been, she would have been awarded her costs. She also draws attention other matters on which the district judge was said to have erred and which were not pursued in the second appeal.

9. In support of the appellant's claim for costs, she also relies on (1) the respondent's conduct in causing the hearing in March 2021 to be aborted because of late notice of the change of solicitor; (2) the respondent's request for a further adjournment of the November 2021 hearing of the appeal which led to the appellant's preferred counsel being required to return the brief and (c) the fact that on 22 February 2022 the appellant made a without prejudice offer offering to withdraw the *Simmons v Castle* on the basis that the appeal was otherwise allowed, followed by a further more generous without prejudice offer on 3 March 2022. In written submissions the appellant's counsel also refers to other matters in the lengthy history of the proceedings which, he contends, demonstrate the respondent's "stolid unwillingness" to concede the point in ground one.

10. In reply, the respondent contends that he should pay the costs on ground one and the appellant the costs on ground two for the following reasons. (1) The appeal was really all about ground two, which was the point of public importance and the reason why permission to bring the second appeal was granted. (2) The importance of the point was illustrated by HLPA's intervention. (3) The vast majority of the hearing before this court was taken up with ground two. (4) The appellant could have abandoned ground two but chose not to do so. (5) If the respondent does not recover any costs on the appeal, he is unlikely to retain any of the damages awarded because of the operation of the statutory charge. (6) Even on the appellant's case she was always liable for substantial damages but has paid nothing in eight years and as a result now owes considerably more than originally awarded. On the other issues raised by the appellant, the respondent accepts that he should pay the costs of and occasioned by the adjournment of the hearing in November 2021. But he contends that the circuit judge's order that the appellant should pay the costs of the first appeal should stand, given the other issues decided by the circuit judge. With regard to the without prejudice offers, the respondent points out that neither was made under Part 36 and asserts that the appellant has not in fact beaten either of them.

11. In our judgment, the appellant should be awarded 50% of her costs of the first appeal before the circuit judge and 80% of her costs of the appeal to this Court. We have reached this decision for the following reasons.

    (1) Although the appellant was unsuccessful on other issues on the first appeal before the circuit judge, the duration of damages issue was a very substantial part of the appeal and, had she won, as she should have done in the light of our judgment, we consider it likely that she would have been awarded a significant proportion of her costs. We estimate that 50% is the right figure.

    (2) It is correct that the greater part of the hearing before this Court was taken up with the argument over *Simmons v Castle* but the appellant is correct in saying that in financial terms it was the subsidiary issue.

    (3) The appellant made a concerted effort to settle the appeal on the basis that the *Simmons v Castle* issue was dropped. It was the respondent who persisted in pursuing the point.

    (4) By our calculation, although neither offer was made on a Part 36 basis, the appellant has "beaten" the second offer made on 3 March 2022.

    (5) But for the issue of the duration of damages raised under ground one, in our view the appeal would never have been pursued. In those circumstances, having succeeded on that issue, it is right that the appellant should recover the greater proportion of her costs of the appeal to this Court and we assess the appropriate proportion to be 80%.

12. We will approve a consequential order in those terms.