85/10

28.1.85.

Before: Sir Frank Ereaut, Bailiff
Jurat C.S. Dupre, M.C.
Jurat P.G. Baker.

BETWEEN

Broad Street Investments (Jersey) Limited and Others — Plaintiffs

AND

National Westminster Bank PLC and Others — Defendants

Advocate P. de C. Mourant for the Plaintiffs
Advocate M.L.Sinel for the Defendants

This is an appeal against the refusal of the Judicial Greffier to exercise his discretion under Rule 6/19 of the Royal Court Rules, 1982, to refer for the determination by the Royal Court before the trial a question raised by the defendants in their pleadings.

The background to this appeal is as follows:

The first plaintiff is the owner of Nos. 19 and 21 Broad Street and the second and third plaintiffs are the tenants of parts of that property. Adjacent thereto are Nos. 23 and 25 Broad Street. The first defendant was the owner of these premises until 31st August, 1979, and from that date the second defendant has been the owner. The other defendants were all involved in the construction of new banking premises which took place on the site of Nos. 23 and 25 Broad Street between September 1979 and November 1981.

During the course of the works considerable damage was caused to Nos. 19 and 21 Broad Street. The plaintiffs have therefore actioned all the defendants for damages, alleging breach of duty and negligence against each.

The first and second defendants, in their Answer, have admitted that they were in breach of duty with the result that damage was caused to the adjoining properties owned and occupied by the plaintiffs, and they have convened the other defendants.

Although the first and second defendants have admitted liability for the damage caused, the extent of that damage is very much in dispute. The plaintiffs claim, on technical advice, that the only way to ascertain the full extent of damage is to carry out a full structural survey of their premises. Such a survey, it is claimed, would require the premises to be vacated for a considerable period.

Because of the nature of the business of the second and third plaintiffs, the costs of vacating the premises and re-locating the businesses elsewhere during the period of the survey would be very substantial, and the plaintiffs therefore decided to seek the consent of the first and second defendants to such a course.

Those defendants, whilst wishing to be co-operative so as to achieve an early finalisation of the case, have not felt able to give the consent requested because the advice of their experts is that an adequate survey of the extent of the damage could be made without the second and third plaintiffs having to vacate the premises.

After further meetings, the technical advisers of both parties have failed to agree on the need to vacate the premises.

Moreover, in paragraph 9 of their Answer the first and second defendants, allege (inter alia) that the plaintiffs have failed to mitigate their damage in that they have failed to institute remedial works within a reasonable time and have undertaken or are undertaking investigation works which are unnecessarily extensive and expensive.

Because of the cost involved in vacating the premises to enable a full structural survey to be carried out, and because the defendants are not prepared, in the light of the technical advice which they have received, to consent to such a course, the plaintiffs desire to have this issue tried prior to the general hearing on damages.

Rule 6/19 of the Royal Court Rules 1982 provides -

> "Where in any action on the pending list it appears to the Greffier that a question raised by a pleading should be determined before the action is set down for trial or hearing, he may refer such question to the Court."

Under that Rule the plaintiffs asked the Judicial Greffier to refer to the Court for determination before the hearing two questions concerning the proposed investigation works. The Greffier, in the exercise of his discretion, refused the application, and that refusal has given rise to this appeal.

Both Counsel recognised that this Court was hearing an appeal against the exercise of the Greffier's discretion, although the way in which we should approach such an appeal was not argued before us.

Our view is (and we are referring only to Rule 6/19) that our duty now is to exercise our own discretion, but that although we are not fettered by the previous exercise of discretion by the Greffier, we should of course give it due weight.

In this case the Greffier heard counsel for the parties before coming to his decision. It could be argued that the terms of Rule 6/19 do not strictly require him to hear the parties, but we think that he was right to do so.

Having heard counsel, the Greffier gave three reasons for his decision to refuse the plaintiff's application.

First, counsel for the plaintiffs had argued before the Greffier, as he has now done before us, that if the two preliminary issues were to be determined in advance of the hearing a settlement of the whole question of damages might very well be negotiated, without further recourse to the courts. Counsel for the first and second defendants did not take that optimistic view and the Greffier concluded that a settlement in all the areas of the dispute was not sufficiently likely as to justify a decision in favour of the plaintiffs on that ground.

We think that that conclusion was correct. We accept that the likelihood of a settlement being reached or substantially facilitated is a relevant factor for consideration, and we can think of many cases where the determination of a preliminary issue would be decisive of the whole or of a substantial part of the litigation. But we are far from being persuaded that this is such a case. The settlement of damages in this action will involve the consideration of many areas, of which the issue before us is but one.

The other two reasons given by the Greffier for his refusal can be taken together. First, he was persuaded by the argument of counsel for the defendants that to refer the issues to the Court would be to ask the Court to act as advisers to the plaintiff and to give them "the Court's comfort"; and secondly, he took into consideration the fact that counsel for the plaintiffs could not cite any instance or authority, in Jersey or in England, where such a matter had been referred to the Court as a preliminary issue. Those same arguments were raised before us.

What the plaintiffs wish the Court to do is to agree to try, as a preliminary issue, the two questions posed to the Greffier. For that purpose the Court would be asked to hear expert witnesses. If the Court were to find in favour of the plaintiffs then the cost of such works and of vacating the premises and of locating the business elsewhere would form part of the award of damages eventually payable by the defendants to the plaintiffs, even though the result of such works and investigation might show them to have been unnecessary. If the Court were, however, to find in favour of the defendants, then it would be for the plaintiffs to decide whether to proceed with such works and investigation, notwithstanding such finding, in the hope, if they did so, that when the full hearing to assess damages took place the Court would find that the cost of such works and investigation was in the event justified and should be included in the award of damages.

Counsel for the plaintiffs conceded that he was, in effect, asking the Court to give his clients an indemnity, and to under-write the financial risk which his clients might be taking in following the advice of their technical advisers to vacate the premises so that a full survey could be properly made. He maintained, however, that it was a proper request because the plaintiffs were the innocent parties in the affair and it was inequitable that they should be placed in the position of having to decide whether to take the financial risk. The proper course was for the Court to anticipate that part of its eventual task which related to the issues of the extent of the damages and of the mitigation of damage and decide at an early date whether it was reasonable for the plaintiffs to adopt the advice of its technical advisers. The fact that the defendants had expressly raised the issue of mitigation of damage strengthened counsel's argument.

Counsel cited two authorities on the issue of mitigation of damages in order to show the duty and obligations of the injured party. The first was Mayne and McGregor on Damages, para. 159 on page 146, and the second was the case of Banco de Portugal -v- Waterlow, 1932 A.C.452 at page 506. Both these authorities are very sympathetic to the dilemma which an innocent injured party may face in trying to mitigate his loss and extricate himself from the position in which he had been placed by the wrongful act of the other party, but they do not assist

us in the instant case because they are relevant to the question of the assessment of damages generally, and not specifically to the question whether it would be proper to allow this appeal and so enable this aspect of the matter to be heard as a preliminary issue.

Counsel for the plaintiffs did produce as an authority the Jersey case of Browne -v- Premier Builders (Jersey) Limited J.J. 1980 95. There the Court, having found that negligent construction work had damaged an adjoining building, decided, for the purposes of assessing damages, to order a structural survey to be carried out jointly by the advisers of the two parties, and further ordered that during the period of the survey the owner of the damaged property and his family should be housed in alternative accommodation at the expense of the defendant. Counsel argued that this case was on all fours with the present case. We do not agree. The Court there said, at page 106, that it was ordering a survey in order to find out whether some of the apparent damage pre-dated the negligent acts of the defendant; in effect, the survey was ordered for the benefit of the defendant.

However that may be, we find it very significant that no other authority or instance can be found to support the plaintiffs' application, despite a close examination of the cases cited in the notes of the Supreme Court Practice to Orders 29 and 33. It was suggested to us that Masters in the United Kingdom do grant such applications in Chambers. If that be so, then we can only comment that we are surprised that no record of any appeal against such an order can be found.

Counsel for the defendants argued against allowing the appeal and we have no hesitation in adopting his arguments.

The main argument, in our view, is that it could be prejudicial to the defendants to take this preliminary issue in isolation. The mitigation of damage is an essential factor in all assessments of damages, and to take that aspect of the assessment in isolation, without knowing the other relevant factors, such as the full extent of the damage and whether the technical advice given to the plaintiffs was correct or not cannot be satisfactory or equitable.

Secondly, the core of the plaintiffs' application does amount, in our view, to seeking the "comfort" of the Court, in the hope that the Court will decide

that the defendants must pay the costs of a full survey and of vacating the damaged property, irrespective of whether such are ultimately shown to have been unnecessary. As we have said, mitigating loss is always a factor in the assessment of damages, and the courts apply the test of reasonableness. To hold that injured parties could come to the courts to find out whether or not the courts agreed that the steps which they proposed to take in mitigation of damage were reasonable and came within the guide-lines for the assessment of damages would, in effect, be asking the Court to act as a legal adviser to the injured party. It would be tantamount to asking the Courts to hold their hands. The Courts could be faced with a flood of applications, many or all of which would, as we have said, have to be decided in isolation.

Counsel cited a number of examples where litigants have to conduct themselves before the hearing of their case on the basis of legal advice given in the knowledge of the judicial principles which can be expected to be applied by the Court and on the basis of the facts which it is believed can be proved. That is a situation which is of general application and we believe that if it were possible to seek the advice of the courts at every stage the position of the courts would become impossible, quite apart from the fact that, as already stated, it would be undesirable and inequitable.

Injured parties in the position of the plaintiffs have the comfort of knowing, as the authorities cited by counsel for the plaintiffs show, that the courts tend to take a sympathetic and realistic view of the problems and dilemmas which they may have to face when confronted with injury or damage. But their conduct must be judged in the context of all the factors and not in isolation.

This court considers that the Judicial Greffier correctly exercised his discretion to refuse the application, and we have independently come to the same conclusion upon the fuller arguments addressed to us.

The appeal is therefore dismissed and the application of the plaintiffs refused.