B2/2014/1764

Neutral Citation Number: [2015] EWCA Civ 369
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT
SITTING AT CLERKENWELL AND SHOREDITCH
(HIS HONOUR JUDGE MITCHELL)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 10 March 2015

B e f o r e:

LORD JUSTICE LEWISON

LORD JUSTICE PITCHFORD

LORD JUSTICE RYDER

- -

Between:
UDDIN & ANR

Appellant

v

LONDON BOROUGH OF ISLINGTON

Respondent

- -

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Miss S Rai (instructed by Devonshire Solicitors) appeared on behalf of the **Appellant**
Mr N Nicol (instructed by Hopking Murray Beskine) appeared on behalf of the **Respondent**

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J U D G M E N T1. **LORD JUSTICE LEWISON: 1.** In his judgment handed down on 6 May 2014, His Honour Judge Mitchell awarded Mr and Mrs Uddin £14,680 as

damages for breach of repairing obligations on the part of their landlord, the London Borough of Islington. With the permission of McFarlane LJ, Islington appeal on limited grounds, permission having been refused in relation to their more comprehensive grounds.

2. 2. It was common ground that Mr and Mrs Uddin were the joint weekly tenants of 116B Englefield Road, London, N1. Since they were weekly tenants, the tenancy contained the covenants implied by section 11 of the Landlord and Tenant Act 1985. These were, so far as material, covenants by Islington to keep in repair the structure and exterior of the dwelling house including drains, gutters and external pipes.

3. 3. The property compromised in the tenancy was a four bedroomed maisonette in the basement and on the ground floor of a Victorian villa. The Uddins moved in in October 2004 and started to complain about the damp. The greater part of the damages awarded by the judge related to the damp problems.

4. 4. Miss Rai on behalf of Islington submits that damp may be one of three types, (1) penetrating damp usually caused by the defective state of some part of the property and thus subject to the repairing obligation, (2) condensation damp generally caused by inadequate insulation, ventilation and/or heating and thus not caused by a defective state of the property which is the subject matter of the repairing obligation, and (3) rising damp which can be caused by an inherent defect in the property, but that remedying the defect would involve the property being wholly different to the property that was demised or caused by a defective damp proof membrane, which is subject to the repairing obligation.

5. 5. We are concerned with rising damp. I do not, however, consider that Miss Rai's submission about an inherent defect is correct. The mere fact that damp is caused by an inherent defect does not of itself absolve the landlord from liability.

6. 6. That is demonstrated by the case of Elmcroft Developments Ltd v Tankersley-Sawyer [1986] 1 EGLR 47 referred to in Dowding and Reynolds on Dilapidations at paragraph 12-31. That was a case about a basement flat in a Victorian purpose-built mansion block in London. The flat was let for 16 years less three days on a lease containing a landlord's covenant to maintain and keep the exterior of the building and the roof, the main walls, timbers and drains thereof in good and tangible repair and condition. As constructed, the external and party walls of the flat included what had been intended to be a damp-proof course consisting of slates laid horizontally. However, it was ineffective because it was positioned below ground. The flat suffered from extensive rising damp which affected internal plaster, decorations and wood work.

7. 7. The question was whether the landlord was liable to install a damp-proof course. Both the County Court and the Court of Appeal said yes. Ackner LJ said:

> "I therefore conclude that the learned judge was wholly right in the

> decision which he made as to the failure by the appellants to comply with the repairing covenant and their obligation in regard to curing the damp by using the only practical method at this price, namely, injecting silicone into the wall. [Counsel] was at one stage prepared to concede that, as the plaster became saturated (which, of course, it was), his clients had the obligation to do the necessary patching -- that is removing -- the perished plaster and renewing it. I am bound to say that concession made the resistance to inserting the damp-proof course a strange one. The damp-proof course, once inserted, would on the expert evidence cure the damp. The patching work would have to go on and on and on, because, as the plaster absorbed (as it would) the rising damp, it would have to be renewed, and the cost to the appellants in constantly being involved with this sort of work, one would have thought, would have outweighed easily the cost in doing the job properly. I have no hesitation in rejecting the submission that the appellants' obligation was repetitively to carry out futile work instead of doing the job properly once and for all."

8. The authors of Dowding and Reynolds go on to comment:

> "It is true that in Elmcroft the building had been constructed with what was intended to be a damp-proof course, so that it may be said that in this respect the case is not on all fours with cases where there has never been a damp-proof course. However, it is thought that the position is the same in relation to cases of the latter kind. In Elmcroft, the slate layer in question was ineffective as a damp-proof course and it is difficult to see any sensible distinction between this and cases where there is no form of damp proofing to begin with."

I agree.

8. 9. The first ground of appeal for which permission has been given is that the judge was wrong in relying on reports from surveyors which had been included in the trial bundle and from which he reasoned that there had been remedial measures to deal with damp that had failed.

9. 10. Mr Cockram who reported in May 2004 found evidence of a previous attempt to install a damp-proof course. He also noted existence of small ventilation grilles at a low level in the walls. These, he said, were common features of an osmotic damp-proof course which was a replacement damp-proof course common in the 1980s but not much used today. Often it was found to be problematic. He also noted replacement internal wall plaster incorporating waterproof cement-based render, but noted that the quality of workmanship was poor.

10. 11. Mr Whalley, who reported on behalf of Islington in July 2004, said much the

same. He began by saying that:

> "It is apparent that there have historically been damp problems externally on the front and rear walls. Osmotic vents have been installed. Internally, there is evidence of replastering of approximately 1.2 metres height in many areas, an indication of rendering works to overcome problems of rising damp."

11. 12. He also said that if a Victorian property had had a damp-proof course, it would normally be formed with slates which were prone to failure over time. He noted that the front and rear walls had knapen siphon tubes, which was a repair system often used in the 1980s to deal with rising dampness.

12. 13. The judge said at paragraph 26:

> "The reports of Mr Cockram dated the 21st May 2004 and Mr Whalley of Faithorn Farrell Timms dated the 7th July 2004 are in the trial bundle and I have allowed the parties to rely on them as records of fact. They are not though expert evidence. Their makers were not called to give evidence."

13. 14. Miss Rai says that during the course of the trial the judge said that the reports would only establish that they were written and could not establish the truth of their contents. She goes on to say that during the hearing Mr Nichol, appearing then as now for Mr and Mrs Uddin, urged the court to rely on them as evidence as disrepair. She says that she was not given an opportunity to respond to that point and complains that in his judgment the judge relied on the reports as statements of fact. Mr Nichol disputes this account of the trial. He says the judge engaged in dialogue with both counsel and there was ample opportunity for Miss Rai to raise any points she wished to raise.

14. 15. The judge's description of what he permitted in paragraph 36 of his judgment, which I have read, does not tally with Miss Rai's recollection. There would have, it seems to me, been no point in admitting the reports merely as evidence that they had been written. There could have been no utility in simply doing that.

15. 16. In addition, in paragraph 13 of their defence, Islington asserted:

> "The Claimants instructed Harter and Loveless Solicitors and obtained a report of Mr S P Cockram dated the 21st May 2004. The Defendant further obtained a report of Faithorn Farrell Timms dated the 7th July 2004. Works were carried out based on these reports and the commencement of tenancy was delayed before these works."

16. 17. On its face, that is an allegation that the works had been carried out as recommended by the reports. Since Islington's own surveyor recommended a silicone

injected damp-proof course, it was difficult to see how the existence of such a damp-proof course was seriously in issue. But without a transcript of the hearing, I do not see how this court can definitively resolve the unfortunate conflict between the recollections of counsel.

17. 18. The principle, however, is clear. Paragraph 27.2 of Practice Direction 32 states:

> "All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless -
>
> (1) the court orders otherwise; or
>
> (2) a party gives written notice of objection to the admissibility of particular documents."

18. 19. There was no such order in this case and it is not suggested that Islington gave written notice objecting to the admissibility of the two reports. In consequence, in my judgment, the judge was entitled to rely on the reports as evidence of the facts contained in them.

19. 20. The second ground of appeal is that even if the judge was entitled to rely on the reports, he was wrong in finding that there was a defective damp-proof course. If there were a damp-proof course, then that would have been part of the structure of the dwelling house and consequently Islington would have been liable to keep it in repair. As noted, both the surveyors found evidence of a post-Victorian method of damp treatment which had plainly not worked, otherwise the flat would not have been damp.

20. 21. The judge reasoned at paragraph 35 of his judgment:

> "Although the overall evidence is far from free from doubt, I am satisfied that, whether or not the building had originally had a damp-proof course, prior to the grant of the tenancy one had been inserted in the 1970s. It would have become part of the structure and accordingly the Defendants were under a duty to keep it in repair. The existence of damp indicates that the course had failed. Therefore, the Defendants had failed to keep it in repair."

21. 22. Now, the judge is not finding there that there was in fact a Victorian damp-proof course. He was concentrating on the post-Victorian remedial measures which both surveyors had noticed and which had obviously failed.

22. 23. In my judgment, on the basis of that material the judge was entitled to find that there had been a deterioration in the structure of the dwelling for which Islington were responsible and which had caused damp. Whether that was the original Victorian

damp-proof course or a later replacement does not, for this purpose, matter.

23. 24. Miss Rai argued that the two reports on which the judge based his conclusion ante-dated the works Islington had carried out, which had been pleaded in paragraph 13 of their defence. But since Islington had few, if any, records of what work they had in fact carried out, the judge was entitled to form his own view on the basis of the evidence before him and to do the best that he could.

24. 25. The next ground of appeal is that the particulars of claim did not plead a defective damp-proof course. That is quite correct. They did not. The question is what, if any, consequences flow from that. As Saville LJ pointed out in British Airways Pension Trustees Ltd v Sir Robert McAlpine and Sons Ltd [1994] 45 Con LR 81:

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind, it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered when in truth each party knows perfectly well what case is being made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played at the expense of litigants, nor an end in themselves, but a means to the end and that end is to give each party a fair hearing."

25. 26. Much the same points were made by Lord Woolf MR in McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at 792.

26. 27. In this case, it is clear that the particulars of claim allege that the flat was badly affected by rising damp. In addition, paragraph 6.3 of the particulars of claim alleged:

> "In about September 2009, the Defendant undertook extensive works to the premises to remedy the dampness. The works involved the removal of large sections of wall plaster in order to enable a new damp-proof course to be installed."

27. 28. The reference there was to a new damp-proof course rather than to the only damp-proof course that had ever been installed, but that may well have been an oblique reference to a previous defective damp-proof course.

28. 29. But in addition, each party had the surveyors' reports, which I have mentioned, included in the trial bundle, each of which concluded that there had been ineffective

previous remedial measures.

29. 30. In a supplementary skeleton argument prepared by Mr Nichol on behalf of Mr and Mrs Uddin on the second day of the trial, there was an explicit allegation that there had been no effective damp-proof course. The point was, therefore, before the judge.

30. 31. Had Islington been in any doubt about the case that it was preparing to meet, it could have made a request for further information, but it never did. Miss Rai did not go so far as to submit that Islington were taken by surprise or indeed that there was additional evidence Islington would have wished to call if it had appreciated that the question of a defective damp-proof course was in issue.

31. 32. What is engaged by this ground of appeal, in my judgment, is not whether the judge was wrong in law, but whether the decision of the court below was unjust because a serious procedural irregularity within the meaning of CPR Part 52.11(3)(b). In my judgment, there was no injustice.

32. 33. The final ground of appeal is that the judge was wrong in allowing counsel for Mr and Mrs Uddin to make further submissions on receipt of the judge's draft judgment, having said that no further submissions on the case would be heard.

33. 34. The judge's draft judgment concluded thus:

> "Given the judgment of issues, the amount of documentary material and the limited time allowed for the trial, it may be that some of the factual matters in this draft judgment may be inaccurate, for example the date when certain repairs would be affected overlooked. Therefore, in addition to filing a schedule of typing errors by the date set out in the preface, the parties may by the same date file and serve a summary of omissions or inaccuracies they have identified. This is not, however, an invitation to re-argue the case or argue that the conclusions are wrong unless based on erroneous material."

34. 35. In his draft judgment, the judge had indicated that he would award damages for disrepair attributable to damp from 30 November 2005. In his comments on the draft, Mr Nichol queried that date and pointed out to the judge that the draft judgment had also accepted that Islington was on notice of the damp from an earlier date in consequence of the two surveyors' reports in May and July 2004 respectively. He therefore said that the correct date for the award to start was October 2004 rather than November 2005. The judge thereupon altered the judgment to award damages from 1 October 2004, but Miss Rai for Islington reminded him that the Uddins had not moved in until the 18th, so the judgment was amended once more. In short, both parties were able to make submissions on the correct date from which the damages should run.

35. 36. There is no doubt that until judgment has been handed down and an order made, a

judge has a power to change his mind: Robinson v Fernsby [2003] EWCA Civ 1820, [2004] WTLR 257 at 91. The usual question is whether the judge was justified in doing so in all the circumstances of the case. Although it was once thought that this power should be exercised only in exceptional circumstances, that is no longer the case: Re: L-B (Children) [2013] UKSC 8, [2013] 1 WLR 634 at 29.

36. 37. The overriding consideration is to deal with the case justly. That may include a consideration whether any party has already taken action on the basis of the draft judgment. Since the draft judgment in this case, like many such drafts, contains an instruction that no action is to be taken except internally in response to the draft before judgment has been formally pronounced, that is unlikely. If the judge is persuaded by short submissions, as in this case, that he has made a mistake, then the right thing to do is to correct the draft.

37. 38. It is notable that there is no substantive appeal against the date the judge chose as the beginning of the period for which he awarded damages. The only complaint is the process by which he reached his ultimate decision. I do not consider that the judge can be faulted in this respect.

38. 39. Accordingly, despite the tenacious way in which Miss Rai put forward her grounds of appeal, I do not consider that she has demonstrated either that the judge was wrong or that any injustice has resulted.

39. 40. I would therefore dismiss the appeal.

40. LORD JUSTICE RYDER: I agree.

41. LORD JUSTICE PITCHFORD: I also agree and wish only to add some observations concerning the need for scrupulous care when making an oral renewal of an application for permission to appeal to the full court.

42. Practice Direction 52C at paragraph 16 sets out the advocate's duty at least four days before the hearing of the oral renewal for a brief written statement informing the court and the Respondent of the points which are to be raised at the hearing and setting out the reasons why permission should be granted, notwithstanding the reasons given for the refusal of permission.

43. In the present appeal, on 15 July 2014 Sir Stanley Burnton set out in some detail in writing his reasons for refusing permission to appeal, notwithstanding no advocate's statement was filed with the court, a fact which McFarlane LJ established at the commencement of the oral hearing on 14 October.

44. In the course of the exchanges between counsel and McFarlane LJ, he posed the understandable question whether or not the existence of a damp-proof course was a prominent issue in the trial. Miss Rai replied not only that it was not a prominent issue,

but that it was not an issue at all.

45. McFarlane LJ posed the question whether the first time that the issue had popped up was in the judgment. Miss Rai replied yes. In fact, in the skeleton argument submitted by Miss Rai to the judge below on 3 January 2014, the issue of causation of rising damp had been specifically raised by her at paragraph 52(v) in which she said:

> "Rising damp can only be disrepair if there is, for instance, a failure in the damp-proof course..."

46. Realising that issue was taken in this respect, Mr Nichol on behalf of the Claimant submitted a supplemental skeleton argument dated 6 January 2014 and served it on Miss Rai. At paragraph 1, he wrote:

> "This supplement is to address one issue. It has been argued on behalf of the Defendant that it is not liable for the existence of rising damp at the property because there is no disrepair."

At paragraph 2, he asserted:

> "The most important and the most obvious point is that damp should not be rising in the basement walls unless the existing damp-proof course is defective (and there is a DPC according to the e-mail and certificates at B46, B8 and B9). Ergo, there is disrepair..."

47. Speaking for myself, had those documents been drawn to the attention of McFarlane LJ, the renewed oral application may have taken a different turn.