

CA sitting at Cardiff on appeal from QBD Cardiff District Registry (His Hon. Judge Moseley Q.C.) before Ward LJ, Clarke LJ, Sir Anthony Evans. 6th December 2002.

JUDGEMENT : Sir Anthony Evans :

1. This appeal is from the judgment dated 13th February 2002 of His Honour Judge Hywel Moseley Q.C. sitting as a judge of the Technology and Construction Court at Cardiff.
2. His judgment was in favour of the claimant, Dr. Stephen Morris, against the second, third and fourth defendants, that is, Mr Thomas McCormack, the Estate of his late wife Mrs Valerie McCormack and their son, Stephen McCormack, in the sum of £39,722.69 plus interest, together with his costs of the claim based on misrepresentation. The claimant, however, was ordered to pay those defendants' costs of a claim based on the Defective Premises Act 1972, which the claimant abandoned shortly before the trial.
3. The facts in summary were as follows. On 27th March 1997 the claimant completed the purchase from Mr and Mrs McCormack of a 999 year leasehold interest in Flat 1, Conway Court, 18 Penhill Road, Cardiff. Flat 1 includes the ground floor and basement of the building. They were freehold owners of the whole building, which they bought in 1994, but they sold similar long leases of flats on the second and third floors to other purchasers before 1997.
4. It is clear from the judge's findings that both the purchase of the building and its subsequent renovation and the sale of leasehold interests in the flats were all handled by the fourth defendant, Stephen McCormack, on his parents' behalf. The findings include:- *"... his father, Mr Thomas McCormack, had no involvement in any of the events described below other than as his son's principal and as the client for whom the solicitor acted on the instructions of the son ... In April 1994 Mr [Stephen] McCormack's parents were registered as the freehold owners of Conway Court ... Apart from providing the finance, Mr McCormack's parents took no active part in any subsequent transactions. Everything was done for them by their son acting as their agent."*

It should be emphasised, therefore, that although the parents have been held vicariously liable for what the judge found was a false and fraudulent misrepresentation made by Mr Stephen McCormack as to the history of Flat 1 when the leasehold interest was sold to the claimant in 1997, there is no suggestion that they were personally involved in making the misrepresentation in any way.

5. He, Mr Stephen McCormack, lived in Flat 1 from 1994, when renovation works were complete, until early 1997 when he moved to London. On behalf of his parents, he put the flat on the market in October 1996, and in January 1997 the claimant became interested in buying the leasehold interest. His solicitors were sent copies of replies which had been sent to a previously interested purchaser in October 1996. In response to Enquiry No. 17:-

"1. Defects

Please give details of any of the following matters which may have affected the property at any time to the Vendor's knowledge. ...

17.6 Damp ..."

the reply was as follows:-

"... Other than the works covered by the guarantee referred to [in the] reply to enquiry 4.3 None to the Vendor's knowledge but caveat emptor must apply and the purchasers should rely entirely upon their own inspection and survey."

The reply to enquiry 4.3 was:-

"Copy Remtox Chemicals Ltd. guarantee herewith."

6. The guarantee dated 15th April 1994 was signed on behalf of Property Care Dampproofing, a Remtox Approved Contractor, and was in respect of:- *"Reoccurrence of rising dampness ..."*
7. Before completing the purchase, the claimant also received three survey reports, as described in detail in paragraph 17 of the judgment. First, a free survey of the property which Mr Stephen McCormack requested and obtained under the terms of the Cardiff Bay Barrage Act 1993. (The Barrage was under construction but not complete, and so the level of ground water in the area was not then affected by it). Second, a survey report from Ferrier & Co., chartered building surveyors, who were retained by him to

report on the condition of the property. Third, a report by Colleys Professional Services, surveyors and valuers, to the Halifax Building Society.

8. There was then a telephone conversation between the claimant and Mr Stephen McCormack on about 3rd March 1997, about which the judge made findings in paragraph 17(4). He accepted the claimant's evidence that he asked what work had been carried out in the basement, and Mr McCormack replied that it had been "tanked" and promised to send copies of documents which described the works carried out. He then received a copy of Property Care documents dated 23rd March 1994. These documents included a quotation by them which was the subject of much discussion at the trial and of detailed findings in paragraphs 8 and 9 of the judgment.
9. The second, third and fourth defendants, who are the appellants, do not challenge the judge's finding that the reply to Enquiry No. 17 was false to the knowledge of Mr Stephen McCormack, who caused it to be made, and that therefore it founds a claim for damages for deceit and for fraudulent, or non-innocent, misrepresentation under the Misrepresentation Act 1967, upon proof by the claimant that the misrepresentation was "material" and that he relied upon it and/or was induced by it to enter into the contract to purchase the property.
10. The appellants' case, and their main submission in the appeal, is that the claimant failed to establish these further facts and that the judge was wrong to find that he had done so. They say that, notwithstanding the misrepresentation, the claim should have failed. Their second, alternative, submission is that the judge erred in assessing the damages for which the appellants are liable in the sum of £39,722.

Liability – materiality, reliance and inducement.

11. The claimant suffered loss by reason of entering into the contract to purchase the long lease of the flat for £88,000, because it was found to suffer from excessive dampness in the basement area and its value was reduced by the need for extensive repairs. "Materiality" in this context means relevant to his decision to enter into the contract, and for his damages claim to succeed he must prove that he relied upon the misrepresentation, and was induced by it to enter into the contract when he did. That was on 27th March 1997. By that date, he had received further survey reports, as indicated above, and was aware that the basement walls had been "tanked" in 1994, apart from the work to cure rising dampness carried out by Property Care. He did not say in evidence, Mr Huckle for the appellants submitted, that he relied or continued to rely upon the reply to Enquiry No. 17 when he entered into the contract. Therefore, he submits, the judge's findings that the misrepresentation as material and that it induced the claimant to enter into the purchase contract were unsupported by the evidence, and were wrong.
12. The reply to Enquiry No. 17 was false because there had been, in 1994, to Mr Stephen McCormack's knowledge, "defects" due to "damp" in the basement area in addition to the rising dampness which was covered by the Remtox guarantee. The condition of the property at that time and the renovation that was carried out were examined in great detail at the trial, and the judge's findings were set out in paragraphs 2-10 of the judgment. In summary, the findings were these:-
 - (1) a survey report from MRM Partnership, consulting engineers, was sent to Mr Stephen McCormack on 3rd December 1993. "In my judgment, it is abundantly clear that after receiving that report Mr McCormack knew that the basement was suffering from problems associated with the ingress of damp. Indeed he would have seen the condition for himself". (Paragraph 3). The significance of this report is that it referred to water entry through the external walls of the basement which were below ground level. One area of concern was that there was no indication of the presence of any tanking.
 - (2) The meaning of "tanking" was an issue at the trial. The judge found that "Tanking is simply a generic description of work undertaken to prevent the ingress of dampness through external underground walls. It can take various forms, some more effective than others. Painting the walls with bitumen paint is one of the least effective and long-lasting methods but it is still properly described as tanking". (Paragraph 19).
 - (3) Mr Stephen McCormack consulted an architect friend, Mr Brian Jones, who was named as the first defendant in this action but the claim against him was not pursued. After considering the evidence as

to Mr Jones' involvement (he was a witness at the trial), the judge concluded:- *"In my judgment it is more likely that Mr Jones' initial suggestion was some form of tanking, that that was rejected on grounds of cost by Mr McCormack, but that Mr Williams [a builder they had approached] of his own initiative and in the knowledge based on his experience that the condition of the basement required some form of tanking, installed his own system."* (Paragraph 5).

- (4) Mr Williams submitted a tender which included, on his own initiative, *"tanking to all external walls" specified in conjunction with "DPC [damp proof course] provide DPC by specialist to all internal walls"*. Mr Williams also tendered for a type of tanking which involved dry lining the walls by facing them with wallboards: what Property Care later called *"dot and dab as a relining for decorative purposes"*. (See below).
 - (5) The DPC was installed by Property Care. Their letter dated 23rd March 1994 recommended constructing a new 100mm thermal block around the walls rather than dot and dab drylining and applying a tanking compound. (Paragraph 8).
 - (6) *"Nevertheless Mr Williams proceeded to tank the walls in accordance with his system, painting them with Vandex [a mistaken reference to Synthaprufl], a proprietary form of bituminous water barrier"*. (Paragraph 9).
 - (7) There were, however, continuing problems with damp, which Mr Jones reported in a letter dated 8th September 1994 which Mr Stephen McCormack saw. *"In my judgment, it is abundantly clear from that document that the basement was still suffering extensively from dampness and I further infer ... that Mr McCormack was fully aware of that"*. (Paragraph 10).
13. It followed from these findings that Mr Stephen McCormack knew, in 1996/7, that there were problems in 1994 caused by water ingress into the basement, apart from and in addition to the rising dampness which was covered by the Remtox guarantee. The reply to Enquiry No. 17, therefore, was false, to his knowledge. The fact that he had no problem with damp or water ingress during the time he lived there, from 1994 to 1996, did not alter this fact.
 14. The next question, therefore, raised by the appellants' contention that materiality was not proved, was whether the false representation was remedied by what the claimant learned later, from the three survey reports he saw (paragraph 7 above). These revealed that the basement walls were tanked and lined, but there was no evidence of dampness except at ground level in the hallway area of the basement (in the *"free survey"* report). Ferrier & Co. stated that *"the dry lining prevented accurate testing for damp penetration"* and that further inquiries should be made. Colleys Professional Services recommended that *"all guarantees and documents ... be clearly examined and confirmed as satisfactory"*. These reports caused the claimant to telephone Mr Stephen McCormack on 3rd March 1997, when he received the reply quoted above (paragraph 8). He did know that there was tanking in the basement, but not why it had been carried out. He was not told what work was done, apart from that covered by the Remtox guarantee, in order to deal with the dampness problem which existed in 1994.
 15. Mr Huckle's submission was that the claimant knew, from the survey reports that he received or were available to him, that there were problems with dampness in the basement area; he knew that some form of tanking work, as well as DPC work covered by the guarantee, had been carried out at some earlier date; he was generally aware of problems caused by ground water levels in the Cardiff Bay area; and therefore, that he was put on enquiry as to why the tanking work had been done, as he would have been if a correct answer had been given to Query 17. Therefore, the incorrect answer no longer affected his decision to buy the property, when he made it. The real problem, he submitted, was that the work done by Mr Williams was sub-standard (this became known at the trial, apparently, as the workmanship issue) and that this was or should have been apparent to the claimant from what he knew.
 16. I agree with the judge that this argument is unconvincing. Having received the reports, the claimant telephoned Mr Stephen McCormack, partly in order to ask him about dampness and what work had been carried out in the basement. Nothing he said *"corrected the misrepresentation that there had been no dampness in the past other than that which had been covered by the guarantee"*. (Paragraph 18).
 17. As regards reliance, the judge acknowledged that *"initially [the claimant] said that he had not considered the replies but he then altered that evidence and said that he had considered them with his solicitor ... in conjunction*

with the other information that became available to him ... and that the replies formed part of the body of information on which he relied in deciding to exchange". (Paragraph 16).

18. The judge was entitled to accept that evidence, and he was correct in law in holding that there was sufficient evidence of inducement and reliance notwithstanding that the misrepresentation was only part of the information which caused the claimant to act as he did (*Smith v Chadwick* [1884] 9, App. Cas. 187; *Edgington v Fitzmaurice* [1885] 29 Ch.D. 459).
19. For these reasons, in my judgment, the appeal against the judge's finding that the claimant is entitled to damages for deceit and fraudulent misrepresentation must fail.

Damages.

20. Counsel were agreed as to the measure of damages, which the judge expressed as follows:- "*Prima facie that is the difference between the price paid for the flat and its value calculated at the date of purchase ...*" (Paragraph 22)."
21. A valuer was appointed jointly by the parties shortly before the trial. He regarded the agreed purchase price, which was £88,000, as a fair reflection of the open market value of the property in sound condition at the time of its purchase (paragraph B.1.5 of Mr Martyn Burnett's Report dated 28th August 2001). He also reported that "*the correct way to arrive at the value assuming the works are required ... is to calculate the cost of works required to put the building into a state that would render it suitable for sale and as originally valued in 1997*". (paragraph C.1.2).
22. He then recorded that the parties' surveyors were unable to agree what that figure was. Their estimates were £20-25,000 and £15,000 respectively for the works which each considered necessary. He obtained estimates which produced a figure of £26,243, or £25,635 if work to a ground floor bathroom was excluded. He then explained that as he is a valuer, not a building surveyor, the most he could say was that the value was £88,000 "*less the agreed costs of rectification works*", and there was no agreement what they should be. The estimates ranged from £15,000 to £26,500 which were "wide diversions upon which to base a calculation". (Paragraphs D.1.4-5).
23. The judge described the report as "unhelpful" and he proceeded to base his judgment on the estimate for £26,243 to which Mr Burnett referred. This dated from December 1998 and "*in the absence of any evidence that the cost of reinstatement would have been any less [in March 1997]*" he took that figure and gave judgment under this head for £30,835.53 including VAT.
24. It is apparent that no deduction was made for the cost of work in the ground floor bathroom, as Mr Burnett had noted.
25. More significantly, the judge does not say why he preferred that figure to the lower estimates given by the parties' experts to Mr Burnett, which as stated above were £15,000 and £20/25,000, respectively. Nor, Mr Huckle submitted, does the judgment deal with his contention that the works required should be limited to applying a coat of bituminous material, such as Synthaprufl, the cost of which would be, if not negligible, certainly much smaller than the lower (£15,000) figure. On the evidence, the material alone would cost only about £250.
26. Mr Huckle raised this contention when he was examining the defendant's expert witness, Mr George, in chief. Mr Geraint Jones Q.C. objected on the ground that the claimant had not received notice of it. This was unfortunate, because the issue was signposted in the valuer's report. The judge upheld his objection with regard to the cost, but he observed:- "*So, we know that to repair it what you need is another tin of Synthaprufl, a paint brush and the removal of the drylining to do it. This is as far as you can go*".
Mr Huckle replied, "*I do not need to go any further than that*". (Transcript Day 4, Page 7A).
27. In his address in reply, Mr Geraint Jones Q.C. submitted that, if necessary, the assessment of damages would have to go off, most unfortunately, to be further considered. (Transcript Day 4 Page 7C). This is, if the 1998 estimate (which should be reduced for the ground floor bathroom, and discounted for inflation, etc.) was regarded as insufficient evidence. (Page 7B).
28. Mr Jones Q.C. submitted that there was no evidence that Synthaprufl was a suitable form of tanking, and therefore that the judge was entitled to accept the claimant's evidence of the need for more extensive

repairs. Mr Huckle submitted that, on the evidence, the claimant failed to discharge his burden of proving what loss he suffered.

29. A further criticism of the judgement made by Mr Huckle, counsel for the appellant, is that the judge nowhere refers to his submission that the claimant, in breach of duty, failed to take prompt and reasonable steps to mitigate his damage. He moved into the property in April 1997; the dampness manifested itself within weeks, and the claimant ceased staying there in December 1997; yet the quotation for the cost of remedial works upon which the claimant relied was not prepared until December 1998. The extent, as well as the cost, of remedial works, Mr Huckle submits, would have been significantly less in (say) mid-1997 than they were found to be 18 months later.
30. I would allow the appeal against damages, and the question arises how best the correct figure should be ascertained in the circumstances of this case. Both counsel accept that they were placed in a somewhat difficult position when they received Mr Burnett's report only a few days before the trial, and it was clear that further evidence as to the cost of remedial works was necessary. Mr Geraint Jones Q.C. for the claimant suggested that it might be necessary for the judge to stand over the assessment of damages to a later hearing.
31. It is clear, in my view, that there is insufficient evidence to permit this court to attempt to assess the damages figure for itself. If the court orders an inquiry, to be heard by the Judge, the already considerable (and perhaps disproportionate) costs which have been incurred by both parties will be yet further increased. That is a considerable disincentive against taking this course. Nevertheless, I consider for my part that an inquiry should be ordered, because it is the most likely to lead to a prompt - and paradoxically, perhaps even the most economical - resolution of the parties' remaining differences. I say this because:-
 - (1) the trial judge is already familiar with the case. Further evidence before him can be strictly limited to the damages issue;
 - (2) if this court were to direct the parties to embark on a process of mediation that course would necessarily result in further costs and delay, if no settlement agreement resulted from it. The fact that a further hearing has been ordered to take place does not prevent the parties, and their legal representatives, from negotiating a settlement agreement, with or without the assistance of a mediator. It may be that the prospect of a prompt hearing and the additional costs that it will involve will help to propel them along this road. I certainly hope that it will; and
 - (3) both parties, I am sure, will appreciate that they should be realistic in their assessments of the damages figure likely to be achieved, whether by agreement or by a further order by the Judge. The defendant and his advisors will recognize that a substantial, rather than what is effectively a nominal figure (the cost of a new coat of Synthaprufl) is perhaps more likely to be awarded. Similarly, the claimant and his advisors will take note of the reasons why, as the evidence stands at present, the Judge's original figure is certainly too high. I do not see why a sensible figure should not be agreed even at this late stage.
 - (4) The inquiry as to damages should also include the claims for consequential losses as well as compensation for loss of enjoyment (judgment paras. 23 and 24), although this should not materially increase the amount of further evidence that has to be placed before the judge.

Costs.

32. The judge made the following orders with regards to costs:-
 - (1) *that the second, third and fourth defendants (the McCormacks) should pay the claimant's costs of the claim based on the misrepresentation issue (paragraph 2 of order dated 12th February 2002).*
 - (2) *that the claimant should pay the McCormacks' costs of defending the alternative claim based on the Defective Premises Act 1972 (paragraph 4 of the order). In fact, this was the only claim made in the original Statement of Claim: the misrepresentation claim was added later by amendment. The claim based on the 1972 Act was abandoned shortly before the trial; and*
 - (3) *that the claimant's application for an order requiring the McCormacks to indemnify him against costs which he was liable to pay to the first and fifth defendants, Mr Brian Jones and his company, was refused.*

33. The claimant appeals with permission from the judge against the order under paragraph 4 (sub-paragraph (2) above). He accepts that no claim could lie under the 1972 Act, because the McCormacks had not done work which was covered by section 1 of the Act. In fact, the property was converted into three flats before they owned it. This was apparent to the claimant, the McCormacks contended, from an Establishment Usage Certificate dated 4th May 1988, showing such usage, which they provided to him in March 1997.
34. The claimant denied that the certificate did indicate this to him, and moreover, he relied upon the terms of the lease which Mr and Mrs McCormack as the freehold owners granted to him. In the lease they were described as "*The Lessors*", and Recital (2) contained the following inaccurate statement:- "*The Lessors have recently laid out and have erected or in the course of erecting on the Estate residential flats intended for sale to the respective several tenants thereof ...*"
- He alleged that this unequivocal statement gave rise to an estoppel which prevented them from contending that he knew or ought to have known facts which meant that the 1972 Act did not apply.
35. There was no evidence that the claimant or his representatives relied upon the statement in the lease in connection with the decision to commence proceedings under the 1972 Act, but Mr Jones Q.C. submits that, this being a case of estoppel by deed, such evidence was unnecessary.
36. The true facts which rendered the 1972 Act inapplicable in this case became known to the claimant from the various defences served in the action in 2000, yet the claim was not abandoned and withdrawn until August 2001.
37. In my judgment, the alleged estoppel by deed did not preclude the judge from exercising his discretion with regard to the McCormacks' costs of defending the abortive claim in the way that he did. Estoppel apart, the judge was clearly entitled to order the claimant to pay the defendants' costs of a claim which was abandoned before trial.
38. The claimant also appealed against the judge's refusal of his claim for an indemnity from the McCormacks against costs which he was ordered to pay to the first and fifth defendants (sub-paragraph (3) above). Mr Jones Q.C. did not advance any separate arguments in connection with this appeal, and I would dismiss it accordingly.
39. Finally Mr Huckle for the McCormacks submitted that his clients should have permission to appeal against the judge's order that they should pay the whole of the claimant's costs of the misrepresentation claim (sub-paragraph (1) above). This claim was based primarily on other allegations of misrepresentation apart from the reply to Enquiry 17, but these other claims had failed. The McCormacks should not have been ordered, he submitted, to pay more than one-half of the claimant's costs of the misrepresentation issue.
40. Nevertheless, the misrepresentation claim succeeded on one of the grounds relied upon by the claimant. In my judgment, the judge was not bound to apportion the claimant's costs between different allegations of misrepresentation, and he was entitled to exercise his discretion as he did. Therefore I would refuse the McCormacks' application for permission to appeal against paragraph 2 of his order.

Lord Justice Clarke :

41. I agree.

Lord Justice Ward :

42. I also agree.

Geraint Jones Q.C. (instructed by Edwards Geldard) for the Appellant
Theodore Huckle (instructed by Rausa Mumford) for the Respondent