say that the witness summonses should not issue because there might be difficulty in enforcing them if the person summoned did not come voluntarily to court; that the magistrate had directed his mind into the future and that it was wrong to refuse to issue the witness summonses because there might be some difficulty in the future."

19 After hearing counsel on the question of costs, I give the costs to applicants to be paid by the intervenors.

Application granted.

[1980–87 Gib LR 250]

MIGGE v. DELLIPIANI and TRIAY AND TRIAY

COURT OF APPEAL (Spry, P., Blair-Kerr and Brett, JJ.A.): October 26th, 1984

Legal Profession–duties to client—conveyancing—solicitor acting for purchaser of land to draft conveyance which gives client most unencumbered and indefeasible title possible; ensure client obtains most favourable terms possible and understands acquired rights, obligations and available courses of action when disputes arise with vendor

Legal Profession—professional negligence—conveyancing—negligent for solicitor to choose wrong precedent for purchase of freehold of flat if fails to give client most unencumbered and indefeasible title possible, especially since sale of freehold of flat unusual in Gibraltar

Tort—deceit—elements of tort—false representation made knowingly, without belief in its truth, recklessly not caring whether true or false, intending representee to rely on it—no false representation if vendor's agent allows purchaser to believe he is vendor, if nothing turns directly on identity of vendor

M brought proceedings in the Supreme Court against D for fraud and against his solicitors for negligence.

B and P agreed to purchase a building which contained two maisonettes and two flats. They arranged for D to act as their agent in negotiations. When a sale seemed near, D instructed an estate agent to find a purchaser for the flats. The estate agent introduced M, who agreed to purchase the freehold of one of the flats and advanced the balance of the purchase

money subject to certain conditions, one of which was the confirmation that D was the owner of the whole building and free to sell to him. It was only after M had paid for the freehold of the flat, however, that the sale of the building from the vendor to D was completed. M then took possession but was not given the title deed and it became apparent that his solicitors had wrongly assumed that he expected to take a 999-year lease of the property as this was common practice in Gibraltar. When this was discovered, M's solicitors sent a draft conveyance for the freehold to B and P, which was returned heavily amended, M's right having been changed to the grant of a lease. Nevertheless, the conveyance was then amended to reflect the initial agreement for the sale of the freehold, but M later claimed he was entitled to various other rights in respect of the property. It was eventually proposed that the conveyance should include a nominal rent charge and a power of re-entry for the vendor, but M was not content with this solution and brought the present proceedings alleging D's behaviour had been fraudulent and that of his solicitors had been negligent. The proceedings were dismissed by the Supreme Court.

On appeal, M submitted that D had behaved fraudulently (a) by entering into a contract to sell him the freehold of the property and then conveying it to B and P, without protecting his interest in it; (b) in deceitfully holding himself out to be the owner of the property without disclosing that he was only acting as an agent; and (c) in procuring the payment to himself of the purchase money for the flat even though he knew that the conditions of payment had not been fulfilled.

M further submitted that his solicitors had been negligent as (a) they had failed to reserve his interests in the property when drafting the relevant conveyances, even though they knew that he had paid the full balance of the purchase price and had certain vested interests in the property; (b) they had failed to inform him both that D was not the owner of the property and that it was D's intention to convey the property to B and P; and (c) they prepared the conveyance from D to B and P without reserving his rights.

The solicitors submitted that they had not been negligent as (a) a conveyance of the freehold of a flat was very rare in Gibraltar, the solicitor responsible for drafting the conveyance having only ever worked on one similar case before; and (b) even if that solicitor had been wrong at times, it was on questions so technically difficult that to be found wrong would not amount to negligence.

Held, dismissing the appeal with respect to D, but allowing it in respect of the solicitors:

(1) D had not acted fraudulently in conveying the property to B and P in the knowledge that M had purchased the freehold. He had not explicitly represented to M that he was the owner of the property, even though he might knowingly have allowed the estate agent to give that impression. This representation, however, had not been intended to be acted upon and the contract was not one in which anything turned directly on the identity

of the vendor. To sustain an action for deceit, M had to prove that D had made a false representation to him with the intention that he would act upon it, either knowingly, without belief in its truth, or recklessly, careless as to whether it was true or false. Here, he had not been able to do that (paras. 20–23).

(2) M's solicitors had been negligent in dealing with the conveyance of the flat to him. The solicitor responsible for drafting the conveyance had followed a precedent for the transfer of a freehold flat which put the vendor in a stronger position than the purchaser, when he should have created a draft giving M the most unencumbered and indefeasible title possible. That this was only the second conveyance of its kind in Gibraltar increased the solicitor's responsibility to ensure not only that M got the most favourable terms possible, but also that he properly understood the rights he was acquiring and the obligations to which he would be subjected. The solicitor had also been negligent in failing to advise M adequately on the courses of action available to him when the vendors' solicitors sought to introduce a rent charge and a right of re-entry into the conveyance. This negligence entitled M to damages in respect of the legal costs incurred in rectifying the conveyance and a nominal sum of damages for aggravation (paras. 30–35; paras. 38–39).

Cases cited:
(1) *Derry* v. *Peek* (1889), 14 App. Cas. 337; 5 T.L.R. 625, applied.
(2) *Priestley's Contract*, *In re*, [1947] Ch. 469; [1947] 1 All E.R. 716, considered.
(3) *Sykes* v. *Midland Bank Executor & Trustee Co. Ltd.*, [1971] 1 Q.B. 113; [1970] 3 W.L.R. 273; [1970] 2 All E.R. 471, considered.

J. Lincoln for M;
D did not appear and was not represented;
J.E. Triay, *Q.C.* for the solicitors.

1 **SPRY, P.:** This appeal arises out of a curious series of transactions. Mrs. Perez was the tenant for life of a building ("the property") which comprised two flats above and maisonettes below. She was desirous of selling. There was no trustee of the settlement, so one had to be appointed by the Supreme Court.

2 The occupant of one of the maisonettes was a Mr. Pizarro. He was interested in buying the property in partnership with a friend, Mr. Blackshaw. They were faced with two difficulties; they thought they would have difficulty in raising sufficient money and they thought that because of some family quarrel, Mrs. Perez would not deal with them. They therefore brought in Mr. Dellipiani, the first respondent, who was looking for fresh accommodation for himself. The initial proposal was that the purchase of the property should be in the name of Dellipiani, so that Mrs. Perez would not be aware of the participation of Pizarro. It was

proposed that Dellipiani should provide one-half of the purchase money and take the two top flats, while Blackshaw and Pizarro would provide the other half and share the maisonettes.

3 Later, the financial position changed, Dellipiani found himself unable to raise his half, while Blackshaw and Pizarro were able to raise the whole purchase price for the property. From then on, Dellipiani became little more than an agent for Blackshaw and Pizarro, although they continued to regard him as having a moral claim to the two flats if he could find his half-share of the purchase price of the property. Dellipiani's own evidence was confused. He had originally intended to live in one of the two flats, but he decided that it would not be suitable for his family. Meanwhile, he negotiated with Mrs. Perez, ostensibly on his own behalf but in reality as agent of Blackshaw and Pizarro.

4 Early in July 1976, Dellipiani must have felt reasonably sure that agreement for the purchase of the property was near, because he instructed Mr. Prescott, an estate agent, to look for a purchaser for one of the flats known as 3B Morello's Ramp. Prescott brought along Mr. Migge, who liked the flat, and, after a little bargaining, agreed to buy it for £11,500. The agreement was recorded in a brief letter dated July 7th, 1976 addressed to Dellipiani and signed by Migge. This merely gave the number of the flat (and that incorrectly), the purchase price and an agreement by Migge "to contribute a proportional amount, 16%," of the cost of putting the building into a better state of repair and future maintenance. There is an endorsement, which is undated, on this letter, signed by Dellipiani, saying that measurements were to be rechecked to verify the percentage. The agreement was silent as to the estate which Migge was buying and this was to lead to disputes and delay. The following day, Migge paid a 10% deposit directly or indirectly to Messrs. Triay & Triay. He saw Mr. Serfaty of that firm and asked him to act in the matter. The judge found that Migge was aware that Triay & Triay were already acting for Dellipiani.

5 The next day, Migge again went to Prescott's office. He was about to leave Gibraltar on holiday and he gave Prescott a cheque for £10,350, the balance of the purchase money, made out in favour of Triay & Triay, to be held by Prescott on conditions which Prescott acknowledged in a letter dated July 9th, 1976. Of these conditions, the one now relevant is that Dellipiani was to be the owner of the whole building and was therefore free to sell to Migge.

6 The sale of the property to Dellipiani then went ahead. On July 21st, 1976, the purchase price, £27,000 was deposited by Blackshaw and Pizarro with Triay & Triay, and out of this a deposit of £2,700 was paid to the proposed trustee of the settlement. A contract of sale was signed on July 27th, 1976. On September 1st, 1976 a trustee of the settlement was

appointed by the Supreme Court and two days later a conveyance of the property to Dellipiani was executed.

7 Somewhere about the middle of August, Migge went to Prescott's office and there met Dellipiani, apparently by chance. Dellipiani told him that the flat was vacant and he could take possession when he wished. Dellipiani also asked about the balance of the money and, to cut a long story short, took the cheque for £10,350, ostensibly to deliver it to Triay & Triay. In fact, he paid it into Triay & Triay's client account at Barclays Bank International.

8 Migge took possession of the flat immediately, although he did not go into occupation as considerable repair and redecoration was necessary. It seems that Dellipiani did not become aware that Migge was in possession until September 14th, 1976 but as soon as he heard of it, he went to Prescott's office and collected the cheque for £10,350 which Migge had left with Prescott on July 9th. Dellipiani said that he took the cheque for the account of Migge and himself. This is supported by Triay & Triay's books and the judge accepted it as true. On September 23rd, Dellipiani decided that as he was now the owner of the property and Migge was in possession, he was entitled to the purchase money; on September 23rd, 1976 he asked Triay & Triay for it and received their cheque. He paid the whole £11,500 to Blackshaw but received back £4,000, which was described as buying out any interest he might still have in the property and probably represented also a commission for what he had done.

9 About this time, Migge began to be concerned that he had no title deed. It seems that when he first called on Serfaty, the latter did not take full instructions and unfortunately made no note of the interview. He assumed that Migge would be taking a lease of 999 years, as that is common practice in Gibraltar, and he thought it would be simpler to complete the conveyance to Blackshaw and Pizarro and for them then to grant a lease to Migge, rather than complete the lease first and afterwards to convey the property subject to the lease. This explains a long period of apparent inactivity.

10 On February 25th, 1977, a conveyance of the property was executed from Dellipiani to Blackshaw and Pizarro and their wives. Not long after, Serfaty, who was very busy at the time, passed Migge's affairs over to Mr. Budhrani, another member of the firm, with the approval of Migge. Budhrani took full instructions and it was only at this stage that Triay & Triay, represented by Budhrani, first became aware that Migge was asserting a right to the freehold of the flat.

11 It should perhaps be mentioned here that Migge was of East German origin and was married to a Gibraltarian. He was not at this time a British subject and his English was less than perfect. The judge found that Migge had not understood the meaning of the word "freehold" when the

negotiations began and he thought Dellipiani had used it to make the offer of the flat more attractive. Whether or not Migge ever really understood, he became insistent that he would accept no lesser tenure.

12 On July 12th, 1977, Budhrani sent a draft conveyance to Messrs. J.A. Hassan & Partner, now the solicitors for the Blackshaws and the Pizarros. On Migge's instructions, the parcels included the roof of the property. On September 5th, 1977, the draft was returned heavily amended: instead of a conveyance, it was changed to the grant of a lease and the grant of the roof was struck out.

13 Migge now sought the support of Dellipiani and Prescott: they confirmed that the agreement had been for a freehold grant, whereupon Blackshaw and Pizarro immediately agreed to honour it. There were, however, other matters of contention. Migge contended that the agreement had included the roof with the right to build upwards: it was only after long negotiation that it was agreed that Migge should be allowed to carry out a single development project. There was also negotiation as to the proportion of the cost of external repairs and decoration that should be borne by the owner of the flat. The area was recomputed and the percentage reduced. Migge also claimed that it had been agreed that he should have the exclusive right to the use of an electric pump which brought up water from a rain-water cistern to serve the two flats. At quite a late stage, he also claimed the right to cross the garden at the foot of the building as it would afford him an alternative approach. As regards the last two of these, the learned judge held that they were matters raised for the first time well after the conclusion of the agreement of July 7th, 1976. There can be no doubt that the introduction of these matters greatly delayed the completion of the sale.

14 Eventually, all these matters were thrashed out and, on March 29th, 1979, a final draft conveyance was sent to J.A. Hassan & Partner and the engrossment was executed on July 24th, 1979. Two points concerning this conveyance should be mentioned—it reserved a nominal rent charge and it contained a power of re-entry. It is not in dispute that these items were in the draft conveyance sent by Budhrani to J.A. Hassan & Partner.

15 Unhappily, that is not the end of the story. There followed disputes, culminating in a writ, over the water supply and Migge was unhappy over the right of re-entry. The writ which initiated the proceedings from which this appeal arises claimed, among other remedies, rectification of the conveyance. That issue was settled just before the trial began and a deed of rectification has been signed. The present claim is for damages and costs.

16 There has been one great difficulty. The proceedings were recorded on tape and it appears that there was some technical fault. The result is that the transcript is largely unintelligible. The judge valiantly tried to

alleviate this, by dealing at exceptional length with the evidence in his judgment. With great respect, this marred his judgment, because instead of an analysis of the evidence on the basis of the issues, it appears in chronological order of witnesses.

17 The grounds of appeal include a criticism of the judgment as being "long and confused." It is unquestionably long, but I think it was the endeavour of the judge to make up for the defective record that was responsible. The statement of claim fell into two distinct parts: first, there is an allegation of fraud against Dellipiani and, secondly, there is an allegation of negligence against Triay & Triay.

18 The allegation of fraud, as pleaded, is limited to the single proposition that Dellipiani, knowing that he had entered into a contract with Migge and received valuable consideration, conveyed the property to the Blackshaws and the Pizaros, without reserving or in any way protecting Migge's rights. The particulars read:

> "(a) Fraud is only alleged as against the first defendant.
>
> (b) The said conveyance was fraudulent in that the first defendant well knew that he had contracted with the plaintiff in the terms set out in para. 3 of the statement of claim in or about July 1976 and had received valuable consideration therefor, but deliberately and/or recklessly conveyed the said property as alleged without reserving the plaintiff's rights therein or referring in any way to the plaintiff's rights."

19 In arguing this part of the appeal, Mr. Lincoln submitted that much of Dellipiani's conduct was fraudulent, that he had been deceitful from the beginning: he had held himself out as owner, without disclosing that he was in reality acting as an agent; he had conveyed the legal estate in the property without protecting Migge's interest; he had deceived his own lawyers by not disclosing to them the letter of July 9th, 1976 and he had procured the payment to himself of the purchase money for the flat at a time when he knew that the conditions for payment had not been fulfilled.

20 Allegations of fraud must be pleaded with particularity and while it is legitimate to look at Dellipiani's conduct as a whole to understand his actions, the allegation of fraud has to stand or fall on the single matter of the conveyance of February 25th, 1977.

21 As I understand the law, the alleged wrong as pleaded is incapable of constituting deceit, as the word is used in tort. Mr. Lincoln did not address us on the law of tort but in answer to the court he referred to the classic case of *Derry* v. *Peek* (1). Briefly, what Lord Herschell said in that case was that, to sustain an action of deceit, there must be proof of fraud and fraud is proved when it is shown that a false representation has been made, to be acted upon by another or others, knowingly, or without belief in its

truth, or recklessly, careless whether it be true or false. It seems to me that the execution of the conveyance is incapable of constituting a tort. Had the Blackshaws and Pizarros dishonoured Dellipiani's agreement with Migge, Migge would have had a remedy in contract and it is possible that Dellipiani would have been guilty of criminal fraud. I am not aware of any branch of the law of tort that could be invoked as regards the conveyance.

22 That is enough to dispose of this part of the appeal, but since the judge considered the allegations of fraud that lie outside the particulars, I should perhaps comment briefly on them. First, Dellipiani does not appear explicitly to have held himself out to Migge as the owner of the property, but he may knowingly have allowed Prescott to give that impression. That seems to be indicated by the evidence, particularly that of Migge. This was not, however, a contract where anything turned on the identity of the vendor: Migge himself in answer to a question from the court said that it made no difference to him provided the title was in order. This was not, therefore, a representation intended to be acted upon. Secondly, obtaining the purchase money from Triay & Triay before Migge had a legal estate may have been a breach of contract but it was not a tort.

23 The judge found Dellipiani an unsatisfactory and unreliable witness but held that he had not been guilty of deceit or fraud. I think he was right. And I think it should be stressed that while the evidence of Dellipiani and Blackshaw was frequently confused and sometimes contradictory, they seem at all times to have been anxious to deal fairly with each other and with Migge.

24 I turn now to the second part of the proceedings, the claim in negligence against Triay & Triay. The particulars of negligence allege that—

> "(a) They knew that they have received from the plaintiff the full purchase price of the property and that the plaintiff had certain vested interests and rights therein.
>
> (b) They failed to reserve the plaintiff's said interests and rights in drafting the said conveyances.
>
> (c) They failed to inform the plaintiff of the fact that:
>
> (i) the first-named defendant was not in July 1976 the owner of the said property;
>
> (ii) that the first-named defendant intended to convey the said property (after acquiring the same) to the defendants;
>
> (iii) the third-named defendants prepared the conveyance from the first defendants to the second defendants without reserving the rights of the plaintiff and without informing the plaintiff that his rights were not being reserved;

(iv) the conveyance to the plaintiff on July 24th, 1979 as drafted by the third-named defendants did not preserve for the plaintiff or assure to him the rights he had contracted for as set out in para. 3 of the statement of claim."

25 As regards (a) and (b), the learned judge expressed the view that "Mr. Serfaty had sufficient grounds to be satisfied that Mr. Migge's interests were adequately protected." He went on to say that "if things had not come to fruition this might be a different story, but in my view Mr. Serfaty's appraisal of the situation was justified by events." He proceeded to say that if he was wrong in this, at least no damage had resulted.

26 With respect, I am a little more critical. I think that Serfaty should have taken full instructions from Migge as soon as possible after agreeing to act. I think he took an unnecessary risk in releasing the conveyance of the property to the Blackshaws and the Pizarros without any safeguard for the rights of his client, Migge. I would not, however, say that this amounted, in all the circumstances and having regard to Serfaty's knowledge of some of the people involved, to professional negligence.

27 As regards (c), I do not think there is any substance in sub-para. (i). As I have already said, in para. 23, the identity of the seller was not important. Sub-paragraphs (ii) and (iii) seem to me to do little more than reproduce (b) in a different form.

28 Sub-paragraph (iv) raises a more serious issue. It alleges that in drafting the conveyance to Migge, Triay & Triay failed to ensure access through the garden and exclusive ownership of the pump and cistern, matters with which I have dealt in para. 15 above, and in giving the vendors a right of re-entry, gave Migge less than the unfettered freehold for which he had contracted. This I think is the real crux of the case.

29 The idea of freehold flats is comparatively new in English law, and so far as Gibraltar is concerned, Serfaty said that this was only the second case with which he had dealt. The problem is that the owners of flats need to ensure that they will enjoy support from below, protection from the weather and so on. The difficulty is that positive covenants do not run with land. Mr. J.E. Triay argued most persuasively that Budhrani was right in drafting the conveyance as he did, and, in the alternative, that if he was wrong, it was on questions so difficult that to be found wrong would not amount to negligence.

30 The judge had dealt very fully with these matters and he concluded that Budhrani "made a wrong judgment but it is not one for which his principals are liable if damage results." I do not propose to go into the complicated and highly technical questions concerning the rules against perpetuities and forfeitures on which Mr. Triay addressed us. I do not think it necessary. The matter as I see it, is really quite simple. Budhrani

was acting as the purchaser's solicitor. He chose to adopt a precedent contained in *The Sale of Flats*, 3rd ed., Precedent No. 14, at 228 (1970). It is a precedent for the transfer of a freehold flat in a block, with a developer on the one hand and flat-owners on the other. I do not think that was appropriate to the situation when Dellipiani contracted to sell the flat to Migge.

31 I should have thought a much more suitable precedent, from the purchaser's point of view, is that to be found in 19 *Encyclopedia of Forms and Precedents*, 4th ed., Precedent No. 7:A:36, at 926. This was not a matter of common form conveyancing. It is quite clear from the text of George & George (*The Sale of Flats*) and the footnotes in the *Encyclopedia of Forms and Precedents* that there are differing views on how best to make effective the covenants between flat-owners that are essential for their mutual protection. The precedent chosen by Budhrani appears to me one that favours the vendor and puts him in a stronger position than the purchaser.

32 There were very serious conflicts of evidence between Budhrani and Migge. The judge, on almost every issue, preferred the evidence of Budhrani and, in particular, believed, contrary to the evidence of Migge, that at all material moments Budhrani explained the terms of the draft deed and the eventual engrossment to his client. I do not think this is enough.

33 Once it was accepted that the agreement of July 7th, 1976 was for the sale of the freehold, without reservation or qualification, I think Budhrani's duty, acting for the purchaser, was to put up a draft which gave the purchaser a title in fee simple as unencumbered and as indefeasible as possible. Had the vendors' solicitors then sought to introduce a rent charge and a right of re-entry, it would have been Budhrani's duty to explain these as best he could to Migge and advise him on the courses available to him.

34 Harman, L.J., in *Sykes* v. *Midland Bank Executor & Trustee Co. Ltd.* (3) observed ([1971] 1 Q.B. at 124):

> "When a solicitor is asked to advise on a leasehold title it is, in my judgment, his duty to call his client's attention to clauses in an unusual form which may affect the interests of his client as he knows them . . .
>
> If this be right, Mr. Rignall committed a breach of the contract of duty which he owed to his clients and they are entitled as a result to at least nominal damages, and I would so hold."

35 The principle, it seems to me, is exactly the same here. The fact that this is said to be only the second conveyance of its kind in Gibraltar, increases rather than diminishes the responsibility of the solicitor for ensuring not only that his client understands the rights he is acquiring and

the obligations to which he will be subject, but also to ensure as far as he can that his client gets the most favourable terms that he can properly demand. Although one is always reluctant to find that a conscientious practitioner has been guilty of professional negligence, I think there has been negligence here, but I would stress, not serious negligence.

36 Finally, then, there is the question of damages. The judge held that Migge was not entitled to damages but that, had he been entitled, they should have included the costs of the rectification. I agree. Mr. Lincoln originally included a claim for damages equivalent to the interest on the purchase money for the flat prematurely taken by Dellipiani but he withdrew this claim when referred by Mr. Triay to the case of *In re Priestley's Contract* (2).

37 He also claimed the amount of the bill of costs of J.A. Hassan & Partner, the vendors' solicitors, paid by the purchaser under what we are told is the local custom. Mr. Lincoln's argument here is that the fees payable would have been less had the conveyance to Migge been completed when Triay & Triay were acting both for Dellipiani and Migge. If there were a right to damages, the amount would, I think, be the difference between the total actual bills of Triay & Triay and J.A. Hassan & Partner and the amount which Triay & Triay would have been entitled to charge had they been acting for both parties. This does not, however, arise. This loss, if any, has nothing whatever to do with the only professional negligence which I find, that is, the inclusion of the rent charge and right of re-entry in the conveyance. That negligence only occurred when J.A. Hassan & Partner were already involved.

38 Finally, Mr. Lincoln claimed general damages for aggravation, worry and inconvenience. There was no claim for special damages. Migge in his evidence spoke of the time taken up by numerous visits to the offices of Triay & Triay, of having to go to hospital and of his business suffering, but he gave no specific evidence. The judge held that a major cause of delay was the introduction from time to time of fresh demands by Migge. He cannot complain of delay for which he was himself largely to blame. Much of the time and much of the worry arose from the claim to exclusive use of the water pump, which led to separate legal proceedings, and to the ownership of the roof and the rights to building. So far as I can see, the rent charge and the right of re-entry were relatively minor causes of distress. I would award no more than nominal damages under this head.

39 To sum up: I would dismiss the appeal so far as it concerns the first respondent, Dellipiani. I would allow the appeal so far as it concerns the second respondents, Triay & Triay, to this extent: I think Budhrani, admittedly dealing with a difficult task, was guilty of a breach of the duty of care he owed to the appellant Migge when he inserted the provisions relating to the rent charge and the right of re-entry. I would award the

appellant as damages payable by the second respondents (Triay & Triay) the amount of legal costs he incurred in connection with the rectification of the conveyance to him of the flat, and the nominal sum of £5 for aggravation.

40 **BLAIR-KERR** and **BRETT, JJ.A.** concurred.

Appeal allowed in part.

[1980–87 Gib LR 261]

YOME v. VALARINO

SUPREME COURT (Davis, C.J.): December 20th, 1984

Public Health—dangerous or dilapidated buildings—order to repair or demolish—order under Public Health Ordinance (cap. 131), s.39 need not specify work to be done but give owner choice to repair or demolish—to be given choice even though preferred choice already indicated to court

The respondent, the Senior Public Health Inspector, applied to the Magistrates' Court for an order under the Public Health Ordinance (*cap.* 131), s.39 requiring the appellant to repair or demolish a dangerous part of his property.

The respondent complained that the dormer window of the appellant's property was potentially dangerous for tenants living there. He applied to the Magistrates' Court for an order requiring that the appellant carry out building work to repair the window and remove the danger or demolish it altogether. At the hearing, the appellant conceded that the window was in a dangerous condition and elected to demolish it. The magistrate, however, in spite of the appellant's choice, made an order phrased in such a way that the appellant was required either to repair the window or to demolish it.

On appeal, the appellant submitted that (a) the magistrate had been wrong to phrase the order so that the option to repair remained; (b) the phrasing meant that if he failed to demolish the window, it would be open to the Government to repair it and recover the cost, placing him in the very position he had wished to avoid; and (c) if, in spite of his choice, an order could still be made for either repair or demolition, then the words "if he so elects" in s.39(1)(i)(a) were superfluous.

The respondent submitted that (a) the order was not defective as it was not necessary for the court to specify exactly how the work should be