[1991–92 Gib LR 416]

HARPER v. ELTHAM and ELTHAM

SUPREME COURT (Kneller, C.J.): December 10th, 1992

Companies—legal proceedings—proper plaintiff—shareholders purchasing land in name of "shell" company for personal occupation, using own funds are proper plaintiffs in action for breach of contract for survey, since land held on resulting trust by company

Valuers and Appraisers—surveyors—breach of contract—measure of damages for loss resulting from purchase of defective property in reliance on negligently performed survey is sum required to place purchaser in same position as if contract properly performed, i.e. sum by which purchase price exceeded value of property

Valuers and Appraisers—surveyors—breach of contract—no damages for distress and inconvenience resulting from purchase of defective property in reliance on survey unless physical discomfort suffered

The respondents brought proceedings to recover damages for breach of a contract to perform a house survey.

The respondents instructed the appellant to carry out a survey on a house, with a view to their purchasing it. Their agreement with the appellant was an oral one, and did not include a warranty that the condition of the house would be correctly described. On inspecting the house, the appellant observed that there were cracks in the external and internal walls, the verandah and a ceiling. The vendors of the house told the appellant that these had previously been filled in but had reappeared. The roof was also unsound. The appellant nevertheless reported that the property was structurally sound and had no serious defects.

The respondents purchased the house in the name of a company solely owned and controlled by them. They later found that substantial remedial works were required to make the property safely habitable, but were unable to borrow sufficient money to pay for the necessary work, as their

only security was the defective house. They commenced proceedings for breach of contract, alleging that the appellant had failed to exercise due care, skill and diligence. The Registrar awarded them the difference between the purchase price and the actual value of the property on the basis that they would have offered a much lower price had they known the likely cost of remedial works. The Registrar also awarded them, *inter alia*, an additional sum as compensation for annoyance and inconvenience, together with interest since the date of completion.

On appeal, the appellant submitted, *inter alia*, that (a) since the house was owned by their company, the respondents had suffered no loss in connection with its purchase; (b) the sum awarded by the Registrar for the diminution in value of the property was wrongly based on the estimated cost of repairs; (c) no sum was payable for mere inconvenience unless physical discomfort had been suffered by the respondents; and (d) the interest awarded was excessive.

Held, allowing the appeal in part:

(1) The respondents were the proper persons to bring the action for damages, since they, rather than their company, had advanced the purchase money for the house, and they were therefore beneficial owners of it by virtue of a resulting trust. The court was entitled to look behind the corporate ownership of the house, since the company was a wholly-owned and controlled vehicle for the purchase, with no other assets or funds. The appellant's fees had been paid by the respondents, and he would look to them for his costs if he succeeded in his appeal. In any event, the court was at liberty to amend the pleadings to join the company as a co-plaintiff if necessary (paras. 10–11; para. 21).

(2) The measure of damages for loss sustained as a result of a negligent house survey was the sum required to place the respondents in the position in which they would have been had the contract been properly performed, namely the amount by which the purchase price, relying on the survey for guidance, exceeded the true value of the house. The Registrar had taken an average of the figures put forward for remedial works and found that the respondents were entitled to that sum, since, had they had been aware of the extent of work needed to make it habitable, they would either have offered comensurately less for the house or withdrawn from negotiations. The court could not argue with this reasoning (para. 12; para. 22).

(3) However, the Registrar had wrongly awarded damages for the inconvenience and distress caused by the purchase, since these were not recoverable under an ordinary contract of sale unless the distress resulted from physical discomfort. In the absence of evidence of physical discomfort suffered by the respondents, the award would be set aside (para. 13; para. 26; para. 29).

(4) Whilst interest at 15% was payable by the appellant from the date of completion on the sum for the diminution in value of the house,

interest at that rate on the other items, *e.g.* survey fees, costs of removal, and minor repairs already carried out on the house, would run from the dates that the losses were incurred (para. 27).

Cases cited:
(1) *D.H.N. Food Distributors Ltd.* v. *Tower Hamlets London Borough Council*, [1976] 1 W.L.R. 852; [1976] 3 All E.R. 462, referred to.
(2) *Dyer* v. *Dyer* (1788), 2 Cox, Eq. Cas. 92; 30 E.R. 42; [1775–1802] All E.R. Rep. 205, *dicta* of Eyre, L.C.B. applied.
(3) *Franklin* v. *Franklin*, [1915] W.N. 342; (1915), 60 Sol. Jo. 43, referred to.
(4) *Healey* v. *Healey*, [1915] 1 K.B. 938; (1915), 84 L.J.K.B. 1454, referred to.
(5) *Merchandise Transp. Ltd.* v. *British Transp. Commn.*, [1962] 2 Q.B. 173; [1961] 3 All E.R. 495, *dicta* of Danckwerts, L.J. applied.
(6) *Watts* v. *Morrow*, [1991] 1 W.L.R. 1421; [1991] 4 All E.R. 937, applied.
(7) *Winkfield, The*, [1902] P. 42; (1901), 71 L.J.P. 21, referred to.

C.A. Gomez for the appellant;
H.K. Budhrani for the respondent.

1 **KNELLER, C.J.:** On April 5th, 1990 Mr. Registrar Balban assessed the damages in this action at the sum of £71,257 together with interest at 15% from May 5th, 1987.

2 Mr. and Mrs. Eltham, through PMS Estate Agents Ltd., retained and employed for reward Mr. Harper on February 12th, 1987 to act as their surveyor for a property known as "El Halcon" (The Falcon) at El Aguila, Jimena de la Frontera, Cadiz, Spain. Mr. Harper is, among other things, a chartered surveyor, project manager, claims consultant and a consultant to building, civil engineering, mechanical and electrical industries.

3 The Elthams-Harper contract was an oral one, and Mr. Harper knew that his survey and report for the Elthams was to help them decide whether they should buy "El Halcon" and, if so, at what price and on what terms. He had to exercise reasonable care, skill, diligence and competence in carrying out the survey and making the report. That would include reporting all visible defects in "El Halcon" and other signs of other probable or possible defects and suggesting what measures would be required to remedy them. It was a normal contract of survey without a warranty that the condition of the house had been correctly described by Mr. Harper.

4 Mr. Harper surveyed "El Halcon" and sent the Elthams his reports dated February 20th and March 1st, 1987. The Elthams were in The Bahamas and, on the strength of those reports, they bought "El Halcon"

for £112,000 on March 15th, 1987 through Serow International S.A., a Panamanian company which they own and control.

5 The external walls of El Halcon, the paving under the column on the outside verandah, a wall inside the kitchen and the underside of the sitting-room ceiling were badly cracked. The vendors said they had been filled in before but had re-opened. They were of structural significance and likely to impair the stability of "El Halcon." The roof was not sound or in good order. Mr. Harper did not tell the Elthams that the cracks had been repaired but had re-appeared. He said they were not structural because they did not penetrate beyond the external rendering and internal plastering, the roof was sound and there was nothing serious in the defects he found.

6 The Elthams estimated that the cost of remedial works together with professional fees, taxes and expenses would be Spanish Pta. 5,425,000. "El Halcon" was worth much less than £112,000. They had been put to much trouble, inconvenience and discomfort because Mr. Harper had failed to exercise due care, skill, diligence and competence in making his survey and reports. They issued a writ and statement of claim for damages and interest on November 16th, 1988.

7 Mr. Harper, for reasons that need not be gone into again here, did not file his notice of intention to defend successfully, so the Elthams were granted interlocutory judgment in default against him for damages to be assessed and costs to be taxed on December 6th, 1988. The hearing before the Registrar took five days. He found that he believed the evidence of Mr. Eltham and his second surveyor, Mr. Francis, and he did not believe the evidence of Mr. Harper's witness, Mr. Sprakes. He delivered his judgment on April 5th, 1990 in these terms:

> "The main measure of damages in this case is the difference between the purchase price paid and the value of the property as properly described. The price paid in 1987 was £112,000. According to Mr. Francis, the value of the property at the time of purchase should have been the market value less the cost of the remedial work, which he estimated at between £49,000 and £53,000 (depending on the rate of exchange). From the estimates before me I have no doubt that the cost of the work would have been between £29,000 to £53,000, and for this reason I have decided to allow a figure of £42,000, which is just about the average for the two highest estimates and Mr. Francis's figure of £53,000. Had the true condition of the property been known to the plaintiffs way back in 1987, they could have either refused to purchase the house or fairly offered to pay £70,000 for it.
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> The plaintiffs have already paid a total sum of £2,097, being £120 for retiling one wall of the downstairs bathroom, £1,527 to Messrs.

Swinney Stubbs for survey fees and £450 to Brian Francis & Associates, and this I also allow.

It is also obvious to me that the plaintiffs are entitled to some compensation for annoyance and inconvenience and, in the absence of any guidelines as to this amount, I have decided to give them £2,000.

The defendant alleges that the plaintiffs had a duty to mitigate their losses and should have carried out the necessary repairs as soon as possible. The plaintiffs replied that they tried unsuccessfully to borrow money to do so but in the end were forced to buy the new house instead because no bank was prepared to lend them money against the security of a house which was falling down. Furthermore, the defendant never really accepted liability. In the circumstances, I consider that the plaintiffs acted properly in not carrying out the repairs and were thus not bound to mitigate their losses as alleged.

As far as interest is concerned, this was fixed at 15% by Legal Notice No. 2 of 1986 for judgments entered upon or after March 1st, 1986, and in the absence of anything to the contrary, I see no reason why I should not grant interest at this rate from the date the cause of action arose (*i.e.* May 15th, 1987) and continuing at the same rate until payment."

8 Mr. Harper gave notice on May 3rd, 1990 that he was dissatisfied with the learned Registrar's assessment. His amended memorandum of appeal is dated December 30th, 1991 and his second, March 16th, 1992. The first is for this court and the second for the Court of Appeal for Gibraltar. I cannot make out if Mr. Harper is "hedging his bets" or is pessimistic about the outcome of this appeal and is prepared for the next stage of this lengthy litigation. Fortunately, the grounds in each are the same, *i.e.*:

"1. The plaintiffs suffered no loss as a result of any negligence on the part of the defendant because the architect who designed the property was at all times willing (through his insurers) to pay for the costs of any necessary remedial works.

2. The plaintiffs failed to mitigate their loss by carrying out repairs expeditiously or at all.

3. The plaintiffs suffered no loss as a result of any negligence on the part of the defendant because they had at all material times a good cause of action against the vendors of the house for fraud and or misrepresentation.

4. The plaintiffs suffered no loss in connection with the purchase of the property because they do not have, and never have had, any

interest in the said property, it having been purchased by a Panamanian company with bearer shares known as Serow International S.A.

5. The sum awarded by the learned Registrar for diminution in value of the house was excessive and/or was in truth not based upon the diminution in value of the house but upon the cost of repairs thereto.

6. The sum assessed for the cost of moving house has no basis in law as calculated and/or is excessive.

7. The sum assessed for professional fees is excessive.

8. The sum of £2,097 assessed is irrecoverable in law and/or is excessive.

9. The sum of £2,000 assessed is excessive.

10. The assessment of interest is excessive.

11. In all the circumstances, the assessment by the learned Registrar is unjust and should be set aside and in lieu the Supreme Court should review the case and reach a fresh determination in the matter."

9 The relevant law cited by counsel in this appeal yielded these guidelines. Eyre, L.C.B. delivering the judgment of the Court of Exchequer in *Dyer* v. *Dyer* (2) (2 Cox, Eq. Cas. at 93; 30 E.R. at 43) said:

"The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; and whether jointly or successive, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a Court of Equity, that this resulting trust may be rebutted by circumstances in evidence."

See also 48 *Halsbury's Laws of England*, 4th ed., para. 605, at 336–337.

10 The proper plaintiffs in any action by a beneficiary are usually the persons in whom the legal right is vested. An equitable owner such as a beneficiary under a trust may have "such possession" as enables him to maintain an action: see *The Winkfield* (7) and *Healey* v. *Healey* (4).

11 Where the character of the company, or the nature of the persons who control it, is a relevant feature: "The court will go behind the mere

status of the company as a legal entity and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance," *per* Danckwerts, L.J. in *Merchandise Transp. Ltd.* v. *British Transp. Commn.* (5) ([1962] 2 Q.B. at 206–207). Goff, L.J. cited that passage as authority for being entitled, on the facts of the particular case before the court, to look at the realities of the situation to pierce the corporate veil in *D.H.N. Food Distributors Ltd.* v. *Tower Hamlets London Borough Council* (1) ([1976] 1 W.L.R. at 862).

12 According to the headnote to *Watts* v. *Morrow* (6) in *The All England Law Reports* ([1991] 4 All E.R. at 938), the proper measure of damages "where the purchaser of a house [buys] in reliance on a negligent survey report prepared under a normal contract of survey requiring the surveyor to exercise proper care and skill but with no special terms," is "the diminution in value rather than the cost of the repairs." This is the result of applying the principle of restitution to the terms of the contract. The damages are "the amount required to put the plaintiff in the position in which he would have been if the surveyor had carried out the contract of survey properly." The test is: What is "the amount by which he was caused to pay more than the value of the house in its true condition?" If [the householder] were to be permitted to recover the costs of the repairs he would, in effect be recovering damages for breach of a warranty that the condition of the house had been correctly described by the surveyor, when no warranty had been given.

13 "Damages for breach of a normal contract of sale [are] recoverable for distress caused by physical consequences of the breach." They are not recoverable "for mental distress not caused by physical discomfort or inconvenience": see *Watts* v. *Morrow* (*ibid.*).

14 Interest on judgments entered on or after March 1st, 1986 is fixed at 15% by Legal Notice No. 2 of 1986.

15 I will deal with each ground of appeal *seriatim*, even if Mr. Gomez, for Mr. Harper, did not do so. Mr. Sprakes, the architect, designed "El Halcon" and supervised its construction for the vendors, and not the Elthams, so he would not be liable to the Elthams. The Registrar found him evasive and unreliable when he gave evidence for Mr. Harper on the issue of damages. He and his insurers have not paid the Elthams any sum. There is no merit in the first ground.

16 There was no submission by Mr. Gomez, for Mr. Harper, on the second ground of appeal, namely, that the Elthams failed to mitigate their loss by carrying out repairs expeditiously or at all. Mr. Gomez explained that he had inherited the memorandum from Mr. Harper's previous counsel, but I note that Mr. Gomez signed those of December 1991 and

March 1992. I take it that he abandoned this one. If not, I agree with the learned Registrar that the Elthams were not bound to do so because they had to find alternative accommodation and pay for it, and no bank would lend them money to do the repairs on their only security, namely, "El Halcon," which was breaking up.

17 There was also no submission by Mr. Gomez on the third ground of appeal, which was that the Elthams suffered no loss as a result of any negligence on the part of Mr. Harper because they had at all material times a good cause of action against the vendors of the house for fraud and or misrepresentation. Mr. Gomez must have abandoned this one when it came to urging the appeal. In any event, the vendors were not a party to the contract or the Elthams' action for damages and there was no evidence before the Registrar of any fraud or misrepresentation by the vendors.

18 The fourth ground was the main one, and the court was addressed at length by Mr. Gomez and Mr. Budhrani on it. It was that the Elthams had "suffered no loss in connection with the purchase of the property because they do not have, and never have had any interest in the property, it having been purchased by a Panamanian company with bearer shares known as Serow International S.A." Mr. Gomez stressed the fact that because the Elthams' judgment was a default one, this point was before a court for the first time and it was possibly Mr. Harper's last chance to have it aired. The Elthams must not be allowed to pierce the veil of the company and act on its behalf. They did not own "El Halcon" and they are not the freeholders, who or which alone could sue. What was to stop Serow beginning proceedings in Gibraltar or in Spain? In fact Serow had initiated proceedings in Spain, so Mr. Harper was in jeopardy of paying double compensation. The Elthams were the wrong plaintiffs and the Registrar should not have awarded them damages for the diminution in value for "El Halcon" because they did not own it.

19 Mr. Gomez conceded that they had a judgment which lasted forever but that did not mean they were entitled to damages. The Registrar should have said, according to Mr. Gomez: "You have your judgment. You cannot have damages. You suffered none." It was undoubtedly true that the Elthams were to be the occupiers of "El Halcon" and, according to Mr. Gomez, they had an irrevocable licence to live in it, which meant they could claim for the reduced value of their right to do so. The damages would be the cost of having to move elsewhere. They could have sued Mr. Harper for damages for negligent statements. There was no resulting trust in favour of the Elthams, but if there were Serow had the legal title to the house, not the Elthams. This was not a technicality but a fundamental matter and so one of importance. The Elthams and Serow were and are separate legal entities.

20 Mr. Budhrani's reply was that Mr. and Mrs. Eltham wholly owned and controlled Serow. They paid for "El Halcon," and Serow did not do so because it has no money, property or business of its own. They registered it in the name of Serow, which holds it on a resulting trust for them as its beneficial owners and it was they who suffered the loss or damage caused by Mr. Harper. Put in another way, Serow's loss is suffered by the Elthams. Serow could not sue Mr. Harper because it had no contact or contract with Mr. Harper. He made no representations to Serow. It had issued proceedings in Spain against the architect and builder, and not Mr. Harper, as a defensive move because "El Halcon" was in danger of falling down and injuring a third party. Mr. and Mrs. Eltham had disclosed their position at the outset in their pleading of five years ago, which had not been set aside. They had established their loss and were entitled to compensation.

21 I find that it is, of course, the Elthams who have pierced the corporate veil for us by setting out in their statement of claim that they purchased "El Halcon" through Serow International S.A. and that it was a Panamanian company which they own and control. There is the reality of the situation, and there is no call for the court to pierce any veil. They were the proper plaintiffs in this action. If I am wrong on that I would, even at such a late stage, have ordered the writ and pleadings to be amended by adding Serow as a co-plaintiff, with all other necessary amendments, the Elthams paying the costs, because all along Mr. Harper knew who to look to for his costs if he were successful—the Elthams, not Serow—and there were no trustees to decide whether they would sue: see *e.g. Franklin* v. *Franklin* (3) ([1915] W.N. at 343, *per* Neville, J.) which was not cited. The fourth ground fails.

22 The next one was that "the sum awarded by the learned Registrar for diminution in value of the house was excessive and/or in truth was not based upon the diminution in value of the house but upon the cost of repairs thereto." He ended his ruling on this point by saying: "Had the true condition of the property been known to the plaintiffs way back in 1987 they could have either refused to purchase the house or fairly offered to pay £70,000 for it," which by itself is in accordance with the test in *Watts* v. *Morrow* (6) ([1991] 4 All E.R. at 938), namely: "What amount were they caused to pay more than the value of the house in its true condition?" They paid £112,000 after negotiations with the vendors and in reliance on Mr. Harper's negligent survey. Had they been told they would have to spend up to £53,000 on making it safe and habitable, they would have offered £70,000. The Registrar referred to the cost of repairs assessments, but did not select any one and declared that it was the correct measure of damages. He took an average figure and, in so many words, said: "That is the amount required to put the Elthams in the position they would have been if the surveyor had carried out the contract

of survey properly. They would have offered £70,000 or not gone ahead with negotiations to buy it." Damages of £40,000 for the diminution in value of the house were not excessive or based on any wrong principle of assessment so the fifth ground fails.

23 The sum assessed for the cost of moving house—£20,160—was agreed by both counsel for the parties, so submissions that it was unwarranted or excessive cannot succeed in the absence of a finding of mistake or fraud in a separate action. The sixth ground has no merit.

24 There is no submission for Mr. Harper that the Elthams could not claim for the professional fees they had to pay because they relied on Mr. Harper's survey. Instead, the sum assessed, which was £50,000, was castigated as "excessive." There was no submission as to why this was so or by how much and it does not appear to be so for these days. Ground 7 fails.

25 £2,097 was awarded as well for—

(i) re-tiling one wall of the downstairs bathroom—£120;

(ii) survey fees (a) Messrs. Swinney Stubbs—£1,527, (b) Brian Frances & Associates—£450.

These are said to be irrecoverable in law or excessive, but these matters were not followed up and I am not persuaded I should uphold Mr. Harper on ground 8.

26 The £2,000 for annoyance and grievance is, I agree, irrecoverable according to *Watts* v. *Morrow* (6), because there was no suggestion or no sufficient evidence that Mr. and Mrs. Eltham suffered any physical discomfort as a result of Mr. Harper's negligent survey report. They were clearly bothered and inconvenienced by it, but damages cannot be awarded for this. Ground 9 is successful and £2,000 must be deducted from the total sum awarded.

27 As for ground 10, the calculation of interest at 15% from the date of the case of action arose, according to the Registrar, one day after "completion" which was on May 15th, 1987. This is correct for the diminution in value sum because the loss began then when the Elthams parted with the purchase price: see *Watts* v. *Morrow* (6) ([1991] 4 All E.R. at 960). But for the other sums, *e.g.* fees, costs of removal, *etc.* it will be from the dates those losses were incurred.

28 Otherwise, the Registrar's assessment was not unjust, so it will not be set aside or reviewed, and this court will not determine the damages that should be assessed.

29 The order for £2,000 for annoyance and inconvenience shall be set aside. 15% interest is payable on the balance of the award, to run from the

relevant dates for each loss. Save to that extent, the appeal is dismissed. The costs of the appeal are awarded to the plaintiffs. Leave to appeal, if necessary, is granted.

Order accordingly.