

Litigation Strategy: When to Put All Your Cards on The Table
And When to Keep An Ace Up Your Sleeve

The Case of Andrew Henley -v- Shelley Bloom [2010] EWCA Civ 202

The Facts

Mr Henley ('the Tenant') was granted a lease of a basement flat ('the Flat') in about 1986. The landlord was obliged to keep the structure and exterior of the building (including drains, gutters and external pipes) in repair but was not obliged to carry out works or repairs for which the Tenant was liable by virtue of his duty to use the Flat in a tenant-like manner.

In September 2001, Mrs Bloom ('the Landlady') acquired the freehold to the building subject to the Tenant's lease.

As at September 2001, the Flat suffered damp ingress which, in turn, caused damage. The Tenant made numerous complaints to the Landlady and, in October and November 2002, the local council sent notices to the Landlady advising the Flat and the building were in a state of disrepair and specifying substantial repair works to bring the Flat and the building up to a reasonable standard. Copies of the notices were sent to the Tenant.

The Landlady obtained an expert's report in February 2003 and then a contractor's cost estimate for repair work. A copy of the contractor's estimate was sent to the Tenant. The Landlady did not carry out any of the repair work.

In August 2006, the Landlady issued possession proceedings. The Tenant defended on the ground that, amongst others, it was not just or equitable to order possession because he had carried out improvements to the Flat. The parties commenced negotiations culminating in a Consent Order dated January 2007 requiring (a) the Tenant to vacate the Flat in good tenable repair and condition by June 2007 and (b) the Landlady to pay damages and costs. The Consent Order was expressed to be in full and final settlement of any claim the Tenant had arising out of his improvements to the Flat.

The Tenant vacated the Flat in May 2007 but not before obtaining an expert's report on the extent of dampness and disrepair to the Flat. Whilst the Tenant kept silent, the Landlady carried out significant refurbishment works to the Flat in July 2007.

In November 2008, the Tenant issued proceedings against the Landlady alleging she had been in breach of her repairing obligations by allowing the Flat to become damp and damaged. The Tenant relied upon the Landlady's cost estimate from 2003 and his own expert's report. The Landlady denied she was in breach of her repairing

obligations and counterclaimed that the Tenant was in breach of (a) his duty to use the Flat in a tenant-like manner and (b) the Consent Order which required him to vacate the Flat in good tenable repair and condition.

The Landlady subsequently applied to strike out the Tenant's disrepair claim on the ground that it was an abuse of process because (a) the Tenant could and should have raised his disrepair claim in the earlier possession proceedings and (b) it was now impossible to have a fair trial on the Tenant's disrepair claim.

With regard to her claim that the Tenant could and should have raised his disrepair claim in the earlier possession proceedings, the Landlady argued that:

1. The state of the Flat was raised in the possession proceedings and there was no good reason for the Tenant not to raise his disrepair claim during those proceedings.
2. The state of the Flat was also raised in the subsequent negotiations and the Tenant '*was not putting his cards on the table*' during those negotiations.
3. The Tenant agreed that he would vacate the Flat in good tenable repair and condition.

With regard to her second claim that it was impossible to have a fair trial on the disrepair claim, the Landlady argued:

1. The Tenant had obtained an expert's report specifically for the purpose of identifying the existence and extent of dampness and damage to the Flat. The Landlady would probably have obtained her own expert's report if the Tenant had raised his disrepair claim before she carried out significant refurbishment works. But now the Landlady could not do so because she had carried out those refurbishment works.
2. In the circumstances, she would be fighting the case '*with one hand behind her back*' and this unfairness had been caused entirely by the Tenant.

The Landlady succeeded in the County Court. The Tenant appealed and but his appeal failed so he appealed again to the Court of Appeal. The Tenant's second appeal was heard by Lord Neuberger and Lord Justices Longmore and Smith and Judgment was handed down on 9 March 2010.

The Decision

Should The Tenant Have Raised His Disrepair Claim In The Earlier Possession Proceedings?

The Court of Appeal found that:

1. Although the possession proceedings were issued in August 2006, settled in January 2007 and the Tenant did not obtain an expert's report to support his disrepair claim until April 2007, the Tenant *could* have raised, and even brought, his disrepair claim in the earlier possession proceedings because:
 - a) He knew the Flat suffered damp since, at least, September 2001.
 - b) He had complained to the Landlady about the damp from around September 2001.
 - c) He knew of the local council's view because he received copies of its notices served on the Landlady in October and November 2002.
 - d) He could have obtained an expert's report earlier than April 2007.
 - e) The Pre-Action Protocol for Housing Disrepair Cases envisages a tenant notifying a landlord '*as soon as possible*' of any arguable disrepair claim.
2. However, the central issue was whether the Tenant *should* have raised his disrepair claim in the earlier possession proceedings and not whether the Tenant *could* have raised it.
3. It could not be said that the Tenant *should* have raised his disrepair claim because:
 - a) The possession proceedings and the disrepair claim involved different issues – the former did not involve any question of whether the Flat was in disrepair and certainly not whether such disrepair was caused by the Landlady.
 - b) Whilst the Tenant agreed to vacate the Flat in good tenantable repair and condition, this obligation related to the state of the Flat at the end of the lease and did not relate to the state of the Flat during the lease.
 - c) The full and final settlement of any claim the Tenant had against the Landlady only related to the Tenant's improvements to the Flat and it could not be argued that this included his disrepair claim.
 - d) The Landlady could have been expected to at least think of (and even raise) the Tenant's possible disrepair claim taking into consideration (i) the Tenant had complained of the damp (ii) the Landlady had been served with the local council's notices and (iii) the Landlady had the Flat inspected by her expert and her contractor. It was as much up to the Landlady to have raised the disrepair claim in the negotiations as it was up to the Tenant.
 - e) The Landlady had brought the possession proceedings and the Tenant merely defended those proceedings – he did not make any counterclaim in those proceedings. The Tenant was not bringing two claims against the Landlady one after the other.

4. Although it could not be said that the Tenant should have raised his disrepair claim, the evidence suggested that he *may* have intentionally kept the disrepair claim '*up his sleeve*' during the negotiations regarding the possession proceedings. If costs were unnecessarily increased as a result of the disrepair claim being brought after the possession proceedings were settled, it may be appropriate to reflect this fact in any costs order made in the disrepair claim.

Was It Impossible To Have A Fair Trial On The Disrepair Claim?

The Court of Appeal stated that the legal question was whether there was a substantive risk that a fair trial was impossible. If so, the proceedings should be struck out. The Court went on to find that:

1. The Landlady was aware of the possible existence of the disrepair claim for a number of years and the Tenant did not say or do anything which could lead the Landlady to think that he would not bring the disrepair claim.
2. Whilst the Landlady did not have an expert's report as detailed or directed to the disrepair claim as the Tenant's expert's report, the Landlady could rely on (a) the survey she obtained when she acquired the freehold to the building in September 2001 (b) the local council taking into consideration it served notices in October and November 2002 (c) the expert who prepared the Landlady's report in February 2003 (d) the contractor who provided the subsequent cost estimate (e) the contractor who carried out the refurbishment works and (f) other sources of information.
3. It is not unusual for one party in litigation to have better expert evidence than the other and this inequality cannot justify the conclusion that the trial cannot be fair. It could not be said that the inequality in this case was substantial or prejudicial or attributable to the Tenant acting unlawfully or dishonestly.
4. In mitigation of the less than substantial inequality, the Landlady could cross-examine the Tenant's expert whose duty is to tell the truth and assist the Court and not the Tenant. Furthermore, it would be appropriate to draw adverse inferences if it is found that the Tenant intentionally kept the disrepair claim '*up his sleeve*' during the negotiations (although the Court acknowledged that this was not a complete answer to the inequality).

The Tenant's appeal succeeded on both grounds.

The Message

For Landlords:

The message for landlords is remarkably simple – ensure that the terms of any settlement with your tenant are expressed to be in full and final settlement of all claims the tenant has, and all claims the tenant may have, against you arising out of all matters which existed during the tenant's possession of your property. This advice should be double-underlined if, at any time prior to the settlement, your tenant or a third person (such as a local council) has ever questioned the state and condition of your property whether formally, informally, in writing or orally.

For Tenants:

The message for tenants is:

1. Take note of the advice to your landlord set out above and carefully scrutinise the terms of any settlement offer made by your landlord. Try to ensure the terms of the settlement relate only to the landlord's claim.
2. If, for whatever reason, you inadvertently fail to raise a claim against your landlord before entering into a settlement of your landlord's claim against you (and assuming the settlement terms do not prevent you from doing so), don't worry – you are free to bring your claim.
3. And unless you act unlawfully or dishonestly, it appears that it is permissible to intentionally keep secret your claim against your landlord during negotiations for the settlement of your landlord's claim against you. Assuming the settlement terms relating to your landlord's claim do not prevent you from doing so, don't worry – you are free to bring your claim at a later date.

And by doing so, (a) you will extinguish your landlord's belief that he/she had obtained finality (b) your landlord may have lost the opportunity to obtain the best evidence needed to defend your claim and (c) you may have weakened your landlord's resolve to defend your claim.

This course of action, however, carries the risk that an adverse costs order will be made against you if costs are unnecessarily increased. But it is our opinion that this risk can be reduced (and even eliminated) if an early, carefully drafted 'Part 36' offer (or standard 'without prejudice' offer) is made to your landlord.

9 March 2012