IN THE SUPREME COURT OF JUDICATURE SLJ 98/6170/3
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(MR LAWRENCE COLLINS QC SITTING AS A DEPUTY JUDGE)

Royal Courts of Justice
Strand
London WC2

Wednesday, 26 August 1998

B e f o r e:

LORD JUSTICE CHADWICK

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RAINBOW ESTATES LTD

Plaintiff/Applicant

- v -

(1) TOKENHOLD LIMITED
(2) HERMAN HERSKOVIC

Defendants/Respondents

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(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
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Official Shorthand Writers to the Court)

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MR M WARWICK (Instructed by Philippsohn Crawfords Berwald, London, WC1V 7JG) appeared on behalf of the Applicant (Plaintiff)
MR D STANCLIFFE LEGAL ASSISTANT REPRESENTING THE SECOND DEFENDANT of Messrs Abrahamson & Associates, London, NW11 7PH appeared on behalf of the Respondent (Second Defendant)

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J U D G M E N T
(As approved by the Court)

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LORD JUSTICE CHADWICK: The applicant, Rainbow Estates Limited, is respondent to appeals brought by Tokenhold Limited and Mr Herman Herskovic against the order made in this action on 4 March 1998 by Mr Lawrence Collins QC, sitting as a Judge of the Chancery Division. By the present

application Rainbow Estates seeks security from each appellant for the costs of those appeals.

The underlying facts may be stated shortly. Mr Herskovic claimed to be entitled to a leasehold interest in property known as the Eastern Annexe, Gaynes Park Mansion, Epping, Essex, under a lease granted on 15 December 1987 by Venrich Limited, a company formerly owned by Mr Herskovic and his brother. Tokenhold Limited claims to be entitled to a leasehold interest in respect of the remainder of the same mansion house under a lease also granted by Venrich Limited on the same day, 15 December 1987. The rent reserved under each lease was £5,000 per annum, payable yearly in advance. Each lease contained a covenant by the tenant to keep and maintain the property in good and tenant like repair throughout the term. The term of each lease determines on 14 December 2004 without proviso for re-entry.

On or about 5 November 1996 the reversion immediately expected upon the determination of each of the two leases became vested in Rainbow Estates Limited. At or about the same time the arrears of rent under the two leases, together with the right to sue for and recover those arrears, were assigned (or purportedly assigned) to Rainbow Estates.

It appears to have been common ground that no rent was paid under either lease in the years 1991 to 1996 (both inclusive). Indeed the tenants assert that, notwithstanding the provisions in the leases themselves, they were each excused from payment of any rent under a collateral agreement made with Venrich on 17 November 1987 - that is to say shortly before the grant of the leases themselves.

The present proceedings were commenced by the issue of a writ on 25 April 1997. Rainbow Estates, as plaintiff, claimed against each defendant, in respect of the lease under which it or he was tenant, arrears of rent in the amount of £30,000 - being the rent for the six years prior to the commencement of the proceedings - with interest thereon; and orders that each defendant do carry out works of repair

specified in a schedule of dilapidations. The writ was followed by a summons for summary judgment. In an interim judgment given on 10 December 1997 Mr Collins QC held that the tenants were bound by the tenant's repairing obligations in the leases, notwithstanding a contention that those obligations had been varied by the same collateral agreement. The Judge gave a further judgment on 4 March 1998 in which he held that the Court had power to order specific performance of tenant's repairing covenants in a lease; and that, in the particular circumstances of this case, orders for specific performance were appropriate. He gave judgment against each defendant severally in the sum of £38,926 (that being arrears of rent and interest on such arrears) and he ordered each defendant to carry out the works of repair identified in the respective schedules of dilapidations. He ordered the defendants to pay the plaintiffs' costs. He granted a stay of execution of the orders to carry out the works of repair for four weeks "pending possible appeal" and he gave leave to appeal.

The notice of appeal was served on or about 1 April 1998. It seeks an order that the appellants have unconditional leave to defend the action and, by implication, that the order of 4 March 1998 be set aside. It appears that, on 8 April 1998, an application for a further stay of execution was made on behalf of Mr Herskovic to the Judge; but that application was dismissed. No application for any stay has been made to the Court of Appeal.

The first appellant, Tokenhold Limited, was ordered to be wound up on 10 June 1998. It is not clear whether the current appeal in its name is being pursued with the authority of the liquidator. Tokenhold takes no part in the present application.

On 30 June 1998 Rimer J granted a Mareva injunction against the second appellant, Mr Herskovic, limited to £80,000, that sum representing the judgment debt and costs for which Mr Herskovic was liable under the order of 4 March 1998. That injunction was discharged during the following week on payment by Mr Herskovic of £80,000 into court. On 20 July 1998 the matter came back before Jacob J

on a motion to commit Mr Herskovic to prison for his alleged failure to carry out the works of repair in accordance with paragraph 5 of the order of 4 March 1998. No order was made on that application, save as to costs, upon Mr Herskovic undertaking to the Court to carry out and complete the relevant works no later than 20 October 1998. The undertaking was reinforced by a further Mareva injunction - in form a variation of a Mareva injunction which had been granted a week or so earlier by Laddie J - restraining Mr Herskovic from disposing of his assets up to a limit of £130,000, that being the estimated cost of complying with the order for specific performance.

It is in those circumstances that the present application is made against each of the appellants for security for the respondent's costs of the appeals.

The power of the Court to order security for costs is conferred by Order 59 rule 10(5) of the Rules of the Supreme Court 1965. It is in these terms:

> "The Court of Appeal may, in special circumstances, order that such security should be given for the costs of an appeal as may be just."

It is settled practice to require security for costs to be given by an appellant who would be unable through impecuniosity to pay the costs of the appeal, if unsuccessful, without proof of any other special circumstance - see the note at 59/10/20 in the Supreme Court Practice 1997 and the cases there cited. That practice recognises the inherent injustice in exposing a respondent, who has succeeded in the Court below, to the risk that he will have to bear his own costs of resisting an unsuccessful appeal against the judgment to which he has been held entitled and which is, ex hypothesi, upheld.

In support of the application Rainbow Estates relies on the affidavit of Stephen Nathan Philippsohn, sworn on 22 May 1998 and on the affidavit of Jonathan Ress sworn on 21 August 1998. The current position appears from Mr Ress's affidavit.

As I have indicated, an order for the winding up of Tokenhold Limited was made on 10 June 1998. The official receiver's report, dated 5 August 1998, discloses that the company has liabilities of £740,000. There are no assets disclosed other than the company's lease of Gaynes Park Mansion; which is said to be of uncertain value. On that material it is plain that the first appellant is in no position to meet any order for costs which might be made following an unsuccessful appeal. Indeed, it is difficult to see how an appeal could be pursued by the company at all in the absence of some external funding. In principle, therefore, this is a case in which it would be right to make an order for security against the first appellant, Tokenhold Limited.

The position of the second appellant, Mr Herskovic, as it appears from the material before me, may be summarised as follows. First, he is required by paragraph 5 in the order of 4 March 1998 to carry out the works of repair to the eastern annexe of Gaynes Park Mansion (that being the property comprised in his lease); and he has given an undertaking to do so by 20 October 1998. The estimated cost of those repairs are said to be £130,000 or thereabouts - an estimate recognised by the Mareva injunction granted by Jacob J on 20 July 1998. There is no expectation, so far as I am aware, that this appeal will be heard before 20 October 1998; and no application for a stay of the order, or a variation of the injunction, pending the hearing of the appeal. Prima facie, therefore, Mr Herskovic will need to find £130,000 or thereabouts prior to 20 October 1998 in order to comply with his obligations to carry out the works of repairs, whether or not the appeal is successful. It was suggested to me on his behalf that he is obliged to find that sum from assets which are not subject to the Mareva injunction of 20 July 1998. Whether or not that is a fair reading of the terms of the injunction, having regard to the circumstances in which it was granted, it seems to me inconceivable either that the respondent, Rainbow Estates, could resist, or that a Court could refuse to grant, a variation of that injunction sufficient to enable assets subject to it to be used for the very purpose in aid of which it was granted: namely, the carrying out of works of repair which are the subject of the order of 4 March 1998 and the

undertaking.

It follows, in my view, that it is correct to approach the matter on the basis that Mr Herskovic can resort to whatever assets he may have for the purpose of carrying out his obligations under the order and the undertaking and I do not understand that to be controverted by the respondent.

Secondly, the £80,000 paid into Court to discharge the Mareva injunction granted by Rimer J on 30 June 1998 has been applied, as to £40,000 odd, in respect of the judgment debt plus interest. The balance remains in Court pending the taxation of the costs of the proceedings up to 4 March 1998. It is said that the estimated costs - which are the subject of a bill of taxation prepared on behalf of Rainbow in respect of that period is £35-40,000 - and, indeed, that figure is consistent with the total of £80,000 for which the Mareva was granted on 30 June 1998. The balance remains in Court pending taxation of costs.

It is reasonable to assume that the costs of the action are likely to tax out at a figure approaching £30-35,000. Further, since 4 March there have been numerous other hearings in the course of which orders for costs have been made against Mr Herskovic. Those include the application on 8 April 1998 seeking a further stay; the application for a Mareva before Rimer J; the application for a further Mareva before Laddie J on 13 July; the application before Jacob J on 20 July and the most recent application on 24 August before Pumfrey J. The respondents put the overall costs of those applications (in respect of which some at least of the orders are that the second appellant, Mr Herskovic, pays costs on an indemnity basis) at a figure in the region of £20,000. That does not seem to me to be unreasonable. Taking those further costs and the untaxed costs of the action together, I am satisfied that there is no real likelihood that any part of the £40,000 now remaining in court is likely to be available to meet any further order for costs which may be made on the appeal. There is no expectation of any funds returning to Mr Herskovic from that source if the appeal is unsuccessful.

Third, in an affirmation made on 19 July 1998 in purported compliance with an order that he give full details of his assets, Mr Herskovic disclosed the following: (a) that he was the freehold owner of a property known as 71 Durdleston Road, London E5, valued on 14 July 1998 at £115,000 but subject to some form of security interest (undefined) in favour of a third party who had advanced the £80,000 paid into Court to discharge the Mareva injunction granted by Rimer J on 30 June - prima facie, the equity in that property is of the order of £35,000 - (b) a property, 10 Overlea Road, London E5, in which he has a life interest only; (c) the leasehold interest in the eastern annexe at Gaynes Park Mansion.

In those circumstances it seems to me clear that Mr Herskovic is in no position to meet from his own resources both the obligations to carry out the works of repair in respect of which he has given an undertaking to the Court and any liability under an order for payment of the respondents' costs of an unsuccessful appeal. A fortiori, if he has also to fund his own solicitor's and counsel's costs of such an appeal. On the figures as set out - and in the absence of any evidence from Mr Herskovic that the costs of fulfilling his obligations under his undertaking are to be found from some other source - the conclusion is inescapable that at the end of an unsuccessful appeal the applicant would be most unlikely to recover anything under a costs order made in its favour.

In principle, therefore, I am satisfied that this is a case in which security for costs should be ordered against Mr Herskovic as well as against Tokenhold Limited. The question, then, is in what amount should security be ordered? The applicant seeks security of £64,250. That is based on a draft bill exhibited to Mr Philippsohn's affidavit of 22 May 1998. The bill is prepared on the basis of a three day appeal upon which both leading and junior counsel are to be instructed on behalf of the respondent.

The bill includes items in respect of attendance on the appellant's application for leave to adduce

further evidence and a subsequent conference with counsel on that evidence. Disbursements to counsel in respect of those items are included at a total of £11,000; solicitor's profit costs in respect of those items are included at £3,750. A total of £14,750. No application to adduce further evidence has yet been made by either appellant - and, so far as appears from the material before me, there is no current indication that any such application will be made; still less that it could succeed. In those circumstances it seems to me that the £14,750 allowed in respect of those items should not be included in any security to be ordered at this stage. A further application for security can be made, if thought appropriate, if and when the appellants do make an application for leave to adduce further evidence and in the light of any order made on that application.

Counsels' fees for a trial estimated at three days are included at £28,500. That is in addition to solicitors' costs of attending the trial, put at £6,750. In the absence of the need to consider further evidence - as to which no application to admit has yet been made, let alone allowed - I am not satisfied that this appeal would occupy three days of this Court's time. The only real point in the appeal, as it seems to me, is whether the Judge was right to hold that the generally held view that specific performance was not an available remedy for the enforcement of a tenant's repairing covenant in a lease was not, or was no longer, supported by authority. That is, of course, a question of some interest; but, given proper preparation and the assistance of skeleton arguments, I can see no reason why it should not be thoroughly and completely examined by the Court of Appeal in the course of a single day.

It is perhaps pertinent to observe that, unless the appellants succeed in persuading the Court that they are not liable under the tenant's covenants in the lease, the question whether or not specific performance was an appropriate remedy seems to me to be largely academic. The works will have been carried out, in accordance with the injunction and the undertaking, and it is difficult to see what damage Mr Herskovic could recover under the landlord's cross-undertaking in circumstances that he

had done only what (on this hypothesis) he was contractually required to do. If appellants do succeed in that point, the question of remedy answers itself. There is no remedy, because there was no breach. Be that as it may, if the point is to be argued I am not persuaded that it is a point of such difficulty and complexity as to require the instruction of two counsel. In my view the costs estimate of the hearing is substantially inflated. A more realistic estimate, as it seems to me, for both solicitors and counsels' attendance at the hearing of the appeal in this matter is £7,500. Taking into account the costs of preparation (excluding the consideration of further evidence) and the costs of today's application, I propose to order security for costs in the sum of £12,000. There will be the usual order that the appeal do stand dismissed without further order if security is not provided within 28 days of today and that the appeal be stayed in the meantime.

There is one further matter that I should mention. It would, in my view, be wrong in principle for a Court to require the provision of security for the costs of an appeal in circumstances where the only assets which could be used as the source of such security are themselves the subject of an order restraining the party against whom security is ordered from using those assets for that purpose, that is to say subject to a Mareva order. In principle the Mareva was not granted in order to provide security; it was granted in order to prevent dissipation. The provision of security for the costs of an appeal for which leave has been granted cannot, in my view, be regarded as a dissipation of assets. It is a normal and proper use of those assets. In those circumstances there are two courses open. Either to require an undertaking from Rainbow Estates that it will not oppose an application to vary the Mareva injunction granted on 20 July 1998 so as to permit Mr Herskovic to use his assets to provide the security which I have ordered; or to give leave to Mr Herskovic to apply within the period of 28 days to vary the order for security which I have made, if he is able to show that an application to use his assets identified in his affirmation of 19 July 1998 for the purpose of providing the security ordered has been refused. On balance, it seems to me that the second course is the more satisfactory and that is the course that I propose to adopt. The order therefore will contain a provision giving to Mr Herskovic leave to apply to

this Court to vary the order for security in the event that an application to use assets disclosed in the affirmation of 19 July 1998 for the purpose of providing the security ordered is refused.

Order: Security for costs in the sum of £12,000 to be paid in 28 days against both defendants; costs of the application to be paid to the plaintiff by the second defendant; proviso that the second defendant have leave to apply to this court in the event that any application to use the assets disclosed in his affirmation of 19 July 1998 for the purpose of providing the security is refused. (This order does not form part of the approved judgment)