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IN THE HIGH COURT OF JUSTICE 1994-ORB-277
QUEEN'S BENCH DIVISION, OFFICIAL REFEREES' BUSINESS
HIS HONOUR JUDGE HUMPHREY LLOYD Q.C.
IN CHAMBERS

B E T W E E N:

DAVID ROSS CAMPBELL WALLACE

CAROLE LOUISE WALLACE

Plaintiffs

- and -

BRIAN GALE & ASSOCIATES [a firm]

Defendant

J U D G M E N T

(Although this judgment was given in chambers it may be treated as if given in open court)
Pursuant to the Practice Statement of 9 July 1990 this text records my judgment and no note or further record is to be made.

His Honour Judge Humphrey LLoyd QC

7 March 1997

Mr Charles Joseph appeared for the plaintiffs instructed by Copley Clark & Bennett.

Mr Alain Choo-Choy appeared for Mr John McQuillan, a former partner in the defendant firm, instructed by Attersolls.

Mr Brian Gale, another former partner, appeared in person.

J U D G M E N T

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In this action the plaintiffs, **Mr and Mrs Wallace, claimed damages from the defendants, Brian Gale & Associates, for negligence in surveying** 19 Ash Close, Merstham, Surrey. Mr and Mrs Wallace had bought the property in 1992 on the strength of a survey carried out by the defendant firm which had been retained by the couples' mortgagees. **Literally on the moment of moving in Mr and Mrs Wallace saw that the floors sloped and that the house was structurally unsound.** This shocking discovery would have been distressing for anyone but it was particularly tragic for Mr and Mrs Wallace who had committed all their savings towards buying the house and were therefore unable to carry out remedial works and had to live in a severely defective house. They commenced proceedings in 1994 which eventually came to trial in July 1995 when a settlement was sensibly arrived at. The terms of the compromise were embodied in a **Tomlin Order dated 7 July 1995.** The wording of the order and of the Schedule to it are important and I shall therefore set out most of both in full. They read as follows:

"AND TERMS OF SETTLEMENT HAVING BEEN AGREED BETWEEN THE PARTIES.

BY CONSENT, IT IS ORDERED that:

1. All further proceedings in this action be stayed upon the terms of settlement agreed between the parties set out in the Schedule herein except for the purpose of carrying the said terms into effect and that there be liberty to apply for the said purpose.

2. The sum presently standing to the credit of the Defendant paid into court on 4th November 1994 be paid out to the Defendant forthwith together with interest accrued thereon.

3. There be Legal Aid taxation of the Plaintiffs' costs from 31st October 1994 and of the Defendant's costs under certificate no. 02/01/94/29547/R from 8th December 1994 and under certificate no. 02/0195/13305/H from 12th June 1995 and it is further ordered that paragraph 6 of the Schedule shall apply as an order of the court.

SCHEDULE

1. WORKS

The Defendant agrees forthwith to procure the carrying out of the works specified in the Performance Specification and Schedule of Works annexed hereto marked "A", and in addition the screeding of the kitchen floor save beneath fixed units, to a good and proper standard to the property known as and situate at 19 Ash Close, Merstham in the county of Surrey ("the property") at the Defendant's costs ("the works"). The works are to be carried out as soon as reasonably practicable subject to the arrangements to be made under paragraph 2 and 3 below.

2. VACATION AND REMOVALS

The Plaintiffs agree to vacate the property for the purpose of the carrying out of the works for such reasonable period as is required for the same to be completed, such vacation to take place from a date not more than 1 calendar month from the date on which the Plaintiffs receive written notice from the Defendant that the works will be commenced. The Defendant agrees to procure for the Plaintiffs at its own cost reasonable accommodation of a similar nature to the property within : mile of the property for the said period. The Defendant further agrees to procure for the Plaintiffs at its own cost (a) the removal and storage of such goods as the Plaintiffs may reasonably require to be removed and stored during the course of the works and (b) the removal and transport of such other goods as the plaintiffs may reasonably require to be removed and transported to the said substitute property during the courser of the works, and on completion of the works also (c) the removal from storage and transport to the property of the goods so stored, and (d) the removal and transport to the property of the goods then at the substitute property.

3. SUPERVISION

The works shall be under the controlling supervision of such engineer as shall be agreed and appointed by the parties within 2 months of today's date and the costs of appointment and supervision shall be borne by the Defendant. In default of agreement...

4. CERTIFICATE

Upon completion of the works the Defendant shall at his own expense procure from James Brian Pyle... Opinion to the effect that the property is structurally stable and that the foundations of the property and the soil beneath are stable...

6. COSTS

6.1 The Defendant agrees to pay the Plaintiffs' costs of the action to be taxed if not agreed subject to the provisions set out hereunder....

7. INFORMATION

The Defendant shall keep the Plaintiffs' solicitors informed in writing of the commencement and progress of the proposed proceedings mentioned at paragraph 6.3 above once every 3 months commencing on 1st September 1995."

It will be seen that the amount that had been paid into court by the defendant was paid out so as to enable the defendant firm to finance the execution of the remedial works. The scheme was however not implemented without difficulty. Problems arose over the appointment of the supervising engineer. Ultimately John Marsh & Associates was appointed. There were further delays in the selection of suitable contractors so that the remedial works would not in any event

have been completed by Christmas 1995. They had therefore to be postponed until 1996. Indeed Mr and Mrs Wallace did not move out until March 1996 and were not able to return until early May 1996. On their return defects were found in the work which had to be made good. The defendant was not able to pay the fees of the supervising engineer or Mr J.B. Pyle, as a result of which a certificate of completion and an opinion were not issued as required by the terms of settlement.

According to the affidavit evidence (from the plaintiffs' solicitor and Mr McQuillan) Mr and Mrs Wallace remained remarkably patient throughout the lengthy period from the settlement of the action and apparently maintained a friendly and cordial relationship with the defendant firm and in particular Mr Brian Gale. However it was not surprising that Mr and Mrs Wallace's solicitors had to correspond with the defendant's solicitors in order to keep the defendant to the terms of the agreement, including trying to obtain information from the defendant about the proposed proceedings against its professional indemnity insurers (which have apparently still not been commenced even though new solicitors were instructed on behalf of the defendant in April 1996). The partnership comprising the defendant firm was dissolved in 1996. (Mr John McQuillan was represented by Mr Alain Choo-Choy and Mr Brian Gale appeared in person.)

On 14 January 1997 a summons was issued pursuant to the provision for liberty to apply contained in paragraph 1 of the Order of 7 July 1995 whereby Mr and Mrs Wallace sought a number of orders. By the time the application was heard by me on 28 February 1997 the defendants had procured the certificate required by paragraph 3 of the schedule to the order and the opinion required by paragraph 4 of that schedule, both in forms acceptable to the plaintiffs...