IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SHOREDITCH COUNTY COURT
(MR RECORDER PAULUSZ)

CCRTF 98/0823/2

Royal Courts of Justice
The Strand
London

Friday 19 February 1999

B e f o r e:

LORD JUSTICE HIRST

LORD JUSTICE MUMMERY

and

LORD JUSTICE BUXTON

B E T W E E N:

KINGCASTLE LIMITED — Appellant/Plaintiff

- v -

GARY CHRISTOPHER WAYNE OWEN-OWEN — Respondent/Defendant

(Computer Aided Transcription by
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Official Shorthand Writers to the Court)

MR BENEDICT SEFI (instructed by Messrs Bishop & Sewell, London WC1 3RJ) appeared on behalf of THE APPELLANT

MR JAN LUBA (instructed by Messrs John Ford Solicitors, London N1 8LN)

appeared on behalf of THE RESPONDENT

JUDGMENT
(As Approved by the Court)

Friday 19 February 1999

LORD JUSTICE HIRST: This is an appeal by the appellant Kingcastle Ltd from the order of Mr Recorder Paulusz in the Shoreditch County Court dated 6 April 1998 whereby it was ordered that the appellant's claim for property situated at 25A Cassland Road, London E9 7AL would be adjourned on the same terms as those ordered by His Honour Judge Graham QC on 20 January 1998, namely until the first open date after the decision of the House of Lords on an application for leave to appeal in the case of Fitzpatrick v Sterling Housing Association. On behalf of the appellant Mr Sefi has presented his case with the most commendable dispatch and we are very grateful to him for the way he has handled it.

The action is a claim for possession of residential premises brought by the appellant, who is the owner, against the respondent, Mr Gary Owen-Owen, who is the occupier.

The respondent's case is that he is the gay partner of the deceased tenant of this dwelling which he has occupied as his home for over 20 years. His contention is that he has a right to statutory succession of the tenancy by virtue of schedule 1 of the Rent Act 1977 as amended.

In Fitzpatrick v Sterling Housing Association [1998] Ch 304 the Court of Appeal, by a majority, on 23 July 1997 refused an application by a gay partner in similar circumstances for a declaration that he had succeeded to such a tenancy.

On 12 November 1997 an application for leave to appeal had been lodged in the Fitzpatrick case with the House of Lords. The present proceedings were launched five days later, on 17 November 1997 with a return date on 20 January 1998. On that date the respondent applied for the action to be adjourned generally, and Judge Graham QC, having seen the petition for leave to appeal in Fitzpatrick, adjourned the proceedings until the first open date after that application had been determined. In that judgment he said as follows:

> "Having considered the Court's duties to weigh up the prejudice to both parties, I conclude that the prejudice to the Defendant in not adjourning this matter and thereafter the Plaintiff obtaining an order for possession would outweigh the prejudice to the landlord in adjourning it.

> Further, in the light of the imminence of the decision of the Appeal Committee in the House of Lords in the case of Fitzpatrick v Sterling Housing Association, I will agree to adjourn this matter.
>
> If I were to hear this matter today then the Defendant would no doubt appeal my decision and obtain a stay pending the outcome of the Fitzpatrick case."

He then made the order which I quoted at the outset of my judgment. This was clearly an exercise of his discretion in which he carefully weighed up the competing prejudice to the two sides according to whether or not he granted the adjournment.

On 10 February 1998 the House of Lords decided that provisional leave to appeal should be given in Fitzpatrick.

This case then returned to the Shoreditch County Court on 6 April before the Recorder and he further adjourned the proceedings on the same terms as His Honour Judge Graham, indicating that he had considered the exercise of his discretion afresh. I do not think that I need read his judgment, save to say that he rejected a contention from the plaintiff that the balance of prejudice had now swung against him, and therefore again clearly decided the case, as had the Judge, on the balance of prejudice.

On the self-same day, 6 April, leave to appeal to the House of Lords was granted in Fitzpatrick, and we have been informed that the appeal has been scheduled for hearing in mid-April 1999.

To my mind (and Mr Sefi fully agrees) it is implicit in both orders that, were leave to appeal to be granted in Fitzpatrick, the case should be stood over until after the determination of the appeal by the House of Lords.

Order 13, rule 3 of the County Court Rules 1981 confers on the court a complete discretion at any time and from time to time upon its own motion to adjourn in advance the date of the hearing of any proceedings.

The principles upon which adjournments should be granted are of course extremely well known, and were recently conveniently re- stated in the Divisional Court in R v Kingston Justices, ex parte

Martin [1994] Imm AR 172. I do not think it is necessary for me to cite those because the main consideration is the question of the balance of prejudice, and I am quite satisfied that, in approaching the matter as they did, both the Judge and the Recorder applied the correct test in the exercise of their discretion. Consequently it would only be proper for this court to interfere if their decision was plainly wrong.

Mr Sefi's submission is that there should have been a trial in due course so that the landlord can know if his claim for possession might be affected by the position as maintained by the defendant to find out where justice lies; and that the preponderance of authority is to the effect that a court of first instance has the duty to try cases in due course and to apply the law as it then appears. In his skeleton argument he goes so far as to say that it would never be appropriate for a judge of first instance to stand outside the state of the law soon after a fully argued Court of Appeal decision, so as to deny a plaintiff the right to a trial of his case for a prolonged period pending an appeal from that decision.

In my judgment for the reasons I am about to explain there is no warrant for laying down such a hard and fast rule and no authority has been cited which would support it.

At the forefront of his argument Mr Sefi relied on the Court of Appeal decision in the case of In re Yates' Settlement Trusts [1954] 1 WLR 564. That was a case where the trial judge, Harman J, granted an adjournment but was reversed by the Court of Appeal. It is quite plain in my judgment that the reversal turned on an appraisal of the particular facts of that case and not on the application of any general principle such as Mr Sefi advances. Mr Sefi placed particular reliance on a very characteristically short and clear judgment of Denning LJ at page 568. Having referred to In re Downshire Settled Estates (in which an appeal was pending to the House of Lords, thus leading to the application for the adjournment in the Yates' case until the Downshire case was decided) Denning LJ said as follows:

> "The law has been stated by the Court of Appeal in In re Downshire Settled Estates, and Harman J should have applied the law as there laid down, without any misgivings about what the House of Lords might hereafter say. I do not think that the plaintiffs should be sent away for

> an indefinite period, especially when it is not known whether the settlor will live so long."

However, the other two judgments make it very clear to my mind that this is a case where the court does have a general discretion. Evershed MR said at page 567:

> "It may well be that if an important case is known to be subject to appeal to the House of Lords, or to appeal from a judge of first instance to the Court of Appeal, a judge may reasonably and properly think that it is in the public interest not to decide another similar case until the result of the case under appeal has become known: whether he should so decide depends very much on all the circumstances of the particular cases...."

I pause there. That is a very clear statement of principle as to the existence of an open discretion. He went on:

> "and if the judges of the Chancery Division have reached the conclusion that it would be in the public interest, generally speaking, to postpone considering applications of this kind until the decision in in re Chapman's Settlement Trusts is known, then I should feel that it was, prima facie at any rate, a matter for the Chancery judges to decide....
>
> Whatever might be the right answer to a case not affected by a consideration of that kind [which arises in the particular case], it seems to me that a real injustice might result if this case were adjourned, perhaps for some months, and if during that period Mr Yates were to die."

That comment was based on the evidence before the court to show that the settlor, who was aged 80, was in a very delicate state of health and that it was impossible to say how long he was likely to live. His health was such that he might die within a very short space of time. In other words, there were very strong special circumstances in that case which told against the adjournment.

Romer LJ reached the same conclusion as the Master of the Rolls. He also cited authority showing that there was a clear discretion in the hands of the judge, but added that in the particular

circumstances of that case, in view of the settlor's ill health, it would be wrong to grant the adjournment. Indeed, Romer LJ described it as "a special case .... because it is a case where the gentleman whose life is of considerable importance in the proposed scheme is some 80 years of age, and an affidavit has been put in before the Court of Appeal, which was not in evidence before Harman J, showing that his state of health is serious. He may not live very long, and in those circumstances, which are rather special ....", the adjournment should not be granted.

There are, as Mr Sefi showed us, instances of refusals of application to adjourn pending the enactment of possible legislation by Parliament which would change the then prevailing law (Willow Wren Canal Carrying Co v British Transport Commission [1956] 1 WLR 213 (Upjohn J), and Secretary of State for Trade and Industry v Hinchcliffe (Times LR, 2.2.98) (Rattee J)).

On the other hand, in Derby v Weldon (No 3) [1989] 3 All ER 118, Vinelott J refused an application to strike out a pleading based on a recent decision of the Court of Appeal which was then the subject matter of a pending appeal to the House of Lords. There is also a decision of the Divisional Court in R v Walsall Justices, ex parte W (a minor) [1989] All ER 460, but I do not think that has much bearing on this case since it was in the criminal context.

In my judgment, as so clearly stated by the Master of the Rolls and by Romer LJ in Yates, each case must depend on its own facts. In the present case I am quite unable to conclude that Judge Graham and the Recorder, having directed themselves correctly in the exercise of their discretion, were plainly wrong.

In the course of his argument this morning Mr Sefi approached the case from a slightly different angle. He submitted that the Recorder, at any rate, and perhaps the Judge also, were in error in that they should have required evidence at the stage of the application before them, and also a pleaded case from the defendant so they could know with greater clarity precisely where the case stood. However, that suggestion was never put forward below to either the Judge or the Recorder. Nor was the submission advanced, which Mr Sefi also continued before us, that there should have been some sort of mini trial to test the defendant's case, or that the case should have been stood over with the usual

directions. I think it is impossible to criticise the Judge or the Recorder in the present case for not giving directions which they were not invited to give.

I would therefore dismiss this appeal.

I would add that I hope that arrangements will be made in the Shoreditch County Court to fix this case as soon as possible after the determination by the House of Lords of the appeal in Eitzpatrick, which should avoid undue delay, and meantime, as I suggested to Mr Luba (who did not dissent), pleadings should be exchanged so that delay can be kept to a minimum.

LORD JUSTICE MUMMERY: I agree.

LORD JUSTICE BUXTON: I also agree.

ORDER: Appeal dismissed with costs.