IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

BEFORE: HIS HONOUR JUDGE BOWSHER Q.C.

BETWEEN:

CHARLES KAMENOU AND GABRIEL KAMENOU
(trading as Regency Developments) Plaintiffs

And

MICHAEL IVAN GEORGE DODSON
And 14 others : Defendants

Case number: 1995 TCC 1419
Dates of Trial: 12 January, 1999
Date of Judgment: 18 January, 1999
Daniel Crowley for the plaintiffs (Solicitors Greenwoods)
Martin Porter for the fifth defendant (Solicitors Lawrence Graham)

JUDGMENT

The text of the Judgment of His Honour Judge Bowsher Q.C. is as follows:

Introduction

1. On the date set for the trial of this action, 12 January, 1999 representatives for the plaintiffs appeared and announced that the plaintiffs had accepted a payment into court made by the fifth defendant, Mr. Michael Dodson, the only remaining active defendant to this action.

2. The plaintiffs ask for a special order for costs against Mr. Dodson. The plaintiffs ask for an order that Mr. Dodson should be ordered to pay not only the costs of the action as against him but also the costs of bringing the action against the other 14 defendants and the costs paid to some of those other defendants on the discontinuance of proceedings against them.

3. I have reserved judgment because this application raises an important point

of practice as to which there is some conflict in the authorities.
History

4. This action concerns alleged damage to a house by the action of tree roots.

5. The plaintiffs are the freehold owners and occupiers of a house and garden at 12, The Avenue, London NW6. That house is a semi-detached property, the adjoining house being number 14. The 15 defendants are joined as parties because it is alleged that they have or have had interests in the whole or part of number 14.

6. The plaintiffs allege that they first noticed damage by subsidence to number 12 in May, 1989. By their Statement of Claim in this action, the plaintiffs allege that the damage was caused by "a number of trees, namely, a large sycamore tree, fruit trees and a black poplar tree" on the property of number 14.

7. Number 14 is divided into flats. In recent years there have been several dealings in the freehold interest and the various leasehold interests in the property.

8. The fifth defendant, Mr. Dodson, is the leasehold owner of the garden flat together with a part of the garden at the rear of the premises. The house at Number 14 does not occupy the whole of the width of the plot. Mr. Dodson's part of the garden is defined by a fence stretching from the outer rear corner of the house back some little distance into the rest of the garden and then at right angles to meet the common boundary. Lessees of other parts of the house have rights over the remainder of the garden.

9. In Mr.Dodson's garden there is a single tree, a pear tree. In the remainder of the rear garden of number 14 there are a Poplar tree, a flowering cherry tree, and a sycamore tree, none of them being particularly close to number 12. In addition, quite close to number 12, in the small front garden of number 14 between the house and the road, there is a sycamore tree. In the rear gardens of number 12 and the adjoining garden of number 10 there are several trees.

10. Before bringing proceedings, solicitors for the plaintiffs made searches at the Lands Registry and also made enquiries of the solicitors for a number of the defendants, including the fifth defendant. The plaintiffs' solicitors were concerned to find out both who were the leaseholders over a period of years and

the terms of their leases. Those solicitors were concerned to see the terms of the leases to ascertain what were the responsibilities of the various individuals concerned with regard to the trees in different parts of the garden. At that stage, the finger of blame was not pointed at any particular tree or trees. Messrs. Amhurst Brown Colombotti, then acting on behalf of a number of leaseholders stated that it was their clients' contention that the parts of the property where the trees were situated were not part of their demise and referred the plaintiffs to the freeholders, St. Mary's Estates Limited, who later became the third defendants to this action. The leaseholders' solicitors, on the instructions of their clients, including Mr. Dodson, refused to give any further information.

11. By employing enquiry agents, the plaintiff's' solicitors discovered that the various defendants had or had previously had some interest in the property, or had lived there. Before bringing these proceedings, the plaintiffs' solicitors had not discovered the terms of the leases. There is some dispute as to whether they could have done so by further enquiry from the Lands Registry.

12. This action was begun by Writ dated 26 October, 1995. The Writ was renewed on three occasions because there was difficulty in finding some of the defendants. In the event, the 1st, 8th, 9th, and 10th defendants were never served.

13. A Statement of Claim was served on 27 March, 1996. The defendants served with proceedings were ordered to serve defences limited to issues related to their alleged interests in the property. Defences relating to matters of causation and the like were deferred until after the service of further and better particulars of the Statement of Claim specifying, among other matters, the precise location of the sycamore tree and the poplar tree referred to in the Statement of Claim.

14. Limited Defences were served on behalf of the 2nd, 3rd, 4th, 5th, 6th, 13th, and 14th defendants in September and November, 1996. Those Defences and documents annexed to them made a full disclosure of the interest of the 5th defendant and of individuals of whom he had knowledge.

15. By his limited defence, the 5th defendant stated that until service of the further and better particulars it was impossible for him to address the matter of responsibility for the tree or trees the subject of the action. That was a reasonable statement because the trees had not been adequately defined. The 5th

defendant did, however, in his limited defence state that he was the assignee of a lease of the garden floor flat and of a part of the garden; and he annexed a copy of the lease to the Defence. That lease, of course, defined that part of the garden for which he was responsible. The 5th defendant also stated that the lease had been granted, not by St. Mary's Estates Limited but by the 4th defendants Ansoll Estates Limited. The 5th defendant also expressed the belief that the freehold had since passed to a Mr. Shamsul Alam Chowdhury. There was also annexed to the limited Defence a copy of a tenancy agreement of the garden flat between the 5th defendant and the 7th defendant. In the same Defence, it was also stated that the 6th defendant had never had a legal interest in the garden flat but had lived there with the 5th defendant for 6 months until her marriage.

16. Despite the giving of this information, the action proceeded against some defendants other than the 5th defendant.

17. For some reason unknown to me, it was not until 1 May, 1997 that the plaintiffs served the Further and Better Particulars of Statement of Claim to which I have referred. Although the plan annexed to those particulars showed the pear tree to which I have referred, it was plain from the request for particulars, that the defendants' advisers do not seem to have thought it important, and they understandably concentrated attention on the sycamore tree and the poplar tree. The plaintiffs by their answer to the request said nothing to indicate that the pear tree was of any importance.

18. At some stage, Mr. Chowdury was made defendant to fresh proceedings which were consolidated with the existing proceedings. The plaintiffs obtained judgment against Mr. Chowdury without trial, though there is some doubt whether he has the means to satisfy that judgment. The proceedings against Mr. Chowdury are not relevant to the application now before me.

19. In June, July and September, 1997, the plaintiffs reached agreements with all of the effective defendants other than the 5th defendant that the proceedings against them should be discontinued on terms that the plaintiffs pay their costs. In some cases those costs were in an agreed amount and in other cases they were to be taxed. Consent orders were made accordingly.

20. Pursuant to an order of the Court, there were meetings between experts for the plaintiffs and the 5th defendant. On 17 December, 1998, again pursuant to an order of the Court, the experts for the plaintiffs and the 5th defendant

respectively signed an agreed statement recording matters on which they were agreed and matters on which they disagreed. While the experts were agreed that the pear tree was not alone responsible for the damage to number 12, they were agreed that it did "possibly" make some contribution to the extent of the damage. They were agreed that if it was established that the pear tree had encroached and caused damage to the property that contribution would be 7% of the total relevant costs. The experts disagreed as to what the total relevant costs were.

21. The following day, on 18 December, 1998, the 5th defendant paid into Court the sum of £5,000. On the last day for acceptance of that payment in, the plaintiffs gave notice of acceptance pursuant to RSC Order 22 rule 3. The notice of acceptance was in the following terms:
"Take Notice that the plaintiff accepts the sum of £5,000 paid into Court by the Defendant Michael Dodson which sum is in full and final satisfaction of all the causes of action in respect of which the plaintiffs claim."

22. Having given notice of acceptance of the money in Court, the plaintiffs' solicitors gave notice that application would be made on the day appointed for the first day of the trial, 12 January, 1999 for the special order for costs which is now sought.

23. By the time the payment was made into court on behalf of the 5th defendant, the 5th defendant was the only effective defendant remaining in the proceedings.
The Law

24. For the 5th defendant it is submitted that I do not have jurisdiction to make the order sought by the plaintiffs: alternatively, it is submitted, if I do have jurisdiction, in the circumstances of this case, I should not make the order sought.

25. Where there are multiple defendants sued jointly or in the alternative, the effect of acceptance of money paid into Court is provided for by Order 22 rule 4:

"(1) Where a plaintiff accepts any sum paid into Court and that sum was paid into Court-
(a) by some but not all of the defendants sued jointly or in the alternative by him, or
.....

the money in Court shall not be paid out except under paragraph (2) or in pursuance of an order of the Court, and the order shall deal with the whole costs of the action or of the cause of action to which the payment relates, as the case may be.

(2) Where an order is required under paragraph (1) only by reason of paragraph (1)(a) then if, either before or after accepting the money paid into Court by some only of the defendants sued jointly or in the alternative by him, the plaintiff discontinues the action against all the other defendants and those defendants consent in writing to the payment out of that sum, it may be paid out without an order of the Court."

26. The purpose of O.22 r.4 is to protect defendants who have not made a payment in from being left without any provision for their costs. The position of those co-defendants can be seen from Order 22 rule 3(4).

27. Order 22 r.3(4) provides:

"On the plaintiff accepting any money paid into Court all further proceedings in the action or in the specified cause of action or causes of action, as the case may be to which the acceptance relates, both against the defendant making the payment and against any other defendant sued jointly with or in the alternative to him shall be stayed."
But that stay is only a stay of further proceedings to determine the substantive rights of the parties and does not extend to questions of costs: Rookes v. Barnard No. 2 [1966] 1 QB 176 per Browne J. If the costs of the co-defendants are not provided for on a discontinuance by the plaintiff, those co-defendants might in a suitable case apply for judgment with costs against the plaintiff: Reardon Smith Line Ltd. v. Cayzer Irvine and another (1929) 46 TLR 146.

28. The Reardon Smith Line case is of some interest because it was decided in 1929, before the precursor of Order 22 r. 4 was brought into being. The precursor of the present Order 22 rule 4 was brought into being by Order R.S.C. (No.1), 1993 as an amendment to the 1883 Rules of the Supreme Court and is to be found in those rules from 1933 as Order 22 rule 4(3). In the Reardon Smith Line case, the first defendant was sued as principal, alternatively as agent for the second defendant. The second defendant paid into court the whole of the sum claimed and that payment in was accepted by the plaintiffs. It was held by Wright J. that the costs between the plaintiffs and the second defendants would be dealt with by the Rules of Court, and the first defendant was entitled to

judgment with costs against the plaintiff.

29. Does Order 22 r. 4(1)(a) apply to this case? It certainly would have applied if the payment in had been made before the action had been withdrawn against all the other defendants. Counsel has submitted that the rule does not apply because at the time the 5th defendant stood alone and was not at that time "sued jointly or in the alternative". I think that is right. That that is the intention of the rule is, I think, shown by the use of the words in paragraph (2), "...if either before, or after accepting the money paid into Court by some only of the defendants ..." If that were not so, the plaintiffs in this case could only take the money out of Court without an order of the Court if the plaintiffs obtained the consent in writing of all the other defendants. I have not been told that the consent in writing of the other defendants has been sought, and it is certainly not recorded in the documents recording the withdrawal of the action against them on terms. Indeed, such consent could not have been given at that time because no payment had then been made into Court.

30. If Order 22 r.4 had applied, any order made by me regarding withdrawal of the money in Court would have been required by the rule to deal with the whole costs of the action, because paragraph 4(1) makes a mandatory requirement to that effect, viz. "... the order shall deal with the whole costs of the action..." That jurisdiction imposed on me by rule would include, as I understand it, jurisdiction to make an order in the form of a Bullock Order or a Sanderson Order, and so would include jurisdiction to make or refuse an order of the sort now requested of me.

31. In circumstances where O. 22 r. 4(1) does not apply, do I have jurisdiction independently of any express rule to make the order requested?

32. The Court has a general jurisdiction as to costs provided by section 51(1) and (3) of the Supreme Court Act, 1981 as amended by the Courts and Legal Services Act, 1990:

"(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to any proceedings in " the High Court "shall be in the discretion of the court."
(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."
RSC Order 62 rule 2(4) provides:
"The powers and discretion of the Court under section 51 of the Act ...shall be

exercised subject to and in accordance with this order."

33. It is common ground that if I make no special order for costs, the plaintiffs are entitled without any express order of the Court to have their costs of the action against the 5th defendant taxed and paid by the 5th defendant. That entitlement is provided by RSC Order 62 rule 5(4):

"Where a plaintiff by notice in writing in accordance with Order 22 rule 3(1) accepts money paid into court in satisfaction of the cause of action " in respect of which he claims " he shall be entitled to his costs of the action incurred up to the time of giving notice of acceptance."

34. I have to decide whether Order 62 r.5(4) precludes the Court from exercising its general jurisdiction in the present circumstances. Rule 5(4) gives the plaintiff a right to certain costs without order. Does that exclude his applying for an order to a different effect under the general jurisdiction of the Court.

35. In QBE Insurance (UK) Limited v. Mediterranean Insurance and Reinsurance Limited (1992) 1 WLR 573, Webster J. held that the automatic right to costs without order given by Order 62 rule 5(4) must be applied in accordance with a restricted interpretation of the words of the rule. At page 576 F, Webster J. said:
"In order to avoid injustice, therefore, in the application of rule 5(3) and (4) the words 'his costs of the action' need to be construed as meaning, in paragraph (3) 'his costs of the action as against that party' and in paragraph (4) 'his costs of the action as against that defendant'. I do not see how this construction can do injustice to anyone. It is convenient to note that the provisions of rule 5 create an automatic right to costs without any order; in those circumstances the order should, in my view, be strictly construed so as to avoid any possible injustice, not in any particular case, but in any particular category of cases. I therefore construe the words 'his costs of the action' in paragraph 4 in the way I have just described."
Thus far, counsel for both parties are agreed with Webster J.'s construction. I also respectfully agree. What follows in the judgment of Webster J. is, however, questioned by counsel for the defendants. Webster J. continued:
"Construed in that way, the rule is much less likely to cause injustice than the wider and more literal construction and, if it can cause any injustice at all, it would be open to a plaintiff, who could reasonably claim to be entitled to recover from a defendant who had paid in his costs against the other defendants, to apply for such an order which the court would, in my view, have jurisdiction

to make."

36. In making that statement, Webster J. had in mind, and distinguished, a decision of the Court of Appeal in Hudson v. Elmbridge Borough Council and others [1991] 1 WLR 880. Hudson was an appeal from an Official Referee, Judge Fox-Andrews Q.C. In that case, there were six defendants and a payment in was made by one of them, the third defendant. The first point of importance is that the Court of Appeal held that Order 22 rule 4(1) did not apply because the defendants were not sued jointly. The case was thus a case where Order 62 rule 5(4) applied. The third defendants were sued in contract and also in tort. The third defendants made the payment in in respect of the claim in contract only. That payment was accepted by a notice which stated that the plaintiffs abandoned their claim in tort against the third defendants. The plaintiffs applied for an order that the third defendants pay the plaintiffs the costs of the action against the third defendants (not limited to the costs of the cause of action in contract). The third defendants applied for an order that the costs paid to the plaintiffs be limited to the costs of the cause of action in contract; and the third defendants also asked for an order that the plaintiffs pay the third defendants' costs of the cause of action in tort. Stuart-Smith L.J. reviewed the history of the rules and regretted the fact that there had been removed from O. 62 r. 5(4) the words "unless the court or a judge otherwise order". Stuart-Smith L.J. held that as Order 22 rule 4 did not apply, Order 62 rule 5(4) had to be applied. In that rule "his costs of the action" meant the whole costs of the action as against the third defendants and the Court had no discretion to make any different order. The plaintiff was therefore entitled to be paid the costs of the cause of action in tort against those defendants in addition to the costs of the cause of action in contract. Stuart-Smith L.J. said, at page885H:
"While I agree that if the matter falls to be dealt with under Order 22 rule 4 the court has a discretion as to costs which is not fettered by Order 62 rule 5(4), this provision does not, in my judgment assist the third defendants in this case."
And at page 888G he said:
"What is surprising and undoubtedly involves injustice in this case to the defendants is that the defendant's right to apply to the court for a different order has now been removed from Order 62 rule 5(4)."

37. In Hudson v. Elmbridge, what was contended for by the third defendant was directly contrary to the express words of Order 62 rule 5(4). Rule 5(4) dictated that the plaintiff was entitled to the costs of the action against the third defendants, whereas the third defendants were arguing that the plaintiff should

only have the costs of one of two causes of action and further that the third defendant should have the costs of the other cause of action. It was therefore not surprising that the Court of Appeal found that the general discretion of the Court was overridden by the express words of the Rule, that discretion having been granted by statute which expressly made the discretion subject to Rules of Court. But, given that where a plaintiff accepts money paid into court in circumstances covered by Order 62 rule 5(4) the plaintiff is entitled to the costs provided for by that Rule and the Court has no discretion to award him a lesser amount, can the court in those circumstances nonetheless in the exercise of its discretion award him a greater amount by way of costs? Can the court say, "You are entitled to statutory costs and we also in addition award you discretionary costs?" That is what the plaintiffs are in effect (though not in terms) asking for in the present action. The Rule does not expressly limit the discretion to prevent an award of a greater amount: does it do so by implication? The Court of Appeal did not consider that question in Hudson v. Elmbridge, it being unnecessary to do so.

38. In QBE Ltd. v. Mediterranean Insurance, at page 576H, Webster J. commented on the decision of the Court of Appeal in Hudson v. Elmbridge as follows:
"I do not regard the Court of Appeal's decision in Hudson v. Elmbridge Borough Council as in any way inconsistent with the construction that I have put upon rule 5(4) because in that case the court was not concerned with the problem that arises in the present case. In that case, the plaintiff was seeking to recover all his costs of all causes of action against one only of six defendants. He was not seeking to recover from one defendant all his costs of all his causes of action against all defendants. But I respectfully echo the regret expressed by the Court of Appeal about the omission from the new rule, which came into force in 1986, of the words "unless the court or judge shall otherwise order".

39. Webster J. was plainly right when he said that the decision of the Court of Appeal does not affect his construction of the words "his costs of the action as against that defendant" in rule 5(4). The Court of Appeal had decided that "costs of the action" meant "costs of the action" as opposed to costs of one of two or more causes of action: Webster J. added that "costs of the action" was limited to the costs of proceeding against the paying-in defendant and did not include the costs of proceeding against other defendants. Webster J. plainly considered that a plaintiff could apply for an additional discretionary order to recover from the paying-in defendant the plaintiff's costs against other defendants, but that was not necessary to his decision. The Court of Appeal did not rule that rule 5(4) was a fetter on the general discretion as to costs

beyond the specific facts of that case, namely where the plaintiff was asking for an order directly contrary to the express terms of rule 5(4).

40. In Hodgson v. Guardall Ltd. and others [1991] 3 All ER 823, Otton J., reciting a note in the Supreme Court Practice, held that, in a case where Order 22 rule 4 did not apply, on his construction of the terms of Order 62 rule 5(4) he had the power to order a defendant who had made a payment into court to pay the plaintiffs costs of proceeding against other defendants together with the costs of other defendants. Otton J. said, at page 828:
"It seems to me that the expression 'his costs' [in Order 62 rule 5(4)] permits the court to order the payment by the defendant making the payment in of costs over and above those directly incurred by the plaintiff in bringing the action against the paying in party alone. " In my judgment the discretion given to this Court and the power given to this Court is very wide indeed and is certainly wide enough not only to order the paying-in defendant to pay the costs of the co-defendants but also to cover the plaintiff's costs incurred against the co-defendants if the circumstances justify."

41. The decision in Hodgson v. Guardall was given some months before the decision of the Court of Appeal in Hudson v. Elmbridge and others and it does not appear to have been cited to the Court of Appeal or to Webster J. Otton J.'s decision was on facts raising issues similar to those in the case before me. However, the decision of Otton J. appears to have been dependent on a construction of Order 62 r. 5(4) which differed from the construction favoured by Webster J. I prefer the construction favoured by Webster J. and therefore find the decision in Hodgson v. Guardall unhelpful.

42. These rules were considered again by Judge Fox-Andrews in Fell v. Gould Grimwade Shirbon Partnership and others (1992) 36 Con LR 62. After making an extensive and helpful review of the authorities, including those to which I have referred, and applying the decision of QBE Limited v. Mediterranean Insurance, Judge Fox-Andrews held that where Order 22 rule 4 does not apply, and Order 62 rule 5(4) does apply, the court has no discretion. (In the first line on page 71 of that report, the reference to Order 62 rule 4 is plainly an error and should read Order 22 rule 4). At page 70 Judge Fox-Andrews said:
"With respect to Otton J. in a case falling within Order 62 rule 5(4), to which because the causes of action against two or more defendants are several Order 62 [sic] rule 4 does not apply, I hold that a court has no discretion. Either the words 'his costs of the action' relate in every case to the costs incurred by the plaintiffs against other defendants or in no case does it do so."

Judge Fox-Andrews apparently took the view that the only course which could be followed would be the course which would automatically follow notice of acceptance.

43. There was a further feature of Fell v. Gould Grimwade. Although the plaintiff wished to accept the money paid into court and could have given notice of acceptance of payment in within the time limited by the rules, the plaintiff declined to do so and instead made application to the Court. Accordingly, because notice of acceptance had not been given, Order 62 rule 5(4) did not apply, and the plaintiff submitted that because rule 5(4) did not apply, the Court had an unfettered discretion under Order 62 rules 2 and 3. Judge Fox-Andrews appears to have accepted that that was so, but he held that only in the most compelling circumstances would he exercise that general discretion in a manner different from the manner in which Order 62 rule 5(4), on his construction, ought to be applied.

44. In Carrs Bury St. Edmunds Limited v. Whitworth Partnership and another (1996)13 Const LJ 199, Judge Esyr Lewis Q.C. again reviewed the authorities and followed the decision of Judge Fox-Andrews in Fell v. Gould Grimwade Shirbon Partnership. Judge Esyr Lewis said, at page 205:
"I respectfully agree with Judge Fox-Andrews' conclusion that, where a plaintiff accepts a payment in within the time limited by Order 22 rule 3(1) in the prescribed form (i.e. in a case where there is only one defendant or where the defendants are severally sued), the court has no discretion to make any order other than that described in Order 62 rule 5(4). In my judgment, the court has no part at all to play where a plaintiff validly accepts a payment in made by one of severally sued defendants. The action against the paying in defendant is automatically stayed and the plaintiff is entitled to take the sum paid in without any order of the court and is similarly entitled to his costs, as defined in Order 65 rule 5(4) which he can proceed to tax, also without any intervention by the court. The plaintiff's action against the other defendants continues. In so far as Webster J. held that the court has jurisdiction to entertain an application by a plaintiff for some different order as to costs than provided for in rule 5(4) where a plaintiff has accepted the payment in accordance with the provisions of Order 22 rule 3(1), I must respectfully disagree. It also follows from what I have said that I agree with Judge Fox-Andrews and find myself unable to accept Otton J.'s view that Order 62 rule 5(4) enabled him to exercise a discretion on costs as he did in the Hodgson case."

45. I agree with Judge Fox-Andrews and Judge Esyr Lewis. In its context, it is plain in my view that the intention of Order 62 rule 5(4) is to provide that the only way in which the court can exercise its discretion as to costs after acceptance of a payment in in circumstances to which rule 5(4) applies is by applying the procedure of Order 62 rule 5. A most important part of the context is Order 62 rule 5(1) which provides for the automatic procedure as to costs:
Rule 5(1): "In each of the circumstances mentioned in this rule an order for costs shall be deemed to have been made to the effect respectively described and, for the purposes of section 17 of the Judgments Act 1838, [making provision for interest] the order shall be deemed to have been entered up on the date on which the event which gave rise to the entitlement to costs occurred".
Plainly, no application to the Court is envisaged and there is no distinction between statutory or automatic costs and discretionary costs. There is one discretion, and where Order 62 rule 5(4) applies, that rule prescribes how the discretion is to be exercised.

46. The effect of Order 62 rule 5(1) is that the plaintiffs in this action are seeking variation of an order deemed to have been entered up on the date of their notice of acceptance only a few days ago, that order having been made in terms defined by a Rule of Court which the plaintiffs voluntarily brought into operation. As I read the Rules, their intention is that the plaintiffs should not be permitted to do that. The plaintiffs could have avoided that situation by refraining from giving notice of acceptance and making application to the Court instead, but I agree with Judge Fox-Andrews that if they took that course, it should only be in compelling circumstances that the Court should make any order differing from the order automatically applied by Order 62 rule 5(4).

47. I hold that I do not have any discretion to make the order requested by the plaintiffs.

48. Mr. Michael Crowley, counsel for the plaintiffs, who very properly drew the decisions of Judge Fox-Andrews and Judge Esyr Lewis to the attention of the Court, sought to distinguish them on the basis that those decisions concerned actions where the liability alleged was several whereas in the present case the 15 defendants were sued jointly or in the alternative. That distinction does not assist the plaintiffs in this action. It is correct that the defendants were originally sued jointly or in the alternative, and had there been more than one defendant still remaining as a party to the action when the payment was made into court, Order 22 rule 4 would have applied. But the fact is that when the payment into court was made, it was made by a defendant who was then sued alone

and Order 22 rule 4 did not apply: that was the position reflected in the plaintiffs' notice of acceptance. The fact that there had previously been other defendants sued jointly or in the alternative does not give the court a discretion where none would otherwise exist under Order 62 rule 5(4), though it does indicate another set of circumstances where injustice may arise from the absence of such discretion. However, no injustice arises in this case because, for reasons which I shall give, if I had had a discretion, I would not have exercised it in favour of the plaintiffs in this case.

49. If I had jurisdiction to make an order in the terms asked by the plaintiffs, I would have refused to make such order for the following reasons.

50. For the plaintiffs it is submitted that it was reasonable for the plaintiffs to institute proceedings against all the defendants and to continue those proceedings for as long as they continued.

51. The plaintiffs stress the lack of information given by the 5th defendant as well as other defendants regarding title to the premises in response to requests for information made by the plaintiffs' solicitors. For the defendants, it is said that it was not easy to be forthcoming until the plaintiffs had identified the trees of which they made complaint. However, the 5th defendant and other defendants gave very full information as to title in their Defences in September and November, 1996. In his written submissions, counsel for the plaintiffs wrote:
"Following service of those Defences the plaintiffs reassessed the case and withdrew the claims against defendants who were not in ownership or control of the trees at number 14 at the material time."
But it was not until almost a year later, when the work of the experts was much further advanced, that the plaintiffs released the other defendants from the action. I infer that the prime reason for joining so many Defendants was that the plaintiffs did not make sufficient investigation of the causation of the subsidence before starting proceedings. I am not impressed by the assertion made on behalf of the plaintiffs that it was not until the 5th defendant served his expert's report in November, 1998 that he identified which trees he accepted as being in his ownership or control. That expert's report was served after the other defendants had been released from the action: in any event, any statement made in it as to responsibility for the pear tree would have been of little significance since documents of title annexed to the limited Defence in November, 1996 made clear his responsibility for any tree in his garden, namely the pear tree. Moreover, observation of the premises would have shown anyone

interested that the pear tree was in an enclosed part of the garden adjacent to the garden flat occupied by the 5th defendant, and if attention had been focused on the pear tree, the number of possible defendants would have been very much restricted, and the defendant might very well have disclosed the terms of his lease before action. This seems to have been a case where, possibly because of the impending expiry of the limitation period, proceedings were started against all possible defendants without sufficient expert investigation of causation of the damage complained of.

52. I am not satisfied that there would be any good reason to make the order requested by the plaintiffs even if I had jurisdiction to make such an order.

Conclusion

53. I do not have jurisdiction to make the order for which the plaintiffs ask. If I did have such jurisdiction, in the exercise of my discretion I would not make such an order. The plaintiffs are therefore left with their right under RSC Order 62 rule 5(4) to tax their costs of the action as against the 5th defendant incurred up to the time of the giving of the notice of acceptance of the payment into court. The costs of the other defendants have already been provided for by agreement with those defendants.

54. The costs of the action incurred after the time of the giving of the notice of acceptance, including the costs of this application, are to be taxed and paid by the plaintiffs to the 5th defendant and there is to be a set-off of the two sets of costs one against the other.

HIS HONOUR JUDGE BOWSHER Q.C.