NUISANCE - RIGHT OF WAY - OBSTRUCTION
DAMAGES AWARD EXCESSIVE CLAIM

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IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

CIVIL DIVISION

On appeal from Order of Mr Justice Walton.

Royal Courts of Justice,

Monday, 24th November, 1980

Before:

LORD JUSTICE BUCKLEY

LORD JUSTICE EVELEIGH and

LORD JUSTICE BRIGHTMAN

Between:

PAUL FRANZ SCHLESINGER

-v-

DONALD DOUGLAS McPHAIL

J U D G M E N T

Appeal Dismissed with costs (See Order)

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(Transcript of the shorthand notes of The Association of Official Shorthandwriters, Ltd., Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, W.C.2).

Mr TIMOTHY BARNES (instructed by Messrs Swatton Hughes & Co., North Harrow, Middlesex) appeared on behalf of the Appellant (Defendant).

Mr WILLIAM BLACKBURNE (instructed by Messrs Gouldens) appeared on behalf of the Respondent (Plaintiff).

J U D G M E N T

LORD JUSTICE BUCKLEY: I will ask Lord Justice Eveleigh to deliver the first judgment.

A LORD JUSTICE EVELEIGH: In this case the Plaintiff claimed damages, inter alia, for nuisance and for obstruction of a right of way. In respect of the nuisance claim he was awarded the sum of £200 and in respect of the obstruction £250. The Defendant now appeals

B against the learned Judge's decision on the question of nuisance, and in respect of the nuisance damages and the damages for the obstruction of the right of way he appeals on the ground that the damages were in any event excessive.

C The Plaintiff is the owner of a cottage known as East End Farm Cottage. That cottage has a fence running along the east and the north sides of it. Along the east side is what might be

D called a drive-way which is on the Defendant's land. The Defendant is the owner of East End Farm, and that farm is adjacent to the farm cottage. The farm cottage was at one time part of the farm property itself. For the purpose of this case, and

E taking the dates from the pleadings, from July of 1978 boxes and other rubbish were placed on the Defendant's land by the Defendant or his agents in close proximity to and on many occasions touching the Plaintiff's fence. There were also placed on that property

F from about the last week in December of 1978 until the 16th January 1979 boxes and other material so as to obstruct a gateway which was about half-way along the fence on the east boundary of the Plaintiff's property. That gateway was a double gateway. It

G was used by the Plaintiff and his wife so that their car could be driven into the garden and parked there in what we have been told was a car port. In consequence of the deposit of boxes and other refuse in the vicinity of and in front of the gates, and also the

H stacking of heavy wooden pallets in front of those gates, the way through them was obstructed and boxes or pallets, as the case

might be, had to be removed in order for access to be obtained to the car port.

The findings of the learned Judge on these matters are not challenged, and it will be necessary to see how he puts it in a moment. But it is necessary first to turn to the Statement of Claim in which those matters are pleaded. The obstruction of the right of way is contained in paragraph 3 of the Statement of Claim. That reads: "In or about the last week of December 1978 the Defendant placed or caused to be placed upon the said road a pile of cardboard boxes and other rubbish thereby obstructing the roadway and substantially interfering with the use of the said right of way by the Plaintiff and/or his wife inasmuch as the Plaintiff and/or his wife were prevented from access over the said roadway to the Cottage via a double gateway between the points shown on the said plan and thereon marked A and B". Paragraph 8 of the Statement of Claim reads: "Since about July 1978 the Defendant has placed and accumulated or caused to be placed or accumulated on the said private road, and on the land immediately adjoining the Cottage so as to be clearly visible therefrom, large quantities of boxes and other rubbish which are unsightly, out of character with the said neighbourhood, an infringement of the town and country planning regulations affecting the land upon which such boxes and other rubbish are placed and a potential hazard to the health and wellbeing of the Plaintiff and his wife". Paragraph 9: "In the premises the placing and/or accumulation by the Defendant as aforesaid of the said quantities of boxes and other rubbish constitutes an undue interference in the comfortable enjoyment by the Plaintiff (and his wife) of the Cottage".

Further and better particulars of the Statement of Claim were requested and, in so far as is relevant for the present

appeal, they were given under paragraph 8 as follows: "The potential hazard to health (not just from the boxes but also other rubbish from the Defendant's land) derives from the risk that the presence of very large quantities of rotting fruit and vegetables coupled with the presence of boxes and similar articles which can provide cover and shelter will attract vermin and insects, which may in turn bring and spread infection. The presence of many and so unsightly a quantity of boxes and other rubbish has caused the Plaintiff's wife to suffer from bouts of depression. The Plaintiff will also rely on the fact that pieces of plastic and polystyrene from among the said rubbish drift or are blown by the breeze onto the Plaintiff's said adjoining property".

It will be observed that in those pleadings something akin to an interference with outlook (or visual nuisance, as it has been called) is pleaded and is sought to be made the basis of a claim for damages, as well as the nuisance of an accumulation of rubbish which is a potential hazard to health and thereby interferes with the enjoyment of the premises by the Plaintiff.

In so far as the visual aspect of the claim is concerned, the learned Judge held that there was no such claim known to English law, and there is no appeal by the Plaintiff from that part of his decision.

The learned Judge's findings on the accumulation of the rubbish was to the effect that there was a substantial accumulation of rubbish - a very substantial accumulation - which principally endured from June 1978 until the 16th January 1979, but that, although thereafter the position greatly improved, there still continued to be some rubbish deposited along the Plaintiff's fence until just before August of that year, 1979.

The findings of the learned Judge, so far as they are relevant to this appeal, are as follows. He said: "I have come to

the clear conclusion on the evidence that the pile of rubbish at its height was a very appreciable nuisance to the Plaintiff, chiefly in that it attracted flies. It attracted flies because, in spite of the system that was supposed to be operated - and I dare say was operated, I have nothing against the system at all - vegetable rubbish and the odd squashed banana, rotting oranges and things of that nature did get through. They did not get through in any very large quantities". I should pause here to say that the Defendant, Mr McPhail, is a greengrocer. He at one time owned about six shops, but at the relevant period the Court was told that he owned two, and it was from those shops that the rubbish was taken that was deposited on his land.

The learned Judge then referred to an allegation made in the course of the evidence of the Plaintiff and his wife that an obnoxious smell was given off from the rubbish; but, as that was not mentioned in the pleadings and the learned Judge took the view, and rightly took the view, it was necessary for that to be pleaded -- he was indeed asked for leave to amend on behalf of the Plaintiff and refused that -- consequently he did not feel it necessary to make any finding on that particular point and the facts of the case.

Having discussed that matter in his judgment, he continued: "So I rest on the question of flies and it seems to me that on balance undoubtedly there were very many more flies about, although to describe them as a swarm or plague is perhaps drawing a long bow. But there were noticeably very many more flies about penetrating into Mrs Schlesinger's kitchen and other places in her garden than there would have been if the rubbish had not been there. As that went on for some considerable time - although of course it abated in the winter because one does not find many

flies in the winter - I think that the Plaintiffs are entitled to damages for that nuisance". He then went on to consider other heads of damage, which it is not necessary to recount, and then said this: "But at the end of the day I dismiss all those heads of damages, and it appears to me that the heads of damage under which the Plaintiffs are entitled to damages are the two that I have mentioned: the rubbish actually finding its way into their premises and the flies from the rubbish equally finding their way into the premises". The evidence had established that from time to time some of the rubbish was blown or fell into the Plaintiff's garden and the Plaintiff and his wife had to gather it up.

Now, it is quite clear, in relation to the nuisance claim, as I see it, that the learned Judge found the accumulation of rubbish along that fence to be a nuisance, not because it presented a health hazard, but because it caused flies to come in an objectionable and uncomfortable number on to the Plaintiff's property and to interfere with the enjoyment of that property; also, because he found that the rubbish was the source of material being blown on to or falling on the Plaintiff's property which gave the Plaintiff and his wife the trouble of having to clear it up. It is because of those findings and because the learned Judge has based his finding of nuisance upon those facts that this appeal is argued as it now is to-day.

In the notice of appeal as originally drafted and dated January of this year, the grounds were as follows: "1. That there was no evidence on which the learned Judge could find that the Defendant had committed a nuisance as alleged in the Statement of Claim of the Defendant". That must be "of the Plaintiff". "2. That the learned Judge misdirected himself in holding that on the evidence before him there was a nuisance committed and that

the Judgment was against the weight of the evidence. 3. In the alternative that if the learned Judge was correct in finding nuisance then the amount of damages awarded was excessive. 4. That the amount of damages awarded in respect of the obstruction of the Plaintiff's right of way was excessive". This Court, at the hearing, was asked for leave to amend the notice of appeal to add the following fifth ground: "The learned Judge awarded damages for nuisance under two heads, firstly for nuisance caused by flies coming on to the Plaintiff's premises and secondly for nuisance caused by pieces of rubbish being blown on to the Plaintiff's premises. Neither of these heads of damage were pleaded and no damages should have been awarded under them"; and, in so far as liability for nuisance is concerned, that fifth heading is the way in which Mr Barnes for the Appellant has argued the case before this Court. He says that from the pleadings and the particulars there was nothing to lead the Defendant or his advisers to think that evidence would be given to the effect that flies had actually been caused to accumulate and to come on to the Plaintiff's property. This, said Mr Barnes, was the kind of evidence that would be likely to take a defendant by surprise; it was therefore prejudicial and the learned Judge should not have allowed it.

I myself am of the opinion that the Statement of Claim did not properly plead a case of nuisance as found by the learned Judge, at least in so far as it rested upon an invasion (if that is the right word) of the Plaintiff's property by flies. There is no mention of that at all in paragraph 8 or paragraph 9 and, as I read those paragraphs, it is the unsightly nature of the rubbish that is complained of and also the fact that it was a potential hazard to health. The way in which it was said to be a hazard to

health is perhaps little more than one would expect or might deduce, namely, that it would attract vermin and insects which might in their turn bring and spread infection. So I think that Mr Barnes is right when he says that the Statement of Claim is concentrating upon the health hazard. I ignore the unsightliness of the rubbish, because this appeal is not concerned with that aspect of the case.

In so far as the rubbish coming upon the Plaintiff's property is concerned, Mr Barnes candidly said that he felt on less secure grounds in his submission in that respect. I think that the Statement of Claim itself as drafted did not cover a case of rubbish coming on to the Plaintiff's property and thereby interfering with his enjoyment of it. But that allegation does appear in the further and better particulars which I have just read: "The Plaintiff will also rely on the fact that pieces of plastic and polystyrene from among the said rubbish drift or are blown by the breeze onto the Plaintiff's said adjoining property". It may be that the intention was that it should limit that fact to the possible potential hazard to health and the Defendant could, in my view, be excused for so reading it. I certainly am prepared for the purpose of this case to say that that, strictly speaking, is not the proper way to plead a claim for nuisance based upon rubbish being caused to be upon the Plaintiff's land; so that the Statement of Claim, in my opinion, did not properly cover the facts found by the learned Judge which in their turn led to a claim and finding of nuisance.

However, we have been told, and it is accepted, that at the trial Counsel for the Plaintiff opened the case upon the very basis that the learned Judge found in respect of this part of the case. He stated the fact in his opening that

rubbish was caused to be on the Plaintiff's land and that swarms of flies interfered with the enjoyment of that property. The case proceeded on that basis. The evidence was directed to those facts. The case was argued upon that basis; and the learned Judge gave his decision, as I have said, on that basis. At no time was any objection raised to it by Counsel for the Defendant. For myself, I am not surprised, because if an objection had been made, I feel confident in a case like this that it would have been followed by an application by the Counsel for the Plaintiff to amend his pleadings, an application which, in the circumstances of the case, would have been granted readily by the learned Judge, on terms perhaps, but none the less readily granted. If an adjournment had been asked for and good reason shown for it, that too in all probability would have been granted. As I have said, no such application was made; and before this Court it has not been possible for Mr Barnes to state affirmatively that the Defendant was in any way prejudiced. He has said a defendant might be prejudiced in a case like this, but such prejudice as has been referred to in this case is, in my opinion, purely speculative.

The Court has been referred to certain authorities in support of the contention that not only was this claim not properly pleaded, but that an amendment would not have been allowed. Foremost, as to the second proposition, Counsel referred to the case of Rawding v. London Brick Company Limited, reported in Volume 10, Knight's Industrial Reports, at page 207. In that case, an employee alleged that he had sustained injuries when he fell, and he claimed that his fall was due to the fact that the lighting on his employers' premises was defective. The claim was originally based upon Section 5 of the Factories Act 1961,

sub-section (1) of which provides: "Effective provision shall be made for ... maintaining sufficient ... lighting, whether natural or artificial, in every part of a factory in which persons are working or passing", and the Statement of Claim was drafted so as to include that allegation in one way or another. But the defendants were in a position to show that the lighting in their factory was in good condition and properly maintained, and the plaintiff at trial pursued his claim on the basis that the light had been switched off negligently by some other employee. At the close of the evidence, the learned Judge at the trial allowed the plaintiff to amend his pleading by adding the allegation of negligence in another employee, and the Court of Appeal held that that amendment should not have been allowed. At page 214 Lord Justice Edmund Davies (as he then was) said: "Mr Stuart-Smith has most persuasively urged that this amendment involves no radical departure from the allegation as to statutory breach in the pleading as it now stands. But in our judgment that is not so. On the contrary, we hold that, if granted, it would raise as novel a case in relation to Section 5 as sub-section (ee) introduced in relation to the negligence aspect. It is even more belated, it would therefore prejudice the defendants even greater, and we therefore refuse it".

That case, in my opinion, is quite different from the present case. The claim put forward at trial was entirely different from that pleaded. As opposed to a claim for the fault of the factory owner himself in failing to perform his own duty, he was met with a claim for negligence vicariously through the act of one of his employees - a matter that, as one knows from that kind of case, would have required considerable investigation.

The important part of the present case is the extent to which the rubbish accumulated against the Plaintiff's fence and its nature. Right from the beginning, the Statement of Claim indicated that it would be contended that the rubbish was excessive in quantity, that it contained matter that would attract insects and vermin, and it takes very little stretch of the imagination to say that the health hazard envisaged by the pleading would be an accumulation of flies which would infest the Plaintiff's property. The fact that by the time the case reached trial that had happened, or indeed the fact that it had happened before the pleadings, is to my mind not a matter that would have been unexpected from the defence point of view. Counsel did indeed cross-examine the Plaintiff's witnesses on the matter and raised, as I have said, no objection to the way in which the case was presented at Court. It is fair to him to say that, as an injunction was asked for in the pleadings, his cross-examination could have been said to be limited to that matter, but quite clearly by the time the matter was argued before the learned Judge, it had not been restricted only to the question of the injunction. One cannot say that Counsel was not alert to the necessity for the case to be pleaded, because when evidence was sought to be led in relation to the smell given off by the rubbish and interfering with the enjoyment of the Plaintiff's property, Counsel objected and submitted that that was a matter that should have been pleaded, and the learned Judge upheld that objection.

In those circumstances, it seems to me that Counsel was feeling under no disadvantage in conducting the case as presented at trial, in so far as the nuisance claim is concerned. I myself see no substance in this appeal. It becomes a matter of a pure technicality. I am well aware that this Court has said on

numerous occasions that it is wrong to treat pleadings as a mere technicality; but, on the facts of this present case, I think that it is right to say that there has been a technical omission which has caused no difficulty to anyone and indeed did not occur to the person who originally drafted the notice of appeal in this case. Be that as it may, the High Court has wide powers of amendment given by Order 20, rule 5, and by Order 59, rule 10, this Court has the same powers of amendment. Counsel for the Plaintiff, in the course of argument, said that he would wish to ask for leave to amend if that should be necessary in this case. Strictly speaking, I have come to the conclusion that it is necessary and for my part, however, I would grant leave to amend the Statement of Claim to cover the nuisance as found by the learned Judge.

I now turn to the question of damages. I think that matter can be dealt with shortly. Mr Barnes has argued that, for what amounts to really something under a year, £200 for the rubbish against the fence is too much. This Court has seen photographs of that rubbish. The heap extended all along the boundary fence and it rose to a considerable height. It is not possible to say exactly how high, but one has photographs of men standing close to the rubbish and one can say that in places it rose to a height greater than that of the average man. It presented all the appearance of a rubbish dump on a large scale. It is not possible for any plaintiff to paint a picture with complete accuracy of the nuisance and annoyance which would be caused to him by some of that rubbish falling into his garden. For myself, however, I take the view it must have been extreme. It does not take much imagination to see how distressing it must have been to the Plaintiff and his wife to have flies coming on to their property, with no real hope of seeing an end to it, except

when the winter came. I do not find the sum of £200 in any way excessive.

Mr Barnes also submitted that the damages for the obstruction of the right of way were excessive. He emphasises that the Court was there concerned with a period of a month, or perhaps a day or two less, and says that £250 therefore is far too great a sum for interfering with the right of way for the Plaintiff or his wife to drive their car to the double gates. Put just like that, it may sound a substantial sum of money, but one has to look at all the circumstances of the case and the nature of the obstruction. It was an obstruction which, as the learned Judge found, was deliberately created by the Defendant, both as regards the boxes and the rubbish and also the heavy pallets. He said that when the Defendant found that the boxes were not effective enough an obstruction, or words to that effect, he placed these heavy pallets there. Evidence was given that when on the four days that the pallets were there the Plaintiff or his wife removed them, or had them removed, they were soon replaced again. Mr Barnes has argued that the learned Judge referred to that conduct with such terms of disapproval that he must have had exemplary or punitive damages in mind, which are not permissible in a case of nuisance. I do not think that the learned Judge was approaching the matter on that basis. It is true that he referred to the conduct in terms of disapproval; but, in my opinion, it is not wholly irrelevant, for if the object is to create an obstruction, it makes it all the more clear to the Court that an obstruction indeed was created - an obstruction, moreover, that could not be rectified in the way that one negligently or inadvertently caused might be, namely, by removing it, for, no sooner is it removed than there is the threat of the repetition. That is a situation that I can well imagine

would cause distress to the occupants of the premises, and I use "distress" here in the sense of meaning a denial of their peaceful enjoyment of their premises.

In those circumstances, I do not feel that the figure of £250 was too much. But, be that as it may, this Court will not interfere unless it can be shown that the learned Judge has made an error in his approach. In Flint v. Lovell, 1935 1 King's Bench Division, 354, at page 360, Lord Justice Greer said: "I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled". I do not regard it as an entirely erroneous estimate, and I would dismiss the appeal under that heading also.

LORD JUSTICE BRIGHTMAN: I entirely agree with what my Lord has said. I wish to add only a few words of my own.

As regards the alleged nuisance: The learned Judge found that the Defendant's accumulation of rubbish "grew to very very large proportions indeed". The photographs produced by the Respondent fully accord with that assessment. It is common ground that the accumulation of rubbish lasted from June or July of 1978 until August of 1979, with a brief interval at the beginning of the year 1979 when the local authority's contractors cleared away the rubbish. The Judge concluded that the accumulation was "a

very appreciable nuisance to the Plaintiff" - chiefly, he said, in that it attracted flies which invaded the kitchen of the Plaintiff's house and also a part of the garden of the house; and because fruit trays and pieces of plastic toppled over, or were blown, into the garden.

The Appellant attacks the award of £200 damages on two grounds: first because the particular nuisances found by the learned Judge were not pleaded, and secondly because the award, it is said, was excessive. I agree with my Lord that the Statement of Claim does not specifically allege nuisance by flies attracted to the Plaintiff's premises by the wrongful acts of the Defendant, or nuisance by drifting or spilling rubbish. What was alleged was that the Defendant's rubbish was unsightly and out of character in the neighbourhood; an infringement of the planning regulations; a health hazard; and an undue interference with the comfortable and convenient enjoyment by the Plaintiff and his wife of the house.

The Defendant sought particulars of the health hazard. The Plaintiff pleaded in the particulars that the rubbish would attract vermin and insects, which would tend to spread infection. The Plaintiff added that he would rely on the fact that pieces of plastic and polystyrene from among the rubbish drifted or were blown on to the Plaintiff's property. A lot of evidence was led and cross-examined to in relation to the nuisance by flies. This evidence was broadly accepted by the learned Judge as accurate.

The presence of flies attracted to the Plaintiff's premises was, I think, an issue of fact disclosed on the pleadings; the particulars alleged that the accumulation of rubbish would attract insects, which might spread infection. So the Defendant was duly warned by the pleadings that he would

have to face a claim involving the presence of insects on the Plaintiff's premises caused by the Defendant's rubbish dump. The only extent, therefore, to which the Plaintiff's case at the trial, and the findings of the learned Judge, can be said to have departed from the pleaded case, was that the flies were alleged in the pleadings to be a potential health hazard, while they were found not to be a health hazard but to constitute a nuisance from the mere fact of their presence; that is to say, an interference with the comfortable living conditions of the Plaintiff and his wife. I take the view that that involved only a minimal departure from the pleaded case. We are told that the Plaintiff's case was opened on the basis of nuisance by flies, apart from any health hazard. If the Defendant felt that he was being taken by surprise and was at some disadvantage, then surely he ought to have said so at the time, as in fact he did when faced with a suggestion that there was a nuisance by smell. By allowing this minimal divergence from the pleadings to go by default, I think that the Defendant should be treated as having debarred himself from effectively complaining when it comes to an appeal.

Moreover, I think it ought to be borne in mind that this was an expedited hearing. When the matter came before the Judge on an application for an interim injunction, an Order was made for a speedy trial. The Order was made on the 19th January and the Plaintiff was required to serve his Statement of Claim within five days. I am not certain whether that time limit was offered by the Plaintiff or whether it was imposed upon him; but, be that as it may, this was intended to be a quick hearing of a matter which deserved a speedy trial. I take the view that where a speedy trial is ordered -- sometimes the affidavits are

directed to stand as pleadings -- one has to accept a certain latitude in the way the case is pleaded; so that, if any objection is going to be taken on the ground of the pleading, that certainly ought to be raised at the hearing and not on appeal.

As regards the spilling and drifting of rubbish, it is correct that it is only pleaded in the particulars and, what is more, pleaded in relation to the allegation of a potential hazard to health. But it was made clear that the Plaintiff was going to rely on the spilling or drifting of rubbish. It was not appropriate to include this under the heading of a potential hazard to health, because it was obviously a separate cause of complaint, but clearly the Defendant was put on notice as to the case that he would have to meet.

I think there is nothing of substance in the pleading points which have been taken. I agree with my Lord that it really is a technical objection. Furthermore, the notice of appeal as originally drafted made no reference to any shortcomings in the pleadings. The important question is whether the Defendant was or was not prejudiced in the preparation or conduct of his case by a defect in the pleadings. If the Defendant or his advisers were consciously prejudiced because his case would have been prepared differently had it been known that the nuisance relied upon would include nuisance from flies and spilling rubbish, then this point would have been included as a ground of appeal when the notice of appeal was first lodged on the 30th January 1980. I appreciate that there has been a change of advisers in this case, but I cannot think that the Defendant was really prejudiced in the preparation or conduct of the case, seeing that this point was only raised at a very late stage by an

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amendment to the notice of appeal. This persuades me that there really is nothing in the point.

So far as the quantum of damage is concerned, £200 in the case of the nuisance was a modest sum to have awarded in the circumstances. There was also a sum of £250 damages for the obstruction to the right of way. The learned Judge's finding was that, from Christmas 1978 to some time in the middle of January, the Defendant obstructed the Plaintiff's right of way with wooden or cardboard boxes and so forth. This, the Judge held, was an obstruction of the access to the gates on the Plaintiff's property, although the rubbish could be kicked out of the way without an enormous amount of trouble. The second part of the obstruction consisted of the piling of pallets against the Plaintiff's gates. The evidence was that there were ten heavy wooden pallets placed there on about two or three occasions. The Plaintiff, who was in his early 70s, had to tug them away with considerable effort. So there was a serious obstruction to the right of way for a matter of three days and a lesser obstruction for something approaching a month. I do not regard the damages of £250 as excessive.

In all the circumstances, I would dismiss the appeal. If it be necessary, I also would concur in granting leave to amend the Statement of Claim; but I am wondering whether that course is really necessary, because it would only add paperwork to this unfortunate dispute.

LORD JUSTICE BUCKLEY: I entirely agree with both the judgments which have been delivered. I only add a very short observation of my own out of respect for the argument which has been presented to us by Mr Barnes in a very persuasive manner. He has, I am sure, said all that is to be said on the pleading

issue, which is the matter which stands in the forefront of his argument.

The Statement of Claim in its present form is, in my view, defective as a pleading of nuisance by invasion by flies and possibly of a nuisance by invasion by drifting rubbish; but we are told that that issue was opened by Plaintiff's Counsel at the trial as an issue in the case. Evidence was led upon it without any protest by the Defendant's Counsel. In the event, it appears to me that the learned Judge fully entertained the issue and that he determined it - all without objection by the Defendant's Counsel. If there had been any objection raised at the trial, I feel little doubt that the learned Judge would have allowed the Plaintiff to amend his Statement of Claim, possibly upon terms, but they would not have been unduly onerous terms, and I cannot see that the Defendant has been in any way prejudiced by the technical defect in the pleadings. In my view, Counsel really allowed the pleading point to go by default at the trial. The present case is, I think, quite unlike Rawding v. London Brick Company, reported in 10 Knight's Industrial Reports, where the case which was there sought to be put forward, which was not foreshadowed in the Statement of Claim at all, was an entirely different case from anything which was pleaded in the Statement of Claim and involved a complete departure and a new claim of negligence. Here, the defect seems to me to be of a slight and technical character and, having regard to the way in which the proceedings have gone on, I think it would be wrong for us now to allow the point to be taken with success in this Court.

I also would be prepared to give leave to amend the Statement of Claim if we are asked to do so. It is perhaps for

consideration between the parties as to whether it is worth incurring the expense.

Upon the measure of damages, I do not feel prepared to say that the damages awarded by the learned Judge were excessive. Certainly, in my judgment, they were not entirely erroneous. In those circumstances it would not, in my judgment, be proper for us to interfere with the awards which he made.

For those reasons, I agree that the appeal should be dismissed.

Order:- Appeal dismissed with costs. Leave granted to amend the Statement of Claim by adding a new paragraph 8A: "The Plaintiff will also allege that large quantities of flies have from time to time been attracted by the said accumulation of boxes and rubbish and have invaded the area of the Cottage, and that boxes and pieces of cardboard, polystyrene and other rubbish have fallen from the said accumulation or been blown into the area of the Cottage".
