Case No: 3CL20068

CENTRAL LONDON COUNTY COURT

13-14 Park Crescent
London
W1B 1HT

11th February 2014

B E F O R E:

HER HONOUR JUDGE TAYLOR

Jack Breuer

-v-
Alba Leccacorvi

Judgment

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1. **Her Honour Judge Taylor :** This is trial of preliminary issues ordered by His Honour Judge Bailey on 31st January 2014.

Background

2. The background to this case is as follows. The appellant Jack Breuer is the owner of 21 Clifton Gardens, and the respondent Alba Leccacorvi is the owner of the adjoining property at 23 Clifton Gardens.

3. On the 2nd February of 2012, Mr Breuer served notice on Mrs Leccacorvi of his intention to carry out works to his property requiring an award under the Party Wall Act 1996. Both parties appointed surveyors, initially Mr Colin Rickard for the appellant, later replaced by Mr Richard Grove, and Mr Dominico Padalino for the respondent.

4. On the 8th March 2012 Mr Rickard and Mr Padalino agreed an award, ("the Primary Award") under section 10 of the Act, authorising some works to be carried out at number 21. It is these works which give rise to this claim and it is alleged that the carrying out of the works caused damage to the respondent's property.

5. On the 24th July 2012 Mr David Maycox, who had been appointed the third surveyor under section 10(1)(b) of the Act, made an award following a disagreement between the two surveyors as to the failure of the appellants surveyor to provide structural engineering drawings and calculations in order that the respondent's surveyor could confirm whether or not the property was structurally secure.

6. Mr Maycox, in resolving this dispute, at paragraphs five and six of his award,("Mr Maycox's award) set out a course of action towards preparation of a schedule of remedial works, preparatory to agreeing a sum for the cost of the respondent effecting repairs. Mr.Maycox's award was not appealed, and in May 2013 Mr Grove, who had by now taken over from Mr Rickard, and Mr Padalino made a further award, ("the Addendum award"), agreeing that the works carried out by the appellant caused the damage to the respondent's property, and that the sum of £71,430 plus VAT reflected the value of the remedial works required.

7. In this appeal against the Addendum award the appellant claims that the surveyors were wrong to find that the works of repair to number 23 were required as a consequence of his works. But that is not the issue to be determined at this hearing.

8. The two issues to be determined are as follows; firstly, whether the respondent intended at the date of the Addendum award to sell her property; and, secondly, in the event that that she did so intend, whether the amount payable by the appellant under the Addendum award should be assessed by reference to the diminution in value of number 23, rather than the cost of carrying out the work.

9. It is agreed that, included in that issue, is the question of whether, as the respondent contends, the appeal should fail as it is in reality an appeal against matters decided in the award of Mr Maycox, which was not appealed in time.

The first issue.

10. Statements have been served from the appellant and his construction site manager Daniel Babiss which were agreed. In support of his contention that the respondent intended to sell the property, Mr Breuer states that the property was on the market. He gave an account in his statement of two interested purchasers, Mr Feldman and one other, from the Jewish community in Stanford Hill where the respondent's property is situated, who were shown round the property by the respondent.

11. On both occasions Mr Breuer said that he was told by them that Mrs Leccacorvi had said that she would not sell the property until she had received payment from him in one instance and 'insurance money' in another. Mr Breuer said he was also aware of interest within the Jewish community which indicated that the property was on the market. No evidence from other parties has been provided.

12. Mr Breuer also relied upon conversations and correspondence with builders and the surveyors. In this respect he repeats Mr Babiss' account. Mr Babiss was asked to provide a quotation for repairs to number 23 by Mr Padalino, and he attended on 1st September 2012. He recorded that during his visit, Mrs Leccacorvi told him that his note was needed for insurance purposes and she intended to sell the property without doing the works. On 3rd September 2012 Mr Babiss sent an email to Mr Padalino saying;

> *"I was informed by the client that the quote is required for insurance purposes only as they do not intend to proceed with works, just sell the property in current condition."*

13. Mr Breuer also relies upon correspondence with Mr Grove, in particular on a letter dated 29th October 2012, including the following:

> *"The adjoining owner is currently considering whether to undertake the works or to sell the property at a reduced price and take the cost of the works as compensation."*

14. Mr Breuer subsequently sent an email to Mr Grove saying that;

> *"You note that Mrs Leccacorvi may be wanting to sell the house at a reduced price to incorporate the damages received. I would like to give you a call to discuss this when I get back next week, as I have had a number of requests from the community to enquire if they want to sell but was reluctant to approach them."*

Mr Breuer therefore contends that the surveyors were both aware of Mrs Leccacorvi's intention, which was, on his case clearly to sell at that stage.

15. Mrs Leccacorvi, who is an elderly lady of 83, gave evidence. She had lived in number 23 for 50 years, more recently with her son. In short she said that throughout the period after the damage, she had been undecided whether to sell or to stay and have the works done. It varied from day to day and sometimes the situation made her depressed, and she looked at selling as an option to get out of the dreadful situation she said she found herself in. She said she had not put the property on the market but her house was attractive to the Jewish community and she had been subject to unsolicited interest, both before and after the damage. She agreed that she had shown two or three people round the house, although she did not specifically remember who, and she accepted that she also looked round some properties herself. Although there

were some properties she liked, she would have had to sell before moving. She said she had never been, and still was not now, sure what she was going to do.

16. Mrs Leccacorvi's witness statement said;

> *"I've explored the possibility of selling the property to get away from this situation, and I've entered into negotiations with prospective buyers. However at present I've no clear intention to sell my property."*

17. In cross examination she was shown a document dated 4th July 2012, which was an unsigned heads of terms for the sale of number 23 to a Mr Rosenberg. It is not prepared by solicitors, nor is it signed. However the section with the sale price of £500,000, with the heading 'Party wall matter', says as follows;

> *"The seller to assign such rights as the law allows and such interest as she may have to the buyer. The buyer's solicitor to draw up the assignment document for approval of the seller's solicitor and advises no further enquiry to be raised about the party wall matters and none will be offered. The seller is not making any representations or giving any warranties regarding the party wall matters, regarding the amount of compensation payable, or that any will be payable, and the buyer purchases knowing this."*

18. On behalf of the respondent Mr Walder submits that initially she was willing to sell the property, but the sale was subject to the possibility of assignment and it was not her intention to take any damages she was awarded and keep them, but to assign those damages to the purchaser. In any event contracts were not even exchanged because terms could not be agreed, and the sale did not go ahead.

19. In relation to this aspect of the case, I reject the submission that this is a potential assignment of the monies that might have been received by Mrs Leccacorvi at the date of sale. What was being proposed to be assigned were any rights which had not yet crystalised in any payment, which remained the case as at the date of the Addendum award.

20. I have considered the evidence and find that on the balance of probabilities at the date of the award in May of 2013, the respondent had not decided whether to sell or not. I take into account that Mrs Leccacorvi is an elderly lady who has lived in this property for a very substantial amount of time. It is clear that she entertained the possibility and took steps both to show interested parties around the property and to look herself. However the fact that there has been no real progress in either buying or selling these properties is in my judgment supportive of indecision, rather than an settled decision to sell having been taken at any stage. I accept Mrs Leccacorvi's evidence that she had not made her mind up. Consequently the answer to question one is a qualified No.

<u>The Second issue</u>

21. Turning then to whether, in the event that Mrs Leccacorvi did intend to sell, whether the amount payable by the appellant under the Addendum award should be assessed by reference to the diminution in value of number 23, rather than the cost of carrying out the work.

22. Having found that there was no decision one way or another, in my judgment the question has to be rather different. That is to say, in the event that she was undecided and had not told the surveyor she intended to undertake remedial works, whether the amount payable under the Addendum award should have been diminution in value rather than cost of repairs.

23. Turning then to the law in relation to this matter, the relevant sections in the 1996 Act are section 7(2), which provides as follows;

> "The building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of this act."

24. In addition, s.11(8), which provides as follows is relevant ;

> "Where the building owner is required to make good under this Act, the adjoining owner has a right to require that the expenses of such making good be determined in accordance with section 10, and paid to him in lieu of the carrying out of work to make the damage good."

25. Section 2 of the Act, sub paragraphs 3 to 6, contain reference throughout to;

> "Making good all damage occasioned by the work."

I do not propose to set out those sections in any detail.

26. Mr Isaac on behalf of the appellant submits that the reference in section 7(2) to compensation reflects the general principle in tort at common law that diminution in value is the well established usual measure of damages where land has been damaged, rather than the cost of repair. He relies on cases such as *Jones v Gooday* [1841] 8 M&W 146. In general, as he puts it, the principle is one of compensation and not punishment and care should be taken not to award a windfall. He draws the distinction between section 7(2) and section 11(8), which refers specifically to the situation where the building owner is required to make good under the Act. This, he argues, relates back to the provisions of section 2, and does not create a general right in the adjoining owner to require payments for works which may not be carried out, rather than diminution in value caused by the damage.

27. He further submits that the purpose of section 11(8) is plainly to protect the adjoining owner from being obliged to allow the building owner or his builders to insist on carrying out making good works to the adjoining owner's property and that therefore is the purpose of section 11(8). Overall he argues that in a case such as this where the respondent has at no stage indicated that she will carry out the works, the general measure of damages which should be applied as far as compensation is concerned under the Act is diminution in value.

28. On behalf of Mrs Leccacorvi, Mr Walder argues that the Addendum award under appeal was simply putting into effect Mr Maycox's award which set out the mechanism under which compensation was to be calculated. Since that award was not appealled the award was obliged to give costs of repair as the basis of compensation.

29. He further argues that, on a proper construction of section 7(2), there is no limit to the recipient of compensation to the lesser of diminution in value or cost of repair, and he

relies on the use of the words "loss or damage" to indicate there were various bases upon which compensation could be calculated, and indeed argued that the 1996 Act was wider in terms of what could be awarded than the earlier legislation.

30. Secondly he says that if the construction for which the appellant argues were accepted there would be no need for section 11(8). Further that this construction would never lead to a consistent and certain result, since it would call for the surveyor to assess the subjective intention of the recipient.

31. I accept Mr Isaac's submission as to the proper construction of the Act, the need for section 11(8) being that, in making good, the respondent would not be obliged to accept the appellant's contractors to carry out the work. There is a distinction in my judgment between the owners obligation to make good in section 2, related to section 11(8) and his obligation under section 7(2) to compensate. That compensation must be in accordance with general principles, in particular in a case where there has been no decision whether to do the works or not. In those circumstances there would be a significant risk of over compensation if the cost of repairs is significantly higher than the diminution in value.

32. As far as the argument about Mr Maycox's award is concerned, Mr Walder submits that he was tasked with a particular disagreement between the surveyors, different to the issues in the Addendum award and, whilst he set out a method for them to follow, he was not entitled to bind them. Indeed they did not consider themselves bound, as in fact they departed from the methodology set out in paragraphs five and six of the award, in that neither professional fees, nor alternative accommodation were included in the Addendum award. He contends that nothing can be read into the word Addendum, this being a common term for an additional award rather than, as Mr Walder submitted, an indication that the addendum award was part of Mr Maycox's award, and therefore they ought to be read together.

33. I accept the appellant's contention. There was no award on this particular issue, the purpose at the stage that Mr Maycox was making his award being the resolution of a dispute between the surveyors. Whilst his award set out a methodology, they were not bound to follow it, and indeed did not follow it. In any event circumstances had changed. There was no indication to the surveyors that the repairs were to be carried out, which was clearly not the case at the time that Mr Maycox was considering matters in March. By the time the award was made in May the surveyors expressly set out that there had been no indication that the works would be carried out.

34. In the circumstances the award should, at that stage, in my judgment, have been made in accordance with established general common law principles on the basis of diminution in value, and that the surveyors were not bound by Mr Maycox's previous award in relation to a different issue.

End of judgment

We hereby certify that this judgment has been approved by Her Honour Judge Taylor.
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