B2/2003/0257

Neutral Citation Number: [2003] EWCA Civ 1816
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MAYOR'S AND CITY OF LONDON COUNTY COURT
(HIS HONOUR JUDGE COX)

Royal Courts of Justice
Strand
London, WC2

Friday, 21 November 2003

B E F O R E:

LORD JUSTICE CHADWICK

LORD JUSTICE SEDLEY

- - - - - - -

ROADRUNNER PROPERTIES LIMITED

Claimant/Appellant

-v-

(1) JOHN DEAN
(2) SUFFOLK AND ESSEX JOINERY LIMITED

Defendants/Respondents

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(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

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MR ALAN STEYNOR (instructed by Adam Cohen Partnership) appeared on behalf of the Appellant
MR VIKRAM SACHDEVA (instructed by Keoghs Solicitors (Bolton)) appeared on behalf of the Respondents

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J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE CHADWICK: This is an appeal from an order made on 25th October 2002 by HHJ Cox sitting in the Mayor's and City of London County Court in proceedings brought by Roadrunner Properties Limited, as owner of a long lease of property known as 14 Molasses Row, Plantation Wharf, London SW11. That property is one of a terrace of what has been described as "atelier dwellings", built in the late 1980s as part of the redevelopment of the riverside area in Battersea. The dwellings each comprise a large open-plan ground floor area for use as an office or small work shop, with living accommodation over. The first and upper floors are configured in such a way that there is room for a conservatory and a paved terrace on the roof of part of the ground floor.

2. The claim in these proceedings is for damage, said to have been caused to number 14 Molasses Row (also described as number 14 Cinnamon Row) by works carried out by the defendants at the adjoining property, number 16.

3. Roadrunner Properties Ltd is a company controlled and managed by Mr Neil Morgan. The property was acquired by that company in September 2000 as an investment. Mr Morgan set about finding a tenant. On 27th October 2000 the property was visited by Mr Cliff Olsson, whose company was interested in taking a sublease. Mr Olsson looked round the property on that day and did not notice any damage or defects which appeared to him to be of any significance; but he decided to have a professional survey before proceeding further with the sublease. He visited the property again with his surveyor, Mr Roberts, at the end of November 2000. They found then that there was damage to the property which Mr Olsson thought had not been there previously. The most obvious damage identified on that visit were tiles which had become detached from the floor in the conservatory and had been pushed upwards into the form of a ridge; a skirting board which had become detached from the wall adjacent to number 16; and a number of cracks in the conservatory wall. None of these items had been noticed on the earlier visit.

4. Mr Olsson reported the damage to Mr Morgan; who himself came to view it. Mr Morgan then went next door to number 16. He discovered there that there had been some recent work to the party wall at first floor level. That work included the cutting of a chase, or channel, near to the bottom of the wall to take pipe work for radiators. The work had been done by contractors, Suffolk and Essex Joinery Ltd; but not by one of their own workmen, rather by an agency labourer who had been employed for that purpose. Mr Morgan discovered that the chase, or channel, had been cut by the use of a Kango 950 Combination Hammer Drill. That tool is described in sales literature, which we have seen, as "ideal for whenever heavy duty drilling or demolition work is to be undertaken." The Kango hammer has a powerful electrical motor, capable of delivering 2000 blows per minute at an energy of 14.3 joules. It weighs 11.4 kilogrammes and is capable of digging up a concrete roadway; for which purpose it is often used. It was said by Mr Morgan, in evidence, to be wholly unsuitable for the task of making a chase in a party wall. The illustration of the Kango 950 in the literature which we have seen bears out his view that it would be an unusual tool to use for that purpose.

5. It is not in dispute that the wall common to number 14 and number 16 Cinnamon Row is a party wall for the purposes of the Party Wall etc Act 1996. Nor is it suggested, now, that the works carried out at number 16 Cinnamon Row in October or November 2000 did not include works which fell within section 2(2) of that Act - see, in particular, subparagraph (f) of that section, which describes works within the section as including:

> "... to cut into a party structure for any purpose which may be or include the purpose of inserting a damp proof course."

This was that kind of work. Section 2(5) of the Act provides:

> "Any right falling within, inter alia, subsection (2)(f) is exercisable, subject to making good all damage occasioned by the work to the adjoining premises."

Section 7(2) provides:

> "A 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."

The question in this case, as in many other cases involving work carried out in respect of party walls, is whether the damage in respect of which the adjoining owner is claiming was "occasioned by" - or, put another way, "resulted from" - the work carried out. The question is one of causation.

6. The scheme of the 1996 Act is calculated to facilitate the resolution of questions of that nature. Section 3(1) requires that before exercising any right conferred on him by section 2 - which, as I have said, includes a right to cut into a party wall under subparagraph (f) - a building owner shall serve on any adjoining owner a notice stating, amongst other things, the nature and particulars of the proposed work and the date on which the proposed work will begin. That notice is to be served at least two months before the date on which the work is to begin - section 3(2)(a). Where such a notice has been served, then, unless the owner on whom it has been served indicates his consent to the works described in the notice, a dispute is deemed to have arisen. That brings into effect, as between the parties, the dispute resolution provisions in section 10 of the Act. That section provides for the appointment of a surveyor or surveyors with power to make an award binding on the parties.

7. The importance of the Party Wall Act procedures, in the context of the present appeal, is that a surveyor appointed under section 10 of the Act has the opportunity and the right to enter upon the premises of both the building owner and the adjoining owner "for the purposes of carrying out the object for which he is appointed or selected": see section 8(5) of the Act. In practice, therefore, the scope for disputes as to causation in relation to works done to party walls is reduced by the ability of both owners, through the surveyor or surveyors appointed or selected under section 10, to monitor the works as they are carried out. In particular - and as an obvious step in that process - there is an opportunity for inspection or survey of the adjoining premises immediately before the works are carried out.

8. In the present case, the owner of number 16, Mr John Dean - who was the building owner in this context - had served no notice under section 3 of the 1996 Act. Those advising Mr Morgan on behalf of Roadrunner clearly took the view that, in those circumstances, Roadrunner could not invoke the provisions of the 1996 Act. They thought that Roadrunner had to sue in the County Court; and had to rely on the common law.

9. The proceedings were brought in the County Court for damages at common law, alleging nuisance and negligence. It is unnecessary to decide in the present case whether the claimant would also have had a claim for breach of statutory duty under section 2(5) or section 7(2) of the 1996 Act. It has not been suggested that, in a case where notice has not been served under section 3 of the Act, the effect of the statutory scheme is to exclude a common law remedy. Such a submission could not be advanced in the light of the decision of this court in Louis and Another v Sadiq (1996) 74 P&CR 325 at 333. Nor, in the present case, would a claim for breach of statutory duty add anything to a claim in common law negligence or nuisance. That is because it is not suggested in the present case (and could not be suggested) that damage to

adjoining premises from the use of a Kango 950 hammer on a party wall was not foreseeable. Foresight is not the issue. The issue in the present case is causation. The issue would be the same whether the claim were brought at common law or for breach of statutory duty.

10. The claim - as originally brought in the Mayor's and City of London County Court - against Mr Dean, as the owner, and Suffolk and Essex Joinery, as the building contractors, was quantified at £6,707. That was the amount sought in respect of four items of damage, described as follows: "(1) invoice dated 19th February 2001 from AA Building Services, to repair/remedy the aforesaid damage, £1,840; (2) invoice dated 19th December 2000 from Spire Associates, Civil and Structural Consulting Engineers, for visiting the claimant's property and offering verbal advice regarding the movement/cracks evident to the floor tiles in the conservatory, £141; (3) invoice dated 31st January 2001 from Spire Associates, Civil and Structural Consulting Engineers, for providing a written report relating to their visit to the claimant's property regarding the aforesaid damage, £105.75; and (4) managerial and supervisory expenses incurred by work personally undertaken by Mr Neil Morgan, including the time incurred therewith, mileage travelled and other associated expenses, £4,620.25." It can be seen that, out of that total of £6,707 odd, the lion's share - £4,620 odd - relates to charges for managerial and supervisory expenses in relation to the affairs of Mr Morgan's company.

11. The invoice of 19th February 2001 from AA Building Services (£1,840) can itself be broken down into four distinct items: grout and re-seal floor, £1,300; repair several cracks and splits in conservatory walls and repaint all walls, £280; repair and repaint several cracks and splits in kitchen and bedroom walls, £160; re-point and repair cracks in external brickwork with dark grey mortar, £100. So that part of the claim which relates to the replacement of the floor tiles is £1,300; together, perhaps, with some element of the invoices from Spire Associates (Mr Blinkow) in respect of his visit to the property.

12. Subsequently, however, the particulars of claim were amended to introduce other items of claimed damage. Those may be summarised as follows: (1) the lifting, stripping and cleaning of all herringbone pattern block paviours on the roof terrace, examination for cracking to the sub-floor beneath the blocks and repair where necessary, £850; (2) the inspection of gullies and drains for cracks and leaks, and then waterproofing with asphalt, £1,600; (3) the lifting out of all the glass panels to the conservatory roof and then correctly refitting the bedding into joint mastic, £1,405; (4) the replacing and re-pointing of the lead flashing to both sides of the conservatory roof, £560; (5) the repointing of a large crack to the base of the party wall between numbers 14 and 16, £375; and the most significant item, (6) the erecting of a large scaffold frame by contractors to carry out the aforesaid works, £4,110. The amounts in respect of each of the items to which I have just referred are quantified in subsequent documents. As pleaded, they were to be particularised on the basis that the claimant could not then give a figure. The effect of the amendment was to raise this claim from a claim of some £6,700, or thereabouts, to a claim of some £16,000 or more, by the time interest had been added in.

13. The action came before Judge Cox for trial in October 2002. By that stage, each party had instructed an expert to consider the property for the purpose of giving evidence. It had proved impossible, it seems, for the parties to agree upon a joint expert.

14. The expert instructed on behalf of the claimant was Mr Blinkow. The expert instructed by the defendants - or more particularly, by Suffolk and Essex Joinery Limited, or their insurers, who had the conduct of this defence - was Mr Pepper. The claimant company appeared at the trial through its director, Mr Neil Morgan in person. He was also the principal witness of fact on its behalf. Mr Morgan had some experience of building - no doubt, acquired in the course of his carrying on business - and was able to express his views as to the likely consequences of using

a Kango hammer on a party wall in property of this nature. But he was not, in the technical sense, an expert witness.

15. Mr Morgan's evidence - which had, if I may say so, the attraction of simplicity and common sense - was that no one in their right mind would use a large and heavy Kango hammer/drill in order to make a chase for radiator pipes in a party wall. Nor, he suggested, would anyone in their right mind reach any conclusion other than that damage which occurred at or within a short period after the use of such a hammer/drill for that purpose, was caused by the work that had been carried out.

16. Mr Blinkow was prepared to support that interpretation of the facts to a limited extent. The thought that the use of the hammer/drill to cut a chase at the base of the party wall on the first floor might well have been the cause of the dislocation of the tiled floor in the conservatory. He pointed out that, in the circumstances that existed in the present case - where the skirting board was fixed to the wall and rested on the screed floor, rather than on the surface of the tiles - lateral pressure on one side of the wall would be likely to be transmitted through the skirting board laterally into the tiles. The lateral pressure would not be absorbed by the screed floor itself.

17. Although that was advanced as a possible cause of dislocation of the tiles; Mr Blinkow's recommendation that further works of inspection through the removal of the skirting board and examination of the brickwork within the party wall - in order to detect whether dislocation of the bricks had occurred - was not carried out. So that Mr Blinkow was not in a position to confirm that that was the way in which the damage had actually occurred. Still, it is plain that it was a possible explanation. Force applied to one side of the party wall at or near to its base would travel through the wall into the floor tiles on top of a screed and cause dislocation.

18. Mr Pepper's view, however, was that the damage to the floor tiles in the conservatory had taken place because the tiles had been laid with smaller joints than required, and had subsequently expanded by the absorption of moisture from the atmosphere. The expansion of the clay tiles on top of a fixed screed - which itself was not liable to expansion - would lead, as Mr Pepper indicated, to buckling. The problem, of course, with Mr Pepper's explanation was that he could not answer the pertinent question put to him by Mr Morgan in the course of cross-examination. He was asked:

> "Q. Could you explain, please, Mr Pepper, why in the 13 years of climatic conditions ... [before] ... on 27th October 2000 these tiles had not risen conspicuously ... in the intervening period from 27th October to 30th November 2000 the climatic conditions were so either unusual, different or exceptional that it produced this dramatic explosion of the floor, bearing in mind the previous 13 years?"

As Mr Morgan was pointing out, in that questions, it was quite a remarkable coincidence that climatic conditions had led to the expansion of these floor tiles - which had previously been unaffected for 13 years since they were laid - within a few weeks of the work that had been done to the party wall, immediately adjoining them. Mr Pepper was not in a position to answer that question. But he told the judge that coincidence was simply not a forensic tool: the fact that two events occur at or about the same time is no evidence that one influences the other.

19. The battle, therefore, in relation to the floor tiles was between what might be described as the "common sense view", advanced by Mr Morgan with support from Mr Blinkow - namely that if a party wall is attacked with a Kango hammer on one side some dislocation may be expected to occur to the wall and an adjacent floor on the other side - and Mr Pepper's view that the timing

of the two events was an irrelevant coincidence - the real cause was the absorption of moisture through what had to be regarded as wholly exceptional climatic conditions occurring between October and November 2000, which had never occurred during the previous 13 years. Support for Mr Pepper's theory would have been enhanced had there been any evidence that there were, in fact, exceptional climatic conditions during the period October/November 2000. That evidence (if it existed) could, no doubt, have been obtained easily from a meteorological office; but it was not adduced.

20. In relation to the cracking of the conservatory wall, little or no evidence was advanced on behalf of the claimant. Mr Morgan took the view, perhaps understandably, that if one side of a plastered wall is attacked with a Kango hammer, it would not be surprising if cracks appeared in the plaster on the other side of the wall. Mr Pepper had a more sophisticated explanation for the cracking; again dependent on shrinkage occurring through conditions which had manifested themselves, after 13 years, in the few weeks following, by coincidence, the work done with the hammer.

21. In relation to the paviour bricks, however, Mr Blinkow was not able to support Mr Morgan's contention that those bricks too had cracked in response to the work done on the party wall. He accepted that he could not say how that cracking had occurred. Mr Pepper, who did not see the cracking for some considerably time afterwards - because, as I have indicated, the cracking to the paving bricks was not raised as a head of damage until an amendment to the pleadings - noticed that those cracks were full of algae when he saw them, which suggested to him that the cracks had been there for some considerable time.

22. Nor was there evidence from an expert called by the claimant to suggest that the other heads of damage, the unseating of panes of glass in the conservatory and the external crack in the wall - had been caused by the works done to the party wall. Mr Morgan's submission, essentially, was that any damage which had been identified at the end of November or the beginning of December 2000 must have been damage caused by the work done to the party wall. Mr Pepper gave evidence of other possible causes.

23. The judge preferred the evidence of Mr Pepper to the evidence of Mr Blinkow and Mr Morgan. He put it in this way, in relation to the tiles:

> "I am bound to say that comparing Mr Pepper's view with that of Mr Blinkow there is not a great deal of difference. As Mr Pepper himself observed the cause that he assigned to it was essentially the same as the cause Mr Blinkow assigned to it, namely compression in the centre of the floor. The difference between them was the cause of that compression. When one looks at Mr Blinko's evidence, in the absence of Mr Blinko's being given any opportunity to consider the investigation that he had himself suggested, it seems to me that there is only one conclusion that the court can draw and that is that on the balance of probability Mr Pepper's view is the appropriate one."

24. With respect to the judge, that passage seems to me to contain a non sequitur. The fact Mr Blinkow had not had the opportunity to pursue the investigation which he himself had suggested, could not lead to any conclusion as to what would have emerged if that investigation had been pursued. The judge could not reach the conclusion that Mr Blinkow's theory was less probable than Mr Pepper's theory, merely because Mr Blinko's theory had not been pursued. Mr Pepper's theory, of course, suffered from the defects which I have identified: namely, first, that there was nothing to suggest abnormal climatic conditions at the relevant time, and secondly that there was nothing to explain how it came about that these climatic conditions coincided with the work being done to the party wall with a Kango hammer.

25. This court will not be slow to disturb a finding of fact made by a judge who has heard and seen the witnesses. That applies in circumstances where the witnesses are experts giving their opinion as it does in cases where the witnesses are witnesses of fact. But the court can look at the reasons given by expert witnesses for the conclusions which they draw; particularly, where expert witnesses are not giving evidence of direct fact which they have observed, but are seeking to construct what happened from evidence of other facts.

26. In this case, as it seems to me, the judge erred in failing to appreciate that Mr Pepper's conclusion was not supported by his reasoning. He failed to appreciate that the coincidence between the dislocation to the floor tiles and the work being done to the wall - in circumstances where forces applied to the wall could transmit to the floor tiles - was a proper factor to take into account in drawing inferences to causation. It was wrong to accept Mr Pepper's assertion that coincidence was not a forensic tool. In drawing inferences whether or not one event was related to another, it may be highly material that the one event followed the other within a short time; particularly in circumstances where that is just what one would expect to have happened if the one event was caused by the other.

27. In my view, the judge was wrong to dismiss Mr Blinkow's analysis of the position; and wrong to hold that Mr Pepper's view was to be preferred on the balance of probability.

28. I would go further and hold that, in a case where the building owner has chosen to carry out works to a party wall without serving the notice for which the statutory scheme provides, he should not be allowed to obtain a forensic advantage by his own failure to comply with the statutory requirements. Had the building owner in this case served the notice which he should have served, the claimant and Mr Morgan would have been in a position to instruct a surveyor to carry out a pre-works survey; and, if they thought necessary, to instruct a surveyor to attend (or to attend in the person of Mr Morgan) at the time when the works were being carried out. They would have been in a position to adduce much more cogent evidence as to the temporal relation between the dislocation of the floor and the carrying out of the works to the party wall. They were denied that opportunity by the course which the building owner chose to take. In taking that course the building owner chose to ignore his obligations under the 1996 Act.

29. In such circumstances, as it seems to me, a court should be prepared to take a reasonably robust approach to causation. If it can be shown that the damage which has occurred is the sort of damage which one might expect to occur from the nature of the works that have been carried out, the court must recognise that the inability to provide any greater proof of the necessary causative link is an inability which results from the building owner's failure to comply with its statutory obligations. In those circumstances, as it seems to me, the court should be slow to accept hypothetical and theoretical reasoning in relation to causation advanced by the building owner after the event. It is within the building owner's power to ensure that proper evidence is or could be available; and if the conduct of the building owner has chosen to deny the adjoining owner the opportunity to obtain evidence, then the court should be slow to accept ex post facto and hypothetical reasoning and theory. The essential requirement, of course, is that the claimant proves the causal link which he or it asserts; but, as I have said, if there is material from which such a causal link can properly be established, I think a court, in those circumstances, should be slow to discard common sense in favour of expert hypothesis.

30. In those circumstances I, for my part, would think it right to reverse the judge in relation to the damage to the floor tiles in the conservatory. I would think it right, also, to reverse him in relation to the cracks in the plaster to the wall itself. I can think of little more self-evident than that percussive force applied to one side of a wall will lead to cracks in the plaster on the other side and on adjacent walls. But there was no evidence on which the claimant could properly ask

the judge to find that the damage to the paving blocks - or the other elements of damage which are asserted - was caused by the works which the defendants carried out.

31. To that extent, as I have indicated, I would allow this appeal. It is for further consideration what the consequences of that should be.

32. LORD JUSTICE SEDLEY: I agree. The question was not, as the judge seems to have thought it was, whether the claimant had established the cause of damage on which its case was founded; it was which of two competing explanations of the known damage was the more probable. On such an approach the claimant's explanation was intuitively the likelier. If only severe vibration could have done such damage, there was nothing to indicate that such vibration had not occurred, and actual damage to suggest that it had.

33. If there was a want of direct evidence, it was the fault of the first defendant in not giving a party wall notice, and of the second defendant in leaving unaccountable lacunae in the evidence of what had happened on the job. I respectfully agree in this situation with the approach of my Lord, Chadwick LJ, to the evidence in an action which has only become necessary because of the defendant's breach of the requirements of the Party Walls Act 1996.

34. Mr Pepper's opinion, which the judge preferred, was founded on a seductive half-truth. He said in cross-examination:

> "Coincidence is not a forensic tool, I am afraid. The fact that two events occur at the same time is not evidence that one influences the other."

Whether this is true is wholly dependent on the nature of the coinciding events: The coincidence in time, as I suggested in argument, of cracks in a building's fabric with work to the adjacent building is inconsequential, no doubt, if the work is wallpapering; not so if it is pile driving.

35. The present case is manifestly in the latter class. The occurrence in a space of four or five weeks, after more than a decade of stability, of damage plainly consistent with the inappropriate use of a Kango hammer against the party wall during exactly that period, raises an inference of cause and effect which it would take cogent evidence to rebut. There was no such cogent evidence here. All there was was informed speculation by Mr Pepper, founded on a false principle of forensic logic.

36. I want to add a word on one ancillary but important question, the deployment of expert witnesses in a case as modest as this in its scope. On 14th November 2001 District Judge Southcombe ordered that expert evidence on the issue of building engineering should be limited to a single expert jointly instructed by the parties, an eminently sensible order. On 7th May 2002 District Judge Trent revoked the order for the appointment of a single joint expert because, we are told, the parties had been unable to agree who the single joint expert should be. He also gave permission for the amendment of the particulars of claim.

37. On the same day trial was fixed for 27th June, but when the trial came on before HHJ Simpson on that date, the order of District Judge Trent as to revocation of permission for a single joint expert, was set aside. The parties were given liberty again to appoint a single joint expert, but also to appoint their own respective experts if they failed to reach agreement. The trial was adjourned for this to be done and the claimant was ordered to pay the costs; apparently, we are told, on the ground that it was he who needed the expert evidence. He was refused permission to appeal against the costs order, and the matter has to rest there.

38. It was in this situation that the trial came on before HHJ Cox and produced the judgment with which we are concerned.

39. It is not simply with the advantage of hindsight that one can say that this was not a case in which more than a single jointly instructed expert should have been allowed to give evidence. It was manifest from the pleaded issues that all that was required was a knowledgeable account of the possible causes of the observed damage. It would then have been for the judge to decide which was the more (or, if more than two, the most) probable. Instead, not only were separate experts called, but one of them, Mr Pepper, was permitted to usurp the judge's function of deciding where the probabilities lay.

40. Rule 35.7 the of the Civil Procedural Rules provides:

> "(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.
>
> ...
>
> (3) Where the instructing parties cannot agree who should be the expert, the court may:
>
> (a) select the expert from a list prepared or identified by the instructing parties, or
>
> (b) direct that the expert be selected in such other manner as the court may direct."

This was, in my judgment, a paradigm case for the exercise of the power of the court to break the deadlock by naming its own expert or by providing for a single expert to be otherwise nominated. A single expert was all that was needed to tabulate the possible causes of the damage. If the defendants were then to persuade the judge to prefer atmospheric causes, they needed to add some meteorological evidence of the kind that is routinely available. If the claimant was to clinch the case that the Kango hammer was the cause, it might have done well to obtain some evidence of the hammer's capacity. But in the absence of either of these things, I agree that the balance of probabilities came down firmly on the claimant's side, especially if one adopts, as I respectfully do, the approach to the evidence commended by my Lord, Chadwick LJ, in the absence of a party wall notice.

41. I too would, therefore, would allow this appeal.

(ORDER: Appeal allowed with costs)