Case No: B2/2010/1025

Neutral Citation Number: [2011] EWCA Civ 186
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WILLESDEN COUNTY COURT
HH JUDGE COPLEY
Case No 8WD02675

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2011

Before :

LORD JUSTICE MAURICE KAY
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE THOMAS
and
LORD JUSTICE ETHERTON

- -

Between :

Laurence and Sara Seeff	**Appellants**
- and -	
Dinh Nam Ho and Bich Thuy Ton Nu	**Respondents**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Daniel Gatty (instructed by **DMH Stallard LLP**) for the **Appellants**
Mr David Marshall (instructed by **Stringer Smith and Levett**) for the **Respondents**

Hearing date: 26 January 2011

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Judgment

Lord Justice Thomas:

1. This appeal relates to a dispute between neighbours arising out of improvement works done by the defendants (respondents to the appeal), Mr and Mrs Ho, that the claimants (appellants), Mr and Mrs Seeff, alleged trespassed onto their property. It was decided largely in favour of Mr and Mrs Ho by His Honour Judge Copley at Willesden County Court on 16 October 2009. After hearing argument on costs, he made an order that there be no order as to costs; after reflection and a further hearing he made an order on 12 April 2010 that made Mr and Mrs Seeff pay the greater part of the costs; as in all such cases, the sums incurred by way of costs are significantly in excess of the amount originally claimed. Mr and Mrs Seeff appeal by permission of the Single Lord Justice on the substantive and cost issues.

The Background

2. The background to the dispute is as follows.

(a) The properties

3. The claimants, Mr and Mrs Seeff, have lived at 316 Whitchurch Lane, Edgware since 1986. When they moved to that house there was a garage on the left hand side built right up to the neighbouring property at 314 which in turn had its garage built up against the garage of 316. The roof of the garage at 314 was fixed to the side wall of the garage of 316 but there was a small gap between the flat front wall of the garage of 314 and the garage at 316. Behind the garage at 314 was a utility room.

4. In 1991 Mr and Mrs Seeff constructed an extension to 316 by building on top of the garage; this had a window on the first floor on the side facing 314. The building of the extension did not in any way change the way in which 314's garage roof was fixed to the side wall of 316. In 2000 the defendants, Mr and Mrs Ho, purchased 314. Relations were at first cordial.

(b) Mr and Mrs Ho's plans

5. In 2006 Mr and Mrs Ho decided to build an extension and make other improvements to 314. They wished to build an extension on the side next to 312 (details of which are irrelevant to this dispute) and convert the garage adjoining 316 into a study. It was the case of Mr and Mrs Ho that there was a conversation between Mrs Ho and Mr Seeff over the garden fence in February or March 2006 when Mr Seeff had given oral consent to proceed with the conversion of the garage and heightening the garage roof. The terms of the conversation and what was agreed formed the major aspect of the first series of issues in the appeal.

6. In October 2006 Mr and Mrs Ho sought planning permission from the London Borough of Harrow, the local planning authority. Plans dated February 2006 were submitted by Mr Damian Peddar, an architect; the plans showed the proposed conversion of the existing garage to the study having a hipped roof with its connection to 316 at the same height and position as the existing garage roof. Notice of the application for planning permission was given to Mr and Mrs Seeff on 1 December 2006. Mr Seeff e-mailed the London Borough of Harrow Council on 8 December 2006 saying that he had no objection to the conversion of the garage into a habitable

room but wished to ensure the external wall of any room was separate from his house so that his external wall did not become a party wall.

7. Planning permission was given on 19 January 2007, as the Council took the view that the objection raised was not a planning matter. The grant of planning permission made clear:

> "The Party Wall Act 1996 requires a building owner to notify and obtain formal agreement from adjoining owners(s) where the building owner intends to carry out building work which involves:
> 1. work to an existing wall shared with another property;
> 2. building on the boundary with a neighbouring property;
> 3. excavating near a neighbour building, and that work falls within the scope of the Act.
>
> Procedures under this Act are quite separate from the need for planning permission or building regulations approval."

8. No party wall notices were ever sent to Mr and Mrs Seeff.

(c) The dispute

9. It was Mr and Mrs Seeff's case that the first they knew about the intention of Mr and Mrs Ho to use the side wall to hold the brackets for the new roof for the study at a point higher than the existing garage roof was after the construction work began. It was their evidence that on a day in August 2007, Mrs Seeff was disturbed by loud drilling into the side wall of number 316; this was necessary to insert brackets to support the roof joists for the construction of the roof to the study.

10. Mrs Seeff told the builders to stop, but they continued with the construction of the roof. On 6 September 2007 Mr Seeff wrote asking Mr and Mrs Ho to stop work and build their own external wall for the study; he wrote further letters on 8, 9 and 23 September. The letters made clear that he had expected the procedure under the Party Wall Act to be followed. The response of Mr and Mrs Ho was to say that they had left it to the architect; they then engaged a Party Wall surveyor, Mr Peterson.

11. A solicitor's letter was sent on behalf of Mr and Mrs Seeff on 10 October 2007 making clear that the procedure under the Party Wall Act should have been followed and seeking undertakings. Correspondence followed, but Mr and Mrs Seeff did not take proceedings.

12. Mr and Mrs Ho completed their work. The work for the roof included (i) cutting and drilling into the flank wall to install some 22 new brackets to hold the joists; there had originally been 15 brackets which had been 12-13 inches lower; (ii) installing beams into those brackets; (iii) fixing timbers to the side wall of 316 above those beams; (iv) installing lead flashing which covered the top of the roof and continued over the roof onto number 316's roof; (v) bonding together 314's new wall to connect to 316's wall with mastic.

13. During the construction work Mr and Mrs Ho changed the design of the roof without seeking the consent of the planning authority; in place of the hipped roof connecting

to 316 at the same height as the old roof, they erected a gable end roof that ended at a height about 12 inches above the old roof. The planning authority was asked to take enforcement proceedings as the roof had not been constructed as a hipped roof. The authority agreed, as was clear, that there had been a breach of planning control, but concluded that it was not expedient to take enforcement action.

(d) The issue of proceedings

14. On 6 March 2008, shortly after the conclusion of the works, Mr and Mrs Seeff wrote letters to Mr and Mrs Ho putting forward a claim for trespass. One of the letters concluded with an offer to mediate:

> "I am open to meet with you to discuss the matter in a civilised manner but it would have to be in the presence of an independent third party who could either record the discussion or take notes. I therefore await your letter of response. "

No response was made by Mr and Mrs Ho to that offer.

15. On 25 April 2008 Mr and Mrs Seeff, acting in person, issued a claim form in the County Court. They alleged that Mr and Mrs Ho had encroached onto their land by raising the roof further than they had indicated, building their garage and utility room by using the wall of 316 without permission and breaching the Party Wall Act by failing to serve the requisite notices. They sought an order that Mr and Mrs Ho dismantle the work that had been carried out and make good their side wall. Alternatively they sought £20,000 being the diminution in value of their property as well as costs and general damages for inconvenience, nuisance and stress. The claim set out the court fees and solicitors costs of £1,756 that had been incurred; the particulars made clear details of the costs incurred were available.

16. Mr and Mrs Ho appointed solicitors to defend the claim; a defence was served on 22 May 2008. During the proceedings the representation remained the same, Mr and Mrs Seeff acting without legal assistance and Mr and Mrs Ho having solicitors and counsel throughout.

(e) The offer made by Mr and Mrs Ho in September 2008

17. In a letter dated 22 September 2008, Mr and Mrs Ho's solicitor offered to pay "£500 damages plus court fees in full and final settlement"; the letter was marked as being without prejudice as to costs and made clear that if the offer was not accepted and the judge awarded less than £500, the judge would be asked to take the letter into account in the award of costs. Mr Seeff responded rejecting the offer as derisory. He pointed out he had incurred £3,000 in costs which were fully documented. The letter concluded:

> "As you should also be aware from the letter submitted.. on 5 March 2008, I proposed some type of mediation, but this request did not receive a response."

18. There was no further discussion and the case proceeded to trial.

(f) The hearing and the judgment

19. The hearing took place over 2 days in July 2009. The judge heard evidence from Mr and Mrs Seeff and Mrs Ho. Two expert witnesses were called in relation to damages - Mr Cooper, a chartered surveyor called by Mr and Mrs Seeff and Mr Peterson, the chartered surveyor whom Mr and Mrs Ho had asked to advise in September 2007 (as set out in paragraph 10), was called by Mr and Mrs Ho.

20. The judge reserved judgment which he gave orally on 16 October 2009. He found that 314 had the use of the side wall since 1985 or 1986 and not only had possession of part of the wall but had acquired an easement of support; Mr Seeff had consented to the raising of the roof and therefore the first three items of work to the roof listed in paragraph 12 did not amount to a trespass. However he found that no consent had been given to the other two items (the fixing of the lead flashing or the use of mastic to bond the walls) and these two items amounted to a trespass.

21. The judge declined to order the removal of the roof support; on damages, he preferred the evidence of Mr Peterson on the basis that he knew the area well and had greater experience. He did not accept that there had been any diminution in value of number 316 as a result of the trespass. He assessed the damages for trespass at £200. He made no other award of damages.

22. After delivering the judgment, the judge gave the parties time to consider it. At the resumed hearing later that day, there were submissions as to costs. At the conclusion of the argument, the judge gave a short judgment stating there should be no order as to costs; he pointed out that the whole of the problems that had arisen had arisen because Mr and Mrs Ho had not followed the procedures under the Party Wall Act.

23. On 19 October 2009 a letter was written at the instigation of the judge by a court officer stating :

> "The judge has reconsidered the matter of costs and has come to the conclusion that his original view that the claimant should have their costs up to the date of the expiry of the defendant's offer to settle and the claimants should have their costs thereafter in accordance with the general rule. Whilst the offer did not comply fully with the requirements of Part 36 so that the strict consequence of failure by the claimants to obtain a more advantageous judgment did not apply, nevertheless the general rule should apply. If both parties agree it the order can be drawn up accordingly without any further attendance. If either party wishes to have the matter re-listed for further argument they should write to the court no later than 2 November 2009."

24. On Mr and Mrs Seeff's request a further hearing was ordered which took place on 12 April 2010. After argument (which was transcribed for us and extended to 32 pages) the judge gave a further judgment changing the decision he had made on costs. Although he accepted that Mr and Mrs Seeff had incurred the costs set out in their claim form and that these had increased, Mr Seeff had not responded to the letter of 22 September 2008 by saying they were prepared to take a comparatively nominal sum and their costs, so that Mr and Mrs Ho could consider the matter further; Mr and Mrs Seeff had wanted a substantial sum throughout. The judge varied his order so

that Mr and Mrs Seeff had their costs until 31 December 2008, allowing for some further time for the matter to be settled; Mr and Mrs Seeff were ordered to pay the costs from 1 January 2009. As the costs of preparing for trial and the trial in 2009 greatly exceeded the costs incurred by Mr and Mrs Seeff prior to 31 December 2008, an order was then made for the payment by Mr and Mrs Seeff of £15,000 on account of costs.

The issues on the appeal

25. The appeal was advanced on 10 grounds which I have grouped under 4 headings; the appellant instructed solicitors and counsel for the appeal. Mr Gatty appeared for them.

(1) What was agreed between parties in the conversation in the early part of 2006?

26. As I have mentioned at paragraph 5, there was a dispute before the judge as to what was said in the conversation in February or March 2006 over the garden fence in relation to consent given. Mrs Ho and Mr Seeff gave evidence on this. The judge accepted Mrs Ho's account of the conversation that she did tell him that she wished to raise the roof of the garage and make it a habitable room; that he had said a second storey was unacceptable because he had a window on the side. The conversation had concluded by him saying: "Go as high as you want, but do not cover my window". In reaching the findings the judge took into account the fact that when Mr Seeff became aware of the planning application in December 2006 he confirmed he had no objection to the change of use.

27. The judge then went on to hold that he was satisfied that the insertion of brackets or hangers for the new roof beams at a raised height did not amount to a trespass as Mr Seeff had given permission for this.

28. Mr and Mrs Seeff did not challenge the finding in relation to what was said in the conversation; this would have been, in my view, a very difficult task. However they did challenge the judge's conclusion as to the effect of the conversation. It was submitted on their behalf that the judge was wrong to infer that Mr Seeff had given permission for the insertion of brackets for the roof beams in the side wall or the fixing of anything to the wall at a height above the former garage.

29. The cross-examination of Mr Seeff as to what he had understood he had agreed to in the conversation was lengthy; that was not for the most part through questions posed by Mr Marshall on behalf of Mr and Mrs Ho, but by extensive questioning by the judge who asked far more questions than Mr Marshall in the course of Mr Marshall's cross-examination.

30. This cross-examination and questioning of Mr Seeff about what he had understood from the conversation was, in my view, misconceived; the dispute as to what had been said was a matter of evidence that was capable of being adduced in short order. It was for the court then to determine objectively what the effect of that was.

31. It was clear on the judge's finding as to what had been said that oral consent had been given to the raising of the roof in the conversation over the garden fence. The judge's task was then to consider the effect of the conversation. Plainly when a neighbour

seeks to do work that affects another neighbour, informal conversations as to what is proposed are highly desirable. However an informal discussion over the garden fence cannot, in my view, be taken objectively as a simple consent to proceed with the work without more. A neighbour who has given the consent would obviously expect that, if planning permission was required or consent under the Party Wall Act was needed, the processes would be put in train and the obligations imposed by the planning authorities or under the Party Wall Act observed as a condition of consent.

32. Thus if planning permission was necessary and was given, it would be understood that the requirements of the planning approval would be followed as a condition of the consent. Similarly if a Party Wall Notice was required, such a notice would be given, the formal procedures under the Act followed and any agreement or award under the Act implemented as a condition of consent.

33. It seems to me clear that a conversation between neighbours would be understood in this way; it would be implicit, as Mr Marshall ultimately accepted, that the proposal to which consent was given would be lawfully carried out. Viewed objectively, therefore, the consent given by Mr Seeff was given on the basis that the proper procedures would be followed – there would be an application for planning permission, proper arrangements under the Party Wall Act would be made (if applicable) and the grant of planning permission and any agreement or award under the Party Wall Act would be followed. Adherence to those arrangements was a condition of the consent.

34. Experience has shown in relation to disputes between neighbours that the failure to observe proper formalities is often, as it was in this case, the source of a dispute. A grant of planning permission sets out what can lawfully be done; the professionalism of surveyors experienced in the Party Wall Act will result in a clear agreement as to what is lawfully required. Consent on the basis of adherence to the terms of the planning permission and party wall awards and agreements makes for certainty and thus the diminution of the risk of such costly disputes between neighbours.

35. As I have set out at paragraph 13, Mr and Mrs Ho did not adhere to the terms of the grant of planning permission; they built a different roof and attached it at a different point; they had not received planning permission for this. They had not therefore adhered to the terms on which consent was given. The work therefore trespassed on Mr and Mrs Seeff's property.

36. As, in my view, the issue as to consent can be determined in this way, it is not necessary to consider whether there was a failure to follow the procedures under the Party Wall Act. The judge observed in his first judgment on costs that the whole dispute that followed would never have arisen if Mr and Mrs Ho had discharged their duty of giving notice under the Party Wall Act. The Act makes it mandatory to give notice in respect of work defined in the Act. Mr and Mrs Seeff contended that the Party Wall Act applied. Mr and Mrs Ho disputed this, on the basis of Mr Petersen's evidence, as to whether a party wall notice was necessary. Although I consider that the judge was probably right, it is not necessary to determine that issue.

37. Nor is it necessary to determine other issues encompassed within this heading, including the ground of appeal that the judge had been wrong to reject the contention that consent had not been given on behalf of Mrs Seeff as joint owner and therefore

she was not bound by any agreement Mr Seeff had made. This was a most unattractive submission. The way in which the trial judge dealt with the issue was not, in my view, entirely happy for reasons it is not necessary to explain. However the issue does not arise and it is not necessary to consider the matter further.

(2) Revocation and easement of support

38. It is evident from the outline of the facts which I have set out at paragraphs 10 and 11, that Mr and Mrs Seeff made it clear that the work should cease in late August or early September 2007. It was contended that they had revoked any consent given. It is not clear whether the judge addressed this contention. It matters not, for in the light of my conclusion on the first group of issues this issue does not arise.

39. It was also submitted on behalf of Mr and Mrs Seeff that as the roof was a new one and in a different higher position than the old roof there was no easement of support for a new roof given through the oral permission. It is not necessary to set out the contention at greater length as the issue does not arise.

(3) Remedies

40. The next series of grounds related to the remedies – whether this court should order the dismantling of the study roof, and if it did not, the quantum of damages.

41. It was submitted that if Mr and Mrs Seeff succeeded in their contention that Mr and Mrs Ho had attached the roof at a higher point without consent, then this court was entitled to exercise afresh the discretion to order an injunction, as the judge had exercised the discretion on an incorrect basis. Mr Gatty relied upon the decision of this court in *Daniells v Mendonca* (1999) 78 P & R 401 upholding the decision of the lower court to order the removal of an extension that had encroached on to a neighbour's land. The court held that the judge had carefully applied the principles set out in *Shelfer v City of London Electric Lighting Co.* [1895] 1 Ch D 287 at 322-3 and in *Jaggard v Sawyer* [1995] 1 WLR 269 at 287-8.

42. It was submitted by Mr Marshall that even if the court concluded that Mr and Mrs Seeff should succeed on the issue of consent, the court should not exercise that discretion differently to the judge, as Mr and Mrs Seeff had never really sought the remedy of dismantling the roof. They were solely concerned with the building of an internal wall and not with the height of the roof; the damage could in any event be compensated in money and removal would be oppressive.

43. It is clear from Mr Seeff's evidence, as the judge correctly found, that Mr Seeff's real concern related to his desire not to have a habitable room next to his house; he did not mind the raising of the roof. It would moreover be oppressive and wholly disproportionate to order the dismantling of the roof. In the circumstances, this was not a case for an injunction requiring removal of the roof.

44. It was next submitted by Mr Gatty that, if an injunction was not granted, damages in lieu of an injunction should have been assessed on the basis of *Wrotham Park Estate v Parkside Homes* [1974] 1 WLR 798 at 815 adopting the approach of Lord Walker in *Pell Frichmann Engineering Limited v Bow Valley Iran Limited* [2009] UKPC 45 at paragraphs 47-48. The increase in value in 314 and the diminution in value in number

316 would have been relevant as would any sum Mr and Mrs Ho would have had to pay for what they had obtained; no assessment had been made and therefore the matter should be remitted.

45. As I have set out, the judge preferred the evidence of Mr Peterson, Mr and Mrs Ho's expert, on the issues as to diminution in value. It was submitted that the judge had misunderstood the evidence of Mr Cooper, Mr and Mrs Seeff's expert. I do not consider that he did. The judge had ample opportunity to consider the evidence of the experts and he gave good reasons for preferring the evidence of Mr Peterson; I do not consider his decision can be faulted in any way. Thus it is clear there was no diminution in value as a result of the trespass found by the judge; the additional trespass cannot have made a material difference. There is no real basis for remission.

46. Although it follows that I can see no basis for awarding a significant sum for the more extensive trespass that I consider was committed, nonetheless the award of damages must be increased to reflect the additional findings of trespass. The increase must for the reasons I have given be modest. Doing the best I can based on the findings of the judge as to overall values, I consider that Mr and Mrs Seeff's damages should be increased to £500.

47. As I have set out, the judge made no finding for an award in respect of general damages. Mr Marshall submitted that this had not been an issue raised at the trial. The judge said there had been no investigation of what, if any, noise or disturbance might have arisen from the unauthorised work as opposed to work that was authorised. As the issue was not raised at the trial, it is too late for the matter to be investigated now.

(4) Costs

48. It was submitted that the judge erred in reversing his initial decision to make an award for costs and thereafter awarding Mr and Mrs Seeff their costs until 31 December 2008 and Mr and Mrs Ho their costs afterwards:

    i) Although the judge was entitled to reconsider a judgment that had not been perfected by drawing up an order, he could only do so on the basis of the principles set out by May LJ in *Robinson v Fernsby* [2004] 1 WLR 257 and by Wilson LJ in *Paulin v Paulin* [2009] 3 All ER 88. There were no circumstances that justified it on the facts of this case.

    ii) The judge was wrong in making an order based on the proposition that Mr and Mrs Seeff had failed to recover more than Mr and Mr Ho's offer of £500 plus court fees, as the offer had made no provision for the costs and expenses of Mr and Mrs Seeff.

49. It is convenient to consider the second submission first. The offer made without prejudice as to costs on behalf of Mr and Mrs Ho and the response of Mr and Mrs Seeff must be considered together. Mr Marshall correctly points to the fact that Mr Seeff considered the amount offered derisory, but Mr and Mrs Ho did not offer to pay the expenses Mr and Mrs Seeff had incurred nor, more importantly, did they respond to the offer of mediation. In my judgment, in these circumstances, the judge should not have ordered Mr and Mrs Seeff to pay the costs of Mr and Mrs Ho. His order on

costs made on 12 April 2010 should therefore be set aside. It is not, in the circumstances, necessary to consider whether the judge was entitled to make that order, having earlier decided that there should be no order as to costs.

50. As in my view Mr and Mrs Seeff are entitled to damages in the sum of £500, the question arises as to whether Mr and Mrs Ho should be ordered to pay the costs that Mr and Mrs Seeff incurred. In my view, they should not. Mr and Mrs Ho incurred significant costs in relation to the various claims for damages, including the professional fees of Mr Peterson. Mr and Mrs Seeff failed in substance on these claims and their failure on those issues should be taken into account in considering the order. In the circumstances, I consider that the right order should be the order originally made by the judge, namely no order as to costs, though for somewhat different reasons.

Conclusion

51. I would therefore allow the appeal in the respects I have set out, increasing the damages to £500 and making the same order as to costs that the judge had originally made – namely – no order as to costs.

Lord Justice Etherton:

52. I agree.

Lord Justice Maurice Kay:

53. I also agree.