# IN THE COURT OF APPEAL, CIVIL DIVISION
# APPLICATION FOR A SECOND APPEAL



REF: **A1/2019/0211**

**McKeeve & Another –v– Welter**

**Decision on an application for a second appeal.** The Judge will not give permission unless he or she considers that (a) the appeal would i) have a real prospect of success; and ii) raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it.

## ORDER made by the Rt. Hon. Lord Justice Coulson

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal



**Decision:** Permission to appeal **REFUSED**

**Reasons**

1. This is a party wall dispute. The applicants were obliged to carry out works to the party wall and were the beneficiaries of a third surveyor's award in the sum of £148,882.32. This was the figure that Cranbrook, the contractor, had quoted. The adjoining owner (now the prospective respondent), appealed that award on the basis that this figure was unreasonable and excessive, and that the reasonable value of the works was far less.

2. Judge Bailey agreed that Cranbrook had grossly overcharged and concluded that a reasonable value of the works that they carried out was just £47,977.30. Amongst other things, he found that the applicants had failed to mitigate their loss. He therefore amended the third surveyor's award to reduce (by over £100,000), the sum due. It is that decision which the applicants seek to appeal. However, in my view, the prospective appeal faces a series of insurmountable hurdles which lead inextricably to the conclusion that permission to appeal must be refused.

3. First, the judge's conclusion that the applicants had failed to mitigate their loss is explained in detail between [142] – [158] of his judgment. These paragraphs contain a mixture of law and factual findings. Those findings were clearly open to him on the facts and this court will not and cannot now interfere with them.

4. Secondly, on the judge's findings, the conclusion that the applicants failed to mitigate is unsurprising. This was a very strong case on the facts. The Cranbrook quotation was, on the judge's figures, three times higher than it should have been; three times higher than was reasonable. Moreover, that discrepancy was known at the time. Mr Davies, the surveyor for the adjoining owner, repeatedly said that more details were required from Cranbrook and was eventually goaded into saying that the Cranbrook figures were "grossly and extremely excessive and probably bare no relationship to the true costs of carrying out the actual work properly required". It cannot therefore be said that the points that arose before the judge were not in play before the works were carried out.

5. Moreover, the judge was rightly very critical of Mr Williams, the applicant's surveyor. Mr Williams was clearly not prepared to undertake the quasi-judicial role which a surveyor under the relevant statute is obliged to perform. This was doubtless in part because of the pressure put on him by the applicants. At [149] the judge set out an email from the first applicant to Mr Williams in which he describes Mr Davies as "a cretan" (*sic*) and views the whole exercise as one of simply putting pressure on him to capitulate. That was entirely the wrong approach and carried with it the risk that – eventually – the applicants would not recover what they spent. That risk has, of course, now manifested itself.

6. Thirdly, I take the view that there is an alternative analysis of these facts which leads to exactly the same result. That is by reference to the principles of causation. Whatever test of causation or foreseeability is adopted, no court could conclude that the result of the party wall works could be the recovery by the applicants of a figure that was three times higher than was reasonable. There was a clear break in the chain of causation when the applicants chose to go with Cranbrook's excessive quotation, notwithstanding the significant concerns raised by Mr Davies (which they ignored).

7. In answer to the five points raised in the grounds of appeal, I would comment:

(a) *Ground 1:* The complaint is that the judge did not embark on a detailed counterfactual analysis of what the applicants ought to have done and what the result would have been. I disagree: he did, at [147], [149], [150] and [152] – [153]. In my view, it was unnecessary for the judge to undertake any further analysis. It was clear that, at the time, the applicants were warned that the Cranbrook figures were excessive. The applicants therefore needed to obtain a reasonable quotation from Cranbrook or to engage another contractor. It was clear that they never

contemplated doing either. There was therefore a failure to mitigate and a break in the chain of causation.

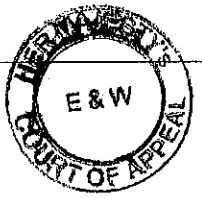
(b) *Ground 2*: This is a further elaboration of the counterfactual argument dealt with above.

(c) *Ground 3*: Again this is a further elaboration of the counterfactual argument. The point ignores the simple proposition that the applicants could only recover the reasonable costs of doing the work and, if Cranbrook were not prepared to charge a reasonable figure, the applicants had to go elsewhere. That was what Mr Williams was there to advise on and bring about. He failed to do so.

(d) *Ground 4*: This is a complaint about the rates used by the judge in the calculations. That was uniquely a matter for him: this court could not reopen that sort of debate under any circumstances. The judge was not obliged to use the rates merely because they had been endorsed by the applicants' expert.

(e) *Ground 5*: This deals with the fact that this is the second appeal. If I had concluded that there was either a point of principle in this appeal, or that there was a strong prospect of success, I would have given permission regardless of the fact that it was a second appeal. However, for the reasons that I have given, there is no point of principle and the appeal cannot succeed. Permission is therefore refused.

**Information for or directions to the parties**




**Mediation:** Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)? Yes/No (delete as appropriate)

Pilot categories:

- All cases involving a litigant in person (other than immigration and family appeals)
- Person[illegible]ury and clinical negligence cases;
- All [illegible]nal negligence cases;
- [illegible]t cases below £500,000 in judgment (or claim) value, but [illegible]ncipal issue is non-contractual;
- Boundary disputes;
- Inheritance disputes.
- EAT Appeals
- Residential landlord and tenant appeals

If [illegible]y reason[illegible] to refer to CAMS mediation under the pilot? Yes/No (delete as appropriate)

If yes, [illegible]ive [illegible]

Non-pilot cases: Do [illegible] a recommendation for mediation? Yes/No (delete as appropriate)

**Wh[illegible]rm[illegible]sion [illegible]beer [illegible], or the application adjourned**

a) [illegible]cluding j[illegible]t)

b [illegible]

*By the Court* Signed:
Date: 28.03.2019

**Notes**

(1) Permission to appeal will only be [illegible]pect of second appeals if the court considers that:
(a) the proposed appeal would [illegible] prospect of success and would raise some important point of principle or practice; or
(b) there [illegible]ome other compelli[illegible]son for the relevant appellate court to hear the appeal.
In respect of second appeals from the county court or High Court, see CPR 52.7.
In respect of appe[illegible] from the Upper Tribunal, see Article 2 of the Appeals from the Upper Tribunal Order 2008 (SI 2008/2834).

(2) Where permission [illegible]d has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and sectio[illegible] of the Access to Justice Act 1999.

(3) Where permission to appeal [illegible] been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **A1/2019/0211**

**DATED 28TH MARCH 2019**
**IN THE COURT OF APPEAL**

# ORDER

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