Neutral Citation Number: [2019] EWHC 2958 (Ch)

Case No: BL-2019-001869

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 7 November 2019

Before:

MS. PAT TREACY
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between:

(1) SINGHSON LIMITED
(2) SADDA SUPERSTORES LIMITED
(3) RIZWANA MAZHAR QURESHI

Claimants

- and -
KANAGARATNAM KANENDRAN

Defendant

- -
- -

MR. EVAN PRICE (instructed by **Bhogal Partners)** appeared for the **Claimants**.
MR. MICHAEL BUCKPITT (instructed by **Lincoln & Rowe**) appeared for the **Defendant**.

Hearing date: 22nd October 2019

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APPROVED JUDGMENT

DEPUTY JUDGE TREACY:

Overview

1. I gave judgment in this matter at the end of the hearing to enable the parties to move forward with the dispute. I set out below the reasons for my decision.

2. This is a claim for a mandatory interim injunction requiring the Defendant to remove four storage containers from land behind shops on Bath Road, Hounslow TW4 7HT.

3. The First and Second Claimants own/operate a supermarket at 354-356 Bath Road. The Third Claimant owns but lets out 362 Bath Road.

4. At the beginning of the hearing it became apparent that, while the Second Claimant occupies 354-356 Bath Road, it is not recorded on the Land Registry as the lessee of that property. The registered tenant is Sadda Superstores HWL Limited, under a lease dated 5 August 2009 ("the 2009 lease") which was annexed to the Particulars of Claim. Counsel for the Claimants explained that although the lease had been assigned to the Second Claimant, the Land Registry had not been updated. The Claimants were willing to give undertakings to ensure that the Land Registry was appropriately updated and that permission to amend the pleadings and to add any necessary further parties would be sought. The Claimants also pointed out that the Second Claimant was an occupier of 354-356 Bath Road and that the rights of way and easements at issue extended not only to the owners of 354-356 Bath Road but also to occupiers of those premises. There was some lack of clarity in the pleadings as to whether the Second Claimant had been included as a party in its capacity as legal tenant or as an occupier. No application to adjourn was made by the Defendant.

5. The Defendant is the freehold owner of 364-366 Bath Road.

6. The title to 364-366 Bath Road includes land at the rear (the "Land"). Taking it from east to west (moving away from 354-356 Bath Road), there is currently on the Land (adopting the terminology from the Defendant's skeleton):

    - a green storage container behind part of 360 Bath Road ("the Green Container");

    - adjacent to it a white freezer container ("the Freezer Container");

- a white freezer container (removed from a truck) near 362 Bath Road ("the Truck Container"); and

- a white food container behind 364-366 Bath Road ("the Food Container").

These are referred to below as "the Containers" and are the subject of the application.

Procedural Background

7. The Second Claimant first complained in writing about the Containers on 22 October 2018. That letter refers to earlier complaints in 2012, but there was no evidence about such complaints. On 4 December 2018, a further letter headed "Pre-Action Protocol" was sent by the Second Claimant to the Defendant. That letter was acknowledged by the Defendant's Solicitors. No substantive response was received until mid-April 2019, when the Defendant's solicitors disputed the allegations in the Second Claimant's letter and made various counter complaints.

8. In mid-August 2019 the Claimants' solicitors wrote to the Defendant's solicitors enclosing a draft Claim Form, Particulars of Claim and Application Notice. A holding response was received on 30 August 2019, and a more substantive response seeking copies of documents which had not previously been supplied was sent on 3 September 2019. On 20 September 2019 the Claimants' solicitors wrote to the Defendant personally, stating that the claim had been issued. Some confusion followed, and on 4 October 2019 the Claimants' solicitors wrote to the Defendant's solicitors confirming that the Claim and the application for injunctive relief had been issued that day. The sealed documents were served on the Defendant personally on 11 October 2019, with a date for the hearing of this application on 22 October 2019.

The issues

9. The Claimants seek an interim injunction requiring the Defendant to remove the Containers which are alleged to interfere with various rights of way and/or easements.

10. The Defendant invited the Court to dismiss the Application or alternatively transfer it and the Claim to the County Court.

Facts

11. The was some argument about the precise scope of the rights involved and the extent of any interference, but the Defendant agreed for the purposes of the Application that the hearing should proceed on the basis that the Claimants have the benefit of rights over the Defendant's property, as set out in the Particulars of Claim, in summary:

    - a right of way over parts of the Defendant's land "*... at all times and for all purposes as well as on foot as with horses carts carriages and other vehicles.*" and

    - an easement over parts of the Defendant's land "*... at all times and for all purposes as well as on foot as with horses carts carriages and other vehicles ... and also ... the right to stand vehicles for the purposes of unloading and loading goods and merchandise.*"

12. The complete history of the Containers is unclear. It was agreed that at least two of the Containers had been on the Land for several years, and that all four had been present for more than one year.

13. It was undisputed that for some period of time (and the precise details were not clear from the evidence) the First Claimant and/or the Second Claimant had placed their own containers on the Land.

14. The Claimants' evidence consists of two witness statements from the Claimants' solicitors and evidence from Mr. Maunder Taylor, initially described as expert evidence but relied on during the application as evidence only of the facts contained in it.

15. Dealing first with the evidence of Mr. Maunder Taylor, CPR 35.4(1) provides that expert evidence is admissible only with the Court's permission. No such permission had been sought by the Claimants and during the application the evidence was relied on as evidence only of the facts contained in it.

16. The other evidence on behalf of the Claimants was that of the Claimants' solicitors (Mr. Naper and Mr. Singh). The failure of the Claimants themselves to give evidence was strongly criticised in the Defendant's skeleton:

"*… there is no direct evidence in support of the Application. This is an application for an interim injunction, rendering D liable to committal if ever the order was made and there was breach. The evidence in support in the main is from Cs solicitors. Neither can give "first hand" evidence. Neither makes any attempt to comply with the relevant practice direction (32 PD 18.2) which provides that:*

18.2 A witness statement must indicate—

(1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and

(2) the source for any matters of information or belief.

[…]

In the circumstances, it is submitted that there is no proper evidence before the Court and certainly not evidence of sufficient "quality" to grant mandatory interim relief."

17. Evidence for the Defendant consists of a statement from Mr. Kanendran himself and a statement from Mr. Muhammad, who is the tenant of the Third Claimant. The evidence of Mr. Muhammad was criticised by the Claimants' Counsel during the hearing, although the grounds for doing so were not developed.

18. I do not disregard the evidence given by the Claimants' solicitors, which is signed with a statement of truth. However, the fact that none of the Claimants has chosen to make a witness statement is a concern. As this is an interim application and there is to be no cross-examination of the witnesses for either party, it may perhaps be thought to be less important that the evidence is not given by the primary witnesses, and for reasons of urgency in such cases it may sometimes be unavoidable that evidence is given by solicitors. Nevertheless, it remains the case that evidence should, where possible, be a written statement which contains the evidence which the witness would be allowed to give orally, signed by that person, as emphasised in the Chancery Guide at paragraph 19.1. Given the time available to the Claimants to prepare for this hearing, there is no obvious reason why the Claimants could not have given direct evidence and it would have been preferable if that had been done. The criticisms

made of some gaps in the evidence during the hearing were more powerful than might have been the case for direct evidence.

Burden and standard of proof

19. This is an interlocutory application for a mandatory injunction. The burden of proving the facts relied on in support of the application to satisfy the requirements for such an application lies with the Claimants. Mr. Buckpitt for the Defendant argued forcefully that that the Court should be slower to grant a mandatory injunction on an interim basis than a prohibitory injunction.

20. It is for the Court to satisfy itself that the considerations established in *American Cyanimid* have been properly considered and that the Claimants have put forward sufficient evidence to enable the Court to exercise its discretion in line with the overriding objective. It is not for the Court dealing with the interlocutory application to seek to resolve critical disputed points of fact or law.

21. The courts may sometimes appear to be more reluctant to grant mandatory injunctions than prohibitory injunctions on an interlocutory basis. This is not because the test is different, but because a mandatory injunction is more likely to cause irremediable prejudice to the defendant, or to disrupt the status quo than a prohibitory injunction.

Should the Claim remain in the High Court or be transferred?

22. The Defendant argues that the matter is more appropriate for the County Court, submitting that it is in effect a neighbours' dispute about conduct which has persisted for 12-18 months and that there is no reason why the Claim could not have been commenced in the County Court or should not be transferred there particularly having regard to the very limited damages sought by the Claimants.

23. Counsel for the Claimants explained during the hearing that the Claim was commenced in this Court because of perceived greater speed of the High Court in dealing with interim applications. No other reason was given and Counsel for the Claimants did not put forward any particular objections to the matter being dealt with in the County Court once this Application had been considered.

24. Transfer to the County Court is in the discretion of the Court, having regard to the matters set out in CPR 30.3(2), in summary: the value of the claim; the complexity of the facts and issues, the importance of the case, whether it would be more convenient to try the case elsewhere and the facilities of the proposed court. In addition, as explained in the Chancery Guide: "*Under PD 29 paragraph 2.2 a claim with a value of less than £100,000 will generally be transferred to the County Court unless it is required by an enactment to be tried in the High Court, it falls within a specialist list, or it falls within one of the categories specified in the list at PD 29 paragraph 2.6*" (Chancery Guide, paragraph 14.19 (c)).

25. PD 29(2) also provides that where an application is made under Pt 25 (Interim remedies) in the High Court, that application will usually be dealt with before a decision to transfer is taken, so I deal first with the application for injunctive relief.

Injunctive relief – principles

26. The principles governing the grant of interim injunctive relief are explained in *American Cyanamid v Ethicon* [1975] AC 396 and subsequent cases. I was directed by Counsel for the Defendant to the guidance given in Volume 2 of the White Book at paragraph 15.7 and subsequently. The broad principles are:

    (i) The Court must satisfy itself that there is a serious question to be tried.

    (ii) Applications should be decided primarily on the balance of convenience.

    (iii) An interim injunction should be refused if damages would adequately compensate the claimant (and the defendant will be able to pay).

    (iv) An interim injunction should be granted if the claimant's cross-undertaking in damages would adequately compensate the defendant (and the claimant would be able to pay).

    (v) If damages would not fully compensate either party, the balance of convenience decides the issue.

(vi) If the balance of convenience favours neither party, the relative strengths of the parties' respective cases on the merits may be taken into account, if one case is disproportionately stronger.

(vii) If other factors are finely balanced, the Court should maintain the status quo.

27. To establish a cause of action, the Claimants will need to: show that they have title to the easements; establish the scope of the easements; and finally establish that there has been substantial interference with that right. Both parties referred to Gale on Easements, 20th Edition for the principal propositions of law on which they relied. As set out above, title to the easements (at least for the First and Third Claimants) was not disputed. The scope of the easements and the extent (and legal consequences) of any obstruction were in dispute.

28. For a complaint about an obstruction of a private right of way to be actionable, the obstruction has to be substantial (Gale, paragraph 13-06). The Claimants argued that the easement at issue in this application is not a right of way, but a right to stand vehicles on land for the purpose of loading and unloading. Their primary submission was that anything other than a *de minimis* obstruction would be actionable.

29. However, even if this is incorrect, the Claimants summarised and relied on the law in relation to easements as set out in *B&Q Plc v Liverpool and Lancashire Properties Ltd* (2001) 81 P&CR as follows:

(i) The test of an actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence upon being able to continue to use the whole of what he contracted for is reasonable;

(ii) It is not open to the granter to deprive the grantee of his preferred modus operandi and then argue that someone else would prefer to do things differently, unless the grantee's preference is unreasonable or perverse;

(iii) If the grantee has contracted for the 'relative luxury' of an ample right, he is not to be deprived of that right, in the absence of an express reservation of a right to build upon it merely because it is a relative luxury and the reduced, non-ample right would be all that was reasonably required;

(iv) The test is one of convenience and not of necessity or reasonable necessity; providing that which the grantee is insisting upon is not unreasonable, the question is "*can the right of way be substantially and practically be exercised as conveniently as before?*".

30. These propositions were approved by the Court of Appeal in *Emmet v Sisson* [2014] EWCA Civ 64 at paragraph 36 and the Defendant did not disagree with them. The Defendant did disagree with some of the broader propositions put forward by the Claimants, including as to the scope of the right to stand and to load and unload and as to the treatment of rubbish.

31. The Defendant's skeleton argument submitted that there was no serious issue to be tried. However, during the hearing it was agreed by counsel that the Claimants had established a serious issue. Given the guidance in *American Cyanamid* that a claimant seeking interim injunctive relief need establish only "*a serious question to be tried*", which is a lower threshold than the previous practice of requiring a strong case on its face, I conclude that the requirement is fulfilled.

Where does the balance of convenience lie?

32. The Court must consider whether the lower risk of injustice will arise from granting or refusing interim relief. All the circumstances of the case are relevant. The Courts have hesitated to produce a definitive list of factors to be taken into account.

33. Those which were put forward by the Claimants included that:

- the First Claimant's tenant is threatening to leave the premises if the situation is not resolved quickly, in which case it is submitted that the First Claimant will face a considerable increase in its losses arising from the obstruction of the easement;
- those losses and the losses of the other Claimants are very difficult to quantify;
- the Claimants are suffering considerable inconvenience and that moving (and removing) the Containers is not difficult; and

- the prejudice to the Defendant in having the Containers removed while the matter is considered is substantially less than the interference with the rights of the Claimants, their occupiers, licensees and tenants.

34. The Claimants' counsel also pointed out that the draft order put forward by the Claimants provided for a cross undertaking in damages.

35. The Defendant argued that:

- the combined damages claim (between the three Claimants) is only £5,000 for over 12 months.

- the evidence of the alleged inconvenience and difficulty caused to the Claimants by the alleged obstruction is sparse, with no significant evidence of recent problems.

- the harm caused to the Defendant will be similar in nature to that caused to the Claimants so that the issue of the adequacy of damages is balanced.

36. Mr. Buckpitt for the Defendant explained that as some of the Containers are used by the Defendant for storage in connection with the Defendant's business at 364-366 Bath Road, the inconvenience if the Defendant is required to remove them is likely to be significant, and difficult to quantify. He also submitted that the damage to Mr. Kanendran of being forced to terminate the agreements that he has with third parties for some of the Containers will be similar in nature to that which may be suffered by the First Claimant if the submissions that the First Claimant's tenant may leave turn out to be justified.

37. Finally, the Defendant noted that there was no evidence from the Claimants supporting the cross-undertaking proffered in the draft order, as would normally be the case (see the commentary at paragraph 25.1.25.11 of the White Book).

38. Overall, it seems to me that the question of adequacy of damages does not fall clearly in favour of either party so I must consider the remaining factors.

39. It was submitted by the Defendant that the result of the order, if granted, would be to bring the Claim to an end as there would be no incentive on the Claimants to pursue

the case vigorously and given the considerable delay already apparent. The Defendant also submitted that if all the other factors are balanced the status quo should be maintained, noting that it was undisputed that two of the Containers have been on the Land for several years, with all four having been present for more than a year.

40. In view of all the above, I concluded that the balance of convenience lies in not granting the injunction sought and in dismissing the application.

41. In view of the considerations set out in paragraphs 23 to 25 above it is also appropriate to order that the Claim be transferred to the County Court.