Neutral Citation Number: [2019] EWHC 3497 (QB)

Case No: QA-2019-000147

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH CIVIL DIVISION

Liverpool Civil and Family Court Centre
35, Vernon Street, Liverpool, L2 2BX

Date: 19/12/2019

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

Dr Morteza Fattahi	**Appellant/ Defendant**
- and -	
Charles Grosvenor Limited	**Respondent/ Third Party**

- -
- -

Mr Kevin Leigh and **Mr Philip Williams**
(instructed by **Aman Solicitors**) for the **Appellant/ Defendant**
Ms Sheila Aly (instructed by **Painters Solicitors**) for the **Respondent/Third Party**

Hearing dates: 5 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

1. This is yet another case in which a dispute between neighbours has spiralled out of control. A claim for an injunction and damages, eventually found to have been worth little more than £10,000, occupied four days of court time in the County Court at Oxford and culminated in a reserved judgment stretching to 188 paragraphs over 36 pages. It is tribute to the patience of Her Honour Judge Vincent that her obvious exasperation at the way in which the defence case had been presented was expressed in such measured terms.

2. At paragraph 55 of her judgment she states:

> "At the outset of the trial I had read all of the first bundle and most of the second containing all the pleadings, witness statements, expert reports, including plans and photographs. I had not yet read the third bundle containing around 450 pages of parties' and solicitors' correspondence. In the circumstances, it was news to me that the defendant was alleging the claimant's conduct of the litigation was an issue and in particular she was alleged to have fraudulently concocted an email. Having read the skeleton argument a number of times, I was still at somewhat of a loss to understand the defence and the legal basis for it."

3. Indeed, the elusiveness of the Defendant's contentions was matched only by the tone of strident confidence with which his legal team had advanced them. The Judge quoted from a letter dated 19 January 2019 from the Defendant's solicitors:

> "Mr Williams of counsel, who will also be trial counsel, has clearly indicated that your client's claim is legally, equitably, regulatorily and factually flawed. It is our client's position that it is doomed to failure and she will be liable for a substantial costs order which we will ask is paid on an indemnity basis for obvious reasons. Our client now has a new legal team who are confident in obtaining a just and equitable result from the court."

4. They lost.

5. As is so often the case in disputes which have blown up out of all proportion to their value, the background facts are relatively simple. For ease and consistency of reference, I will continue to refer to the parties as they were referred to below: Claimant, Defendant and Third Party.

6. The Claimant and Defendant owned adjoining terraced houses in Islip Road, Oxford. The Defendant decided to build a second-floor extension. He engaged the Third Party to carry out the works.

7. Clause 7 of the contract between the Defendant and the Third Party provided:

> "All other consents reasonably required by this Company to undertake the contract works including Party wall consents … shall be the responsibility of the customer. If the customer fails

> to obtain any such consents and the Company suffers loss as a result, including any loss of profit, the customer shall be liable to the Company for such losses."

8. The Defendant did not read the contract and did not serve the requisite notice on the Claimant as required by Section 3 of the Party Wall etc Act 1996. The Judge found as a fact (contrary to the Defendant's strenuous but ultimately unsuccessful attempts to establish otherwise) that the Claimant did not find out about the planned extension until some days after the Third Party had started work on site. The absence of any notice to the Claimant was always likely to increase significantly the risk that legal action would thereafter ensue which, in the event, it did.

9. The 1996 Act provides some level of protection, to a party who complies with its terms, against claims from adjacent owners which would otherwise be viable under the common law. However, as a result of his non-compliance, no such protection was available to the Defendant. Furthermore, the Act imposes a regime which is intended to minimise the risk that disputes will arise between adjoining owners.

10. Just such a dispute did, in fact, arise. The Claimant brought a claim in trespass and nuisance alleging, for example, that her roof had been damaged and a Rayburn gas appliance, the flue to which emerged in the vicinity of the works being carried out by the Third Party, had been rendered unusable. The Defendant, in turn, claimed an indemnity or contribution from the Third Party.

11. During the course of the trial, for understandable tactical reasons, Mr Williams, on behalf of the Defendant, concentrated his fire almost exclusively upon the Claimant's claim rather than upon the pursuance of his Part 20 claim for an indemnity. To this end, he submitted with vigour and persistence that the Claimant was a dishonest and manipulative woman who had, in fact, suffered no, or no significant, loss as a result of the work of the Third Party. This must have seemed like a good idea at the time.

12. In the event, the Judge made findings, unchallengeable on this appeal, that the Claimant was honest and that a significant part of her claim had been made out. In the usual course, such a finding of liability would have been passed down the chain to the Third Party. However, in this case, the Defendant faced the difficulty posed by his admitted failure to comply with the terms of the 1996 Act which the Judge found had fatally undermined his claim for an indemnity or contribution.

13. On this appeal, however, it is argued on the Defendant's behalf that the operation of the provisions of the Act are immaterial because any relevant tort relied upon by the Claimant could only have been that of the Third Party since the Defendant himself played no physical, supervisory or other role in the carrying out of the works.

14. It is a matter of very considerable regret that the Judge was provided with virtually no assistance whatsoever on the way in which the Defendant put its case under the Part 20 proceedings. One might be forgiven for thinking that the Defendant's level of misplaced confidence in his prospects of success against the Claimant, as evidenced in the letter from which the Judge quoted, had turned the Part 20 claim into a virtual irrelevance.

15. However, having had the inestimable advantage over this Court of hearing evidence over four days, the Judge was clearly conscious of the potential consequences of the

Defendant's breach of clause 7 of his contract with the Third Party. During the course of submissions on the fourth day of the hearing, she observed:

> "…if he had served the Party Wall Act in the first place, then there would have been an exchange of the plan and then there would have been a conversation saying: "Oh, I have seen the plans, there is not my flue on it, let's have a conversation with it." Mr Annis would have come down and said: "Oh, I have got lots of ideas with what to do with this flue and extension. There would have been photographs that showed whether the flue was standing up or bent over and they could do it and life would have been sweet, all would have been fine.""

16. This line of analysis was reflected in the Judge's judgment in which she held:

> "Having considered the evidence of Mr Radler, I am satisfied to the standard of a balance of probabilities, that the stainless-steel flue has been damaged by being knocked out of position, so that it now presents at an angle. Without having photos or plans showing the state of the flue before November 2015, Mr Radler cannot be certain that the damage was caused by CGL, but he notes the flue is positioned where CGL were working. Given that it was not marked on the plans, it is entirely probable that the contractors were not primed to look out for it…"

17. Earlier at paragraphs 130-131 she had observed:

> "130. I note from the correspondence that the claimant's position at the outset was that she was not necessarily objecting to the extension remaining but she wanted there to be in place the process envisaged by the Party Wall etc Act starting with the service of the notice and the appointment of a surveyor. This is in my judgment a reasonable position for her to have adopted. The extension is small and it could well have been that solutions were found that met with her and her husband's approval so as to allow it to be completed. However, the fact of not serving the notice means that the claimant was deprived of any opportunity to have a voice and she is completely at the mercy of the defendant as to the potential consequences of the extension for her property. I have no doubt that Mr Annis could in time offer a solution to any problem including the flue pipe, but whatever solution he is offering is one that is premised on the extension remaining up. The flue pipe being extended to a significant height and planning permission required to be obtained. It is a solution that the claimant has to suffer and have imposed upon her and she remains at risk that it is something that devalues her property to an unacceptable level for her, both financially and emotionally.
>
> 131. The defendant's claim against the part 20 defendant to be indemnified, alternatively for a contribution to any damage as he

> is required to pay to the claimant must fail. It is the defendant who is liable to the claimant for the trespass and nuisance caused by the works on his property. A homeowner who causes work to be undertaken to a party wall owes his neighbour a non-delegable duty of care (***Alcock v Wraith*** [1991] 59 BLR 61) so he could not have delegated to CGL. In any event, he has entered a contract with CGL which provided that it was his responsibility to provide the relevant notice and obtain relevant consent from his neighbour under the Party Wall etc Act. To the extent that it is relevant, I accept on a balance of probabilities the evidence of Mr Annis that the defendant did tell him that he had obtained permission from his neighbour. The defendant has no positive evidence to the contrary. He says he cannot remember. The contract provided that the defendant would indemnify the part 20 claimant for any damages payable as a result of the Party Wall issues."

18. In law, where a duty is non-delegable, the party owing it, A, cannot escape liability to B for its breach by purporting to delegate such a duty to C. The Defendant, however, is right to point out that this does not mean that the performance of the works giving rise to such a duty cannot be entrusted by A to C. Where this happens, A still owes the duty to B but may, depending upon the terms of any agreement between A and C, pursue C for an indemnity or contribution in respect of a claim made by B against A arising out of the works.

19. In paragraph 131 of her judgment it would appear that the Judge fell into error in concluding that the non-delegable nature of the Defendant's duty to the Claimant was somehow relevant to the Part 20 claim. Nevertheless, it is clear that she fully understood that, in so far as the Claimant's claim was attributable to the Defendant's failure to obtain 1996 Act consent, the Part 20 claim would, in any event, fall foul of clause 7 of the contract.

20. The Defendant's case on appeal involved taking me through each head of damage in respect of which an award had been made by the Judge and arguing that I could be satisfied that it would have given rise to a claim regardless of the application of the regime provided for under the 1996 Act. However, a perusal of the transcript revealed that no such contentions had ever been articulated before the Judge.

21. Against this background, it is understandable that the Judge was succinct in the reasons which she gave for concluding that the Part 20 claim did not survive the operation of clause 7 of the contract. Had the Defendant considered that her reasons were inadequate then the proper course would have been to ask her to provide further reasons in accordance with the guidance set out in ***English v Emery Reimbold & Strick Ltd*** [2002] 1 W.L.R. 2409. His advisors would have had plenty of time in which to do this because her judgment was circulated in draft form to all the parties more ten weeks before it was eventually handed down. When I challenged Mr Williams as to why this course had not been adopted he explained that it would have been embarrassing for him because such a request would have involved expressly or impliedly criticising the Judge's conclusions. I note, however, that no such reticence was on display during the course of this appeal. Mr Leigh elaborated further saying that there was no point in asking judges to expand upon their reasons because they would invariably refuse. I have

been unable to decide which of these two submissions was the less attractive. Each was competitively unappealing.

22. In any event, I find that it is clear from the judgment as a whole that the Judge had formed the view that the root cause of the bringing of the claims in the first place was the Defendant's failure to comply with the requirements of the 1996 Act. Paragraph 130 of the judgment, in particular, articulates this conclusion and how it was reached.

23. I am satisfied that the essence of the Judge's finding was that if the Defendant had complied with the requirements of the 1996 Act then, on a balance of probabilities, the Claimant and the Defendant would have come to a reasonable mutual accommodation in advance of the commencement of the works and would have achieved a level of subsequent cooperation which would, in turn, have meant that it was unlikely that the Defendant would ever have faced a claim for damages from the Claimant. It is to be noted in this context that the Guidance published by the Ministry of Housing, Communities and Local Government in 2013 provides:

> "The Party Wall etc. Act 1996 provides a framework for preventing … disputes in relation to party walls…."

In my view, it was entirely reasonable for the Third Party to require that the statutory procedure must be followed because, where it is not deployed, the risk of disputes arising and claims being made is likely to be seriously increased. This is particularly relevant in a case such as this in which a contractor's work has been interrupted mid-stream and where avoidable acrimony between adjacent landowners has been foreseeably fuelled by a failure to follow the framework mandated by the Act. Of course, clause 7 would not have been apt to protect the Third Party from, for example, claims arising from damage caused by negligent workmanship which would have been likely to form the basis of claim regardless of compliance with the 1996 Act but the Judge was given no assistance whatsoever as to where she should draw the causational lines despite the fact that her interventions during submissions revealed her provisional conclusions on the issue quite clearly.

24. In the event, the issue as to causation was one which the Judge, having endured four days of evidence and submissions, was uniquely well placed to resolve. She may have been persuaded to have reached a different conclusion had she had the advantage of the arguments presented before me on this appeal but that is not to the point. The Defendant cannot now be heard to complain that if the case had been differently presented below then he may have won. So long as the Judge's conclusion was consistent with the evidence then her decision must stand.

25. It was and it does.

26. This appeal is dismissed.