Neutral Citation Number: [2016] EWCA Civ 867

B2/2015/1150

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM OXFORD COUNTY COURT
(HIS HONOUR JUDGE TOLSON QC)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 6th July 2016

B E F O R E:

LORD JUSTICE LAWS

LORD JUSTICE TOMLINSON

LORD JUSTICE LEWISON

OTTERCROFT LIMITED

Claimant/Respondent

v

SCANDIA CARE LIMITED
DR MEHRDAD RAHIMIAN

Defendants/Appellants

(DAR Transcript of
WordWave International Limited
Trading as DTI
8th Floor, 165 Fleet Street, London EC4A 2DY
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Official Shorthand Writers to the Court)

Mr S Hockman QC (instructed by Direct Public Access) appeared on behalf of the **Appellants**
Mr N Lavender QC & Mr G Healey (instructed by Guy Clapham & Co) appeared on behalf of the **Respondent**

J U D G M E N T
(Approved)

1. LORD JUSTICE LAWS: I will ask Lewison LJ to give the first judgment.

2. LORD JUSTICE LEWISON: 1. Ottercroft Ltd and Scandia Care Ltd own adjoining properties in St Paul's Row, High Wycombe. Scandia Care Ltd is controlled by Dr Mehdad Rahimian. The dispute between them arises out of Scandia Care's proposed redevelopment of its property by the construction of a store room in the yard behind the property and the actual erection of an external metal staircase in place of an existing wooden one.

3. 2. His Honour Judge Tolson QC held that Scandia Care ought to have served notice on Ottercroft under the Party Walls Act 1996 either at some time before July 2011, at a time when it intended to proceed with the construction of the store room; or, alternatively, before December 2011 when the new staircase was erected. In fact, it did neither.

4. 3. The judge did not set out a detailed chronology of the course of events, but he accepted the evidence of Mr Brown, one of Ottercroft's directors, who did. The salient events are these. In the course of a visit to the property in July 2011 Mr Brown noticed a large amount of building rubble piled up against the wall dividing the two properties. He made attempts to find out what was going on. The rubble was cleared some days later, but on a further visit in July he was concerned to find that the glass roof of Ottercroft's conservatory extension had been covered with plastic netting and that scaffolding had been erected off the parapet walls, ridges and roof valleys of its property. Some clay tiles on the roof had been broken. He tried to speak to the contractors, but without success as they did not speak English. On 4th July 2011 he contacted GKS Building Surveyors, Ottercroft's building surveyors, to obtain advice on the damage that had been caused and on the correct procedure which should have been followed under the Party Walls Act 1996. On the same day Ottercroft's solicitors wrote to Scandia Care complaining of what had happened and asking for undertakings.

5. 4. A few days later Mr Brown instructed GKS to contact Scandia Care's surveyors or consultants. Mr Brown met GKS on site on 9th July 2011 to consider and review the scaffolding and party wall issues. GKS thereafter entered into correspondence with Scandia Care's surveyors. Amongst other things, they asked for copies of working drawings.

6. 5. Ottercroft began proceedings against both Scandia Care and Dr Rahimian on 21st August 2011, claiming declarations about a claimed right of light, an injunction to restrain the defendants from interfering with that right, and other relief. On 23rd September 2011 Dr Rahimian gave a personal undertaking to remove scaffolding by a specified date, not to interfere with an alleged right to light to the ground floor window of 12-13 St Paul's Row, to remove a support for an external metal staircase, to reinstate a section of pipe and to refill inspection holes. On 3rd October 2011 Dr Rahimian signed another undertaking in similar terms "For and on behalf of Scandia Care".

7. 6. Despite the giving of the undertakings, work continued, although as a result of the proceedings the works were scaled down so as to exclude the proposed store room. Nevertheless, the construction of the new metal external staircase went ahead, which, as became common ground, amounted to an infringement of Ottercroft's right to light.

The judge found that it had been constructed without any notice to Ottercroft, without planning permission and in breach of the undertakings. He said that it was clear that the defendants had behaved badly throughout and in an unneighbourly manner.

8. 7. The judge made an order which, amongst other things, recited that the new staircase infringed Ottercroft's right to light, declared that the construction of the staircase was and remained a breach of the two undertakings, ordered the defendants to alter or replace or remove the staircase so that it ceased to interfere with Ottercroft's right to light, awarded Ottercroft modest damages and made an order for costs in the following terms:

> "The Defendants shall be jointly and severally liable for the Claimant's costs of the consolidated claims and counterclaims, to be assessed on the indemnity basis if not agreed, which costs shall include the Claimant's pre- and post-action party wall surveyor's costs, as well as the Claimant's pre- and post-action legal costs."

9. 8. Mr Hockman QC submitted that the judge was wrong to have granted a mandatory injunction and wrong to have restrained the defendants from interfering with Ottercroft's right to light. He argued that the judge had abdicated his responsibility to carry out a balancing exercise fairly and objectively.

10. 9. The judge referred to the most recent authority on the subject, namely the decision of the Supreme Court in Lawrence v Fen Tigers Ltd [2014] UKSC 13; [2014] AC 822. At paragraph 104 of his judgment, Lord Neuberger quoted the famous passage in the judgment of A L Smith LJ from Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, in which the learned Lord Justice said this:

> "In my opinion, it may be stated as a good working rule that - (1) If the injury to the plaintiff's legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction - then damages in substitution for an injunction may be given."

10. Lord Neuberger considered those criteria and other authority. He pointed out at paragraph 120 that:

> "The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in *Regan v Watson*."

At paragraph 123 he said:

> "Where does that leave A L Smith LJ's four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in *Fishenden* 153 LT 128, 141. First, the application of the four tests must not be such as

'to be a fetter on the exercise of the court's discretion'. Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted."

11. 11. As Mr Hockman submitted, the first of the three criteria in Shelfer were satisfied on the facts of this case. However, the satisfaction of those criteria in effect opens the gateway to the exercise of discretion, as again Mr Hockman submitted. Whether or not to grant an injunction to reverse the invasion of a property right is a matter for the discretion of the judge and will not be disturbed by an appellate court unless he has gone wrong in principle.

12. 12. The judge in our case expressly directed himself that he should not grant an injunction if damages would be an adequate remedy. He then went on to consider the factors that weighed for and against the grant of an injunction. Those against were that the infringement was minor, had not caused significant damage and could be measured in money. He also considered the position of the residents of the flats for whom the metal staircase was a fire escape, but he held that a new staircase could be constructed before the existing one was removed, with the result that there would be no real disturbance to them. The important factors that weighed with the judge in favour of the grant of an injunction were these. First, he was "overwhelmingly" influenced by the undertakings given by both Scandia Care and Dr Rahimian. At paragraph 36 of his judgment he said this:

> "The claimants accepted these contractually binding promises instead of coming to Court to seek interim relief, which they would surely have obtained unless the defendants had been able to demonstrate that they would voluntary have complied with their obligations. Unless parties accept undertakings in lieu of Court Orders, in all areas of the law the Courts would be clogged with applications for interim relief. What more could the claimants reasonably have done to protect their position? I believe that the claimants must be treated as being in no worse position than if they had come to court and obtained Interim Orders."

13. I have to say, with great respect to Mr Hockman, that his submissions on the question of oppression failed to grapple with this overwhelming reason which the judge had for granting the injunction. Second, the judge considered that the defendants had acted badly throughout, and earlier in his judgment he had described Dr Rahimian's behaviour as "high handed"; indeed, he went so far as to hold that Dr Rahimian wished his neighbours to remain in ignorance of what he was doing. Mr Hockman submitted with some force that the judge had overstated the position as regards planning position. The judge had said that the new staircase had been erected without planning permission. In fact, there was a planning permission in place, albeit for a staircase of a different design. It would have been more accurate for the judge to have said that the staircase had not been erected in conformity with the planning permission already granted. However, as I see it, the absence of planning permission played little, if any, part in the judge's overall evaluation and does not vitiate the balancing exercise that he

conducted. Mr Hockman also submitted that there was no specific finding that Dr Rahimian knew that the erection of the metal staircase would amount to an infringement of the right to light. In fact, the judge said at paragraph 6(iii) that:

> "at all material times [Dr Rahimian] was fully aware that he might be infringing the rights of his neighbours, but wished them to remain in ignorance of what he was planning on doing."

And at paragraph 13 that:

> "Dr Rahimian was at all material times personally aware that his actions would have a significant impact upon his neighbours' right to light."

14. But in any event the judge was entitled to consider the defendant's conduct in the round, and that included everything that had preceded the commencement of the action as well as the breach of the undertaking. I do not consider that the judge has been shown to be wrong in his characterisation of the defendants' conduct. Finally, Mr Hockman argued that the judge had not considered the extent to which the grant of the mandatory injunction would be oppressive to the defendants. He said there was no material on which the judge could have held that moving the staircase was feasible. However, that submission fails on the facts. The joint statement of the experts, Mr Fawell and Mr Moyle, says in paragraph 8:

> "We agree that it should be possible to alter the staircase in such a way that overcomes the right of light injury, whilst maintaining the functionality of the staircase. We agree that moving the main flight of stairs by around the width of the staircase towards the south west (i.e. move the staircase to the right as viewed standing in St Paul's Row and looking toward the staircase by approximately the width of the staircase) is likely to overcome the right of light injury."

They added, in dealing with the question of compensation:

> "We are of the opinion that the parties would be unlikely to agree a sum of more than £6,000 on the basis that it would be more cost effective for the claimant to alter the staircase than pay a higher level of compensation."

From those two statements one can see, first, that moving the staircase was feasible and, secondly, that the cost of doing so was likely to be less than £6,000.

13. 15. In Lawrence v Fen Tigers, at paragraph 121, Lord Neuberger cautiously approved the following statement from Lord Macnaghten in an earlier case:

> "In some cases, of course, an injunction is necessary - if, for instance the injury cannot fairly be compensated by money - if the defendant has acted in a high-handed manner - if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a

warning to others."

14. 16. Those observations seem to me to fit the facts of this case exactly. In addition, I consider that the judge was not only entitled to attach weight to the fact that the undertakings had been breached, but was right to do so. To hold the defendants to their contractual undertakings cannot, in my judgment, be said to be oppressive. I can see no error in the judge's exercise of discretion.

15. 17. The second issue that Mr Hockman argued was whether the judge was wrong to hold Dr Rahimian personally liable to Ottercroft as a joint tortfeasor. The decision of the Supreme Court in Prest v Petrodel Resources Limited [2013] UKSC 34, [2013] 2 AC 415, warns against piercing the corporate veil, to use that well-worn metaphor, except in cases where a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades, or the enforcement of which he deliberately frustrates by interposing a company under his control. As Mr Hockman rightly submitted, that is not this case, but piercing the veil is, in effect, ignoring the separate personality of the company; but where, as here, a company and a director of that company are held to be joint tortfeasors, the veil is not pierced at all.

16. 18. The second authority to which Mr Hockman referred was the decision of the Supreme Court in Fish & Fish limited v Sea Shepherd UK [2015] UKSC 10; [2015] AC 1229. That case considered accessory liability in tort. At paragraph 21, Lord Toulson said this:

> "To establish accessory liability in tort it is not enough to show that D did acts which facilitated P's commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further."

17. 19. Mr Hockman submitted that where the company is what he called a "one man band", there can be no common design because one cannot have a common design with oneself. But this proposition contradicts the first proposition, that the veil should not be pierced, because if the veil is not pierced then there are two legal actors involved.

18. 20. The classic exposition of the circumstances in which a director of a company can be held liable as a joint tortfeasor with a company that he controls is to be found in the judgment of Chadwick LJ in MCA Records Inc v Charly Records Ltd [2001] EWCA Civ 1441; [2002], FSR 26. As far as I know, it has never been disapproved and in any event is binding on us. At paragraph 49 Chadwick LJ said:

> "First, a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company - that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given

> to the identity of the company as a separate legal person. Nor, as it seems to me, will it be right to hold a controlling shareholder liable as a joint tortfeasor if he does no more than exercise his power of control through the constitutional organs of the company - for example by voting at general meetings and by exercising the powers to appoint directors ... I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed."

21. In the following paragraph, paragraph 50, he said:

> "Second, there is no reason why a person who happens to be a director or controlling shareholder of a company should not be liable with the company as a joint tortfeasor if he is not exercising control through the constitutional organs of the company and the circumstances are such that he would be so liable if he were not a director or controlling shareholder. In other words, if, in relation to the wrongful acts which are the subject of complaint, the liability of the individual as a joint tortfeasor with the company arises from his participation or involvement in ways which go beyond the exercise of constitutional control, then there is no reason why the individual should escape liability because he could have procured those same acts through the exercise of constitutional control."

19. 22. The acid test, then, is whether the putative tortfeasor is exercising control through the constitutional organs of the company. If he does no more than vote at board meetings, then he will be exercising control through the constitutional organs of the company. The constitution of the company may of course have delegated authority to officers of the company without the need for formal board meetings; and in that event I would not rule out the possibility that an individual doing no more than exercising that properly granted authority would escape personal liability.

20. 23. It is, of course, the case that Dr Rahimian was personally liable for breach of his own personal undertaking, which would of course have justified both the judge's orders for injunctions and the orders for costs against him. Dr Rahimian is a director of Scandia Care and is also its Company Secretary. The only other director is his wife, Mrs Strutz-Rahimian. Although Dr Rahimian gave evidence at trial, the judge did not find him to be truthful witness. He also held that Dr Rahimian did not want the full truth to emerge, that his role was decisive in driving the project through, and that at all material times he was fully aware that he might be infringing the rights of his neighbours, but wished them to remain in ignorance of what he was planning on doing. Mrs Strutz-Rahimian did not give evidence. The argument in support of the appeal relies entirely on what Dr Rahimian said in his witness statement. But since the judge found Dr Rahimian to be an untruthful witness, that is a shaky foundation on which to build an argument that the judge's factual finding was wrong.

21. 24. In the present case, moreover, there was no evidence of what the company's constitution was, no evidence of the decision making process within the company, no

indication that Dr Rahimian's co-director played any part in that process, and no evidence that the company did anything other than what Dr Rahimian wanted it to do. The judge's finding at paragraph 12 was that Dr Rahimian controlled Scandia Care. He continued:

> "It is abundantly clear that he did so and that he was personally instrumental in pushing the plans for redevelopment through. Any act that I am considering was an act of Dr Rahimian as much as it was an act of the company. To join Dr Rahimian to proceedings is not to pierce the corporate veil, it is to bring a claim against a tortfeasor."

22. 25. I do not consider that it can be said that the judge's finding of fact was wrong.

23. 26. The last point relates to the judge's costs order. Mr Butler presented this part of the appeal. He said that the judge had no power to order the payment of pre- and post party walls surveyor's costs under sections 10 or 11 of the Party Walls Act 1996. He may well be right about that, but the judge does not appear to me to have purported to exercise any power under that Act. In paragraph 40 of his judgment, he said:

> "Beyond this [I interpose to say, the injunction] the remainder of the case is simply resolved. No other points arise on the claim as I will leave any question of damages on the Party Wall Notice issue to be further ruled upon if necessary. I suspect that the matter will be capable of being resolved, and will be resolved by way of Orders as to costs."

27. So the judge was deliberately not ruling on any question of damages under the Party Wall Act, which were the costs which were incurred by Ottercroft; he was saying in terms that he was going to deal with the matter by way of an order for costs.

24. 28. The judge's jurisdiction to make an order for costs derives from section 51 of the Senior Courts Act 1981, which provides that subject to the rules of court, the costs of "and incidental to" all proceedings in the county court are in the discretion of the court. It has long been the law that pre-action costs can count as costs incidental to proceedings: see Frankenburg v Famous Lasky Film Services Ltd [1931] 1 Ch 428, whose facts bear a striking resemblance to the facts of this case. This is now explicitly confirmed by CPR Part 42.2(6)(d), which empowers a court to make an order that a party must pay "costs incurred before proceedings are begun". In addition, one of the factors that the judge was required to take into account was the conduct of the parties, which includes conduct before as well as during the proceedings: see CPR Part 44.2(4)(a) and (5)(a). The order that the judge made was therefore well within his jurisdiction. There is no separate attack on the judge's exercise of discretion so this ground of appeal must also fail.

25. 29. Mr Butler also submitted that the judge was wrong to have held that Scandia Care ought to have served a party wall notice, because there was no evidence that the foundations of the proposed store room would have extended to a lower level than the bottom of the foundations of the Ottercroft building. In fact, the expert gave an opinion to the effect that the foundations would have been deeper than 500 millimetres.

However, it is not easy to see how the arguments raised by these grounds of appeal are reflected in the judge's order, or indeed how success on these arguments would change it. As the judge himself said, very little turned on it in view of the other findings. Mr Butler's written skeleton argument seems to suggest that they are relevant only to the extent that they undermine the judge's order for costs, but irrespective of the rights and wrongs under the Party Walls Act 1996, the judge had jurisdiction to make the costs order that he did for reasons I have explained. It is trite law that appeals are appeals against orders, rather than reasons. These arguments are, in my judgment, entirely academic. I would dismiss the appeal.

26. LORD JUSTICE TOMLINSON: I agree.

27. LORD JUSTICE LAWS: So do I.