In the High Court of Justice

Chancery Division

Claim No. HC14A02149

[2014] EWHC 4057 (Ch)

Charlie Properties Limited

- and-

(1) Risetall Limited (a company incorporated in the Turks and Caicos Islands) (2) Warmhaze Limited

Mr. N. Strauss Q.C. (sitting as a deputy judge of the High Court)

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Date of judgment ..2 December 2014.

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Joanne Wicks Q.C., instructed by Blake Morgan LLP appeared for the claimant Steven Woolf, instructed by Gunnercooke, appeared for the defendants.

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Approved judgment \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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Claim No. HC14A02149

Claimant

Islands)

Defendants

Mr. N. Strauss Q.C. (sitting as a deputy judge of the High Court)

appeared for the claimant. appeared for the defendants.

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Introduction

1. This is an application for summary judgment for trespass to land.

2. The claimant owns land at 72-73A, Chalk Farm Road and at 8A and 8B Belmont

Street, London N.W.3.. 72-73A Chalk Farm Road is leased to Belgo Restaurants. 8A-B

Belmont Road is a derelict sausage factory, which the claimant bought for £1 million in

2007 and intends to redevelop.

3. The defendants, own neighbouring properties at 10 and 10A Belmont Street and

17 and 27 Ferdinand Street, part of which is in the course of redevelopment as residential

flats.

4. The claimant and the 1st defendant have rights of way over parts of each other’s

property and the 1st defendant also claims prescriptive rights to park, load and unload

vehicles and store materials in a yard which is part of 8A-B Belmont Street.

5. The various features of the properties relevant to the alleged trespass are complex,

but it is unnecessary to deal with them in detail. The defendants attempted to buy parts of

8A-B Belmont Street, and there were negotiations between 2011 and April 2014, which

came to nothing. The defendants then proceeded to appropriate the claimant’s land,

incorporating it into their construction site. They stripped the paving from the yard,

concreted it over for the storage of their building materials, erected an elevated

portacabin, dug out a light well to benefit the basement of their development, fenced off

the roof of one of the buildings, putting up fencing and decking across parts of the

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property and created new doors in the residential units they have constructed with Juliet

balconies extending into the claimant’s air space.

6. The claimant discovered all this in August 2014 and, having failed to obtain

satisfaction following its letter before action, brought these proceedings. To a large

extent, the claimant’s allegations are admitted and no justification or reasonable

explanation has been advanced for the defendants’ conduct.

7. The claimant now seeks summary judgment for the damages for trespass and (in

one respect) nuisance to be assessed, and injunctions relating to certain of the acts of

trespass. The defendants accept that the claimant is entitled to summary judgment for

most of the acts complained of, and I will deal only with those matters which are in issue.

8. Certain of the matters in issue relate to admitted acts of trespass, where the

defendants accept liability to pay damages but resist the injunction sought by the

claimant. On these matters, I was referred to the recent decision of the Supreme Court in

Lawrence v. Fen Tigers Ltd. [2014] A.C. 822, in which the decision of the Court of

Appeal in Shelfer v. City of London Electric Lighting Co. [1895] 1 Ch. 287 was

overruled. While prima facie the remedies in a nuisance case include an injunction to

restrain the commission of nuisance in future as well as damages for past nuisance, the

court now has an unfettered discretion to award damages in lieu of an injunction, having

regard in particular to the public interest and the effect that an injunction would have on

3rd parties.

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9. However, justification for refusing an injunction in cases of trespass is inherently

less likely than in a nuisance case, since the defendant is seeking by the payment of

damages to buy the right to interfere, not merely with the claimant’s enjoyment of the

property, but with the property itself. In this case, the defendants have not suggested that

an injunction would affect the public interest or adversely affect third parties.

10. Accordingly, what I must decide on the matters where the defendant resist

summary judgment for an injunction is whether there is a realistic prospect that they

would nevertheless would be able, at trial, to persuade the court that no injunction should

be granted. The fact that the trespass was committed deliberately and flagrantly, and in no

way inadvertently or in ignorance of the claimant’s rights, does not provide a promising

foundation for its case. As Lord MacNaghton said in Home and Colonial Stores Ltd

[1904] A.C. 179 at 193, in a passage “cautiously approved” in Lawrence at [121]:-

“In some cases, of course, an injunction is necessary ... if the defendant has acted in a high handed manner – if he has endeavoured to steal a march upon the plaintiff...”.

This is clearly such a case.

11. The first issue relates to a metal fence which the defendants have erected round the

roof of a building known as building B, apparently in order to create a roof terrace for the

purchasers of residential units on the lowest floor of their building. The defendants also

say that there was previously barbed wire on the roof, to prevent anyone getting on to it

from an adjoining walkway, and that the fence would bar people from getting across to

the residential units and thus enhance security. As against that, the claimant asserts that it

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wishes to preserve the fullest possible freedom to develop its property at a time of its

choosing, which may involve the demolition and reconstruction of buildings on the

property including building B: it would be wholly unreasonable that it should inhibited by

the defendant having paid damages to compensate for past and future trespass and thus

being in a position to claim a right to keep the fence there permanently. In any event, the

defendants have no conceivable right to maintain a fence on the roof of their building.

12. The next issue relates to the continuation of the same fence, near another building

known as building C. Counsel are agreed that the position is indistinguishable from that

relating to the fence round building B.

13. On behalf of the defendants, Mr. Woolf contended in relation to these issues that,

because the first defendant has a right of way across the walkway adjacent to the fence, or

at least part of it, the claimant would not be able to redevelop this part of its land anyhow.

Therefore, the argument that the fence constitutes a constraint on future redevelopment

was unrealistic: no redevelopment in this part of the claimant’s property would be

possible. I cannot assess the strength of this argument, because the entitlement to a right

of way is not pleaded and cannot be tested.

14. However, Ms. Wicks’ response to this on behalf of the claimant was that prima

facie the claimants are entitled to have the fence removed. It was for the defendants to

show good reason why removal should not be ordered, and why it should instead be

entitled to pay for its continuing trespass. She submitted that no good reason had been

shown, and that it was not necessary for the claimant to demonstrate that it would be

prejudiced. In any event, there was clearly prejudice since, whether or not the claimant

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decided eventually to sell or develop the property, it was clearly not in its interests to

have a substantial fence erected by a third party permanently placed on it.

15. I agree with the claimant on these issues. There is no conceivable justification for

the defendants’ claim to maintain a fence on the claimant’s property, and I do not

consider that they would have any realistic prospect of resisting an application for an

injunction, if the case went to trial.

16. Exactly the same applies to the next item in issue, which is some decking which

has been placed on part of the roof of building B. Again, the defendants have shown no

good reason why they should not be ordered to remove it, and the claimant clearly has a

legitimate interest in not having decking on its property which it would or might not, in

the future, be entitled to remove, and which might need continuing maintenance.

17. As regard all these matters, I have considered whether damages would or might be

an adequate remedy, but I do not see how damages could compensate the claimant for

continuing trespass. For example, if the claimant wanted to sell its property, prospective

purchasers might well be deterred or willing to pay only a lower price, but it would be

impossible or very difficult to quantify in advance the amount which would be necessary

to compensate for this risk.

18. The next item relates to some block paving in the yard which is part of the

claimant’s property. The defendants removed it and concreted the surface so that it could

be used to assist its building operation. After the commencement of this action, they

resurfaced the yard with cobblestones. Again, there is no dispute that these acts were

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trespasses, but the defendants resist an order that it remove the cobblestones and replace

them with block paving. The claimant does not object to the cobblestones as such, which

are as good as the previous block paving, but alleges that the work was badly done, and

for that reason seeks the reinstatement of the original material. As to this, the defendants

claim that the work of laying the cobblestones was properly done, and that there are other

reasons for the standing water in the yard. This is not an issue that I can resolve. It seems

to me that the issue here is not really whether the yard should have block paving or

cobblestones, but rather whether the present problems are due to defective work carried

out by the defendants in reinstating the yard. In these circumstances, it is not clear

whether an injunction is an appropriate remedy for this act of trespass, and the defendants

should have permission to defend on this issue.

19. The next issue relates to an inadequately repaired hole in the wall of building A.

The defendants deny liability for this, but I accept Miss Wicks’ submission on behalf of

the claimant that this damage can only realistically have been caused by the defendants’

builders, who occupied and controlled the yard. The same applies to other minor items of

damage to the side of building A and to its shutter door. These items are shown in the

bundle at tab 14 exhibits 23-25.

20. The next issue relates to the Juliet balconies. The defendants first added them to

the upper stories of their residential development, overlooking the roof of building B. The

defendants converted the windows on the lowest floor into doors, obviously so as to allow

tenants to use the roof of building B as a roof terrace, protected by the fence (see above).

After this action was started, when the defendants must have realised that they would be

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unable to use the roof of building B as a terrace, they added Juliet balconies to the lower

doors as well.

21. The defendants’ case was that the balconies did not protrude any further into the

claimant’s airspace than the cornicing on the building which, it contended, established a

prescriptive right to oversail the roof of building B to that extent. However, the

undisputed evidence is that the balconies protrude further than the cornicing, and are in a

different position. The defendants then contended that their prescriptive right was

established by the presence for more than 20 years of air conditioning units and satellite

dishes, but these too are in different locations from the Juliet balconies i.e. they do not

protrude into the same air space. It follows that the defendants have no realistic prospect

of establishing any prescriptive right, and that the Juliet balconies represent a trespass.

22. The defendants again contend that they have a realistic prospect of persuading the

court at trial that the only remedy that should be awarded is damages. Ms. Wicks,

however, points out that any development for which the claimant seeks planning

permission will doubtless have to be a certain distance away from the windows of the

defendants’ development, so that the additional projection will or may affect where the

claimant is permitted to build, even if by only a small distance. Therefore, an injunction

requiring the defendants to remove the Juliet balconies is necessary in order to preserve

the claimant’s ability to do what it likes on its own property. Again, the effect on possible

purchasers is relevant. These points are in my view unanswerable and, in any event, there

is no justification for allowing the defendants to perpetuate their trespass by the payment

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of money. As in relation to the earlier issues, I do not consider that the defendants would

have a realistic prospect of defending the claim for an injunction at trial.

23. The final issue relates to a door in the defendants’ building near building B, which

they installed on the basis, which it is now accepted was incorrect, that the first defendant

had a right of way over the claimant’s yard at that location. The claimant accordingly

seeks an order for its removal and Miss Wicks submitted that, even though it opens

inwards, present or future occupiers of the building would inevitably use it to cross the

yard which, it is now admitted, would be a trespass; its removal was therefore necessary

to prevent a threatened trespass. Mr. Woolf submitted that no injunction was required; if

and when there was a trespass, an application would then be appropriate. I think that this

is a matter which should be dealt with at trial, but I propose in the meantime to make an

interim order requiring that the door be locked or otherwise barred.

24. I have asked the parties to provide an agreed order reflecting the above decision

(which I gave at the hearing), the issues on which it was agreed that there should be

summary judgment and directions for trial. I would be happy to order a stay of the action

for an agreed period, to allow for mediation, if both parties wish it.