Neutral Citation Number: [2017] EWHC 1353 (TCC)

Case No: HT-2017-000042

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2017

Before:

MR A WILLIAMSON QC
(sitting as a Deputy High Court Judge)

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Between :

LEA VALLEY DEVELOPMENTS LIMITED	**Claimant**
- and -	
THOMAS WILLIAM DERBYSHIRE	**Defendant**

- -
- -

Mr Nicholas Isaac (instructed by **Devonshires**) for the **Claimant**
Mr Justin Mort QC (instructed by **Child & Child)** for the **Defendant**

Hearing date: 22nd May 2017

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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.

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MR A WILLIAMSON QC

Mr A Williamson QC:

1. In this case, the claimant seeks two declarations, as set out in its Part 8 claim. The defendant also seeks the declarations identified in its acknowledgement of service.

2. These issues arise under the Party Wall etc. Act 1996 ("the Act").

3. These proceedings are brought under CPR Part 8, a procedure which is applicable where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact.

4. This gives rise to an initial difficulty. There is no agreed set of facts in this case. However, the context appears relatively uncontentious. Whether this is true of the facts which bear on the real dispute between the parties is another matter.

5. The claimant is the freehold owner of a property in Muswell Hill. The defendant is the freehold owner of the adjoining property ("the property"). This consists of flats, which have been let out on assured shorthold tenancies.

6. The claimant decided to carry out some building works. These included notifiable excavation works under section 6 of the Act. The claimant therefore obtained an award authorising those works under section 10 of the Act in December 2014 ("the Award").

7. The Award contained at paragraph 4 (D) a requirement that the claimant should:

> *"Make good all structural or decorative damage to the Adjoining Owners property occasioned by the works… If so required by the Adjoining Owner, make payment in lieu of carrying out the works to make the damage good, such sums to be determined by the Agreed Surveyor".*

8. Unfortunately, the works caused damage to the property. In about August 2016 it was agreed in principle between the parties, or their representatives, that the property had been so badly damaged by the works that it could not be economically repaired and must therefore be demolished and rebuilt.

9. The costs of these works to demolish and rebuild the property are estimated to be between about £1 million and about £2 million. These figures are in dispute.

10. The claimant has, however, obtained expert evidence which suggests that the diminution in value of the property will be significantly less: between about £500,000 and £1 million. These figures too are in dispute.

11. The claimant says, therefore, that there is an issue between the parties, namely whether any compensation payable to the defendant should be assessed by reference to diminution in value or on the basis of the costs of reinstatement. In summary, the claimant submits that the answer to this question is in no way fettered by the Award

or by the Act, and that compensation should be determined in accordance with common law principles. These principles, it is submitted, show that diminution in value, as opposed to the cost of reinstatement, may, depending upon the factual situation, be the appropriate measure of compensation.

12. The defendant, on the other hand, argues that there is, in effect, no issue for the court to determine. The proper basis for compensation has already been laid down by paragraph 4 (D) of the Award which, according to the defendant, provides for compensation to be assessed on the basis of the costs of reinstatement. If that is not right, then the issue is in any event so fact sensitive that the court cannot make any useful declaration in any event.

13. In those circumstances I need to consider essentially two questions:

    i) The effect of paragraph 4 (D) of the Award;

    ii) The position apart from that paragraph.

Paragraph 4 (D) of the Award;

14. I have set out paragraph 4 (D) above, so far as material.

15. The defendant submits in short:

    i) This paragraph effectively determines the central issue in the defendant's favour;

    ii) The Award was intra vires;

    iii) The claimant has approbated the Award by proceeding with the works and cannot now reprobate the Award.

16. I do not agree that paragraph 4 (D) of the Award is determinative in this case.

17. Firstly, the Award refers to making good. I do not think that this is apt to cover the situation which has now arisen, whereby complete demolition and rebuilding is required. The draftsman of the Award clearly had in mind works of repair "*in material to match the exiting* [sic] *fabric and finishes"*, a quite different undertaking from demolition and rebuilding.

18. Secondly, the reference to *"payment in lieu of carrying out the works to make the damage good"* does not answer the question of the basis upon which any such payment should be made. What payment is to be made and how is this to be assessed? That is the central issue between the parties and it is not, to my mind, resolved by paragraph 4 (D) of the Award.

19. The defendant appeared to submit that words should be read into this provision to the effect that the payment should be the same as the cost of demolition and rebuilding

but I do not see how this can be so. The provision does not refer to demolition and rebuilding, still less the cost of demolition and rebuilding.

20. For these reasons, I do not agree with the defendant that the Award resolves the issue between the parties as to the proper basis upon which compensation is to be paid to the defendant. That being so, the vires of the Award and the question of approbation become academic. However, since these matters have been fully argued before me, I should say something about them in case my view of the proper construction of paragraph 4 (D) of the Award is incorrect.

21. The claimant submitted that paragraph 4 (D) of the Award was ultra vires. This paragraph was, it was said, mistakenly based upon section 2 of the Act, which makes express provision for making good at, for example, section 2(4). There is no such provision in section 6 and thus there was no power to include paragraph 4 (D) in the Award.

22. The defendant says that the Award was intra vires. The Act, at sections 10 (10) and10 (12), gives the surveyors wide powers, which would extend to the relevant paragraphs of the Award.

23. On this issue, the claimant's analysis is to be preferred:

    i) Section 2 makes express provision for making good damage occasioned by the work;

    ii) There is no such provision in section 6;

    iii) Section 10(10) of the Act provides that the surveyor *"shall settle by award any matter (a) which is connected with any work to which this Act relates, and (b) which is in dispute between the building owner and the adjoining owner"* (my emphasis). But the parties were not, when the Award was made, 'in dispute' about a right of making good, a matter not contemplated by section 6 at all;

    iv) Section 10(12) provides that *"An award may determine (a) the right to execute any work;(b) the time and manner of executing any work; and (c) any other matter arising out of or incidental to the dispute including the costs of making the award"*. However, an obligation to make good neither arises out of, nor is incidental to, a dispute under section 6.

24. As regards approbation, there is a well-known series of cases to the effect that a party cannot "blow hot and cold" when he has a choice of two rights, either of which he is at liberty to adopt but not both: see the cases summarised in PT Building Services Ltd v ROK Build Ltd [2008] EWHC 3434 (TCC) at paras 20 to 26. These principles have been applied in the arbitration context and more recently in adjudication enforcement cases.

25. It is, however, important to have in mind the principle which is being applied in the arbitration cases. It seems to me that this is correctly summarised in Mustill and Boyd on Commercial Arbitration, second edition, page 582. The learned editors explain

that, since an irregularity in procedure makes an arbitral award voidable rather than void:

> *"a further consequence of the fact that irregularities make an award voidable and not void are that a party who affirms an award whether expressly or by conduct, after it has been published, cannot later seek to avoid it on the grounds of irregularity".*

26. This seems to me an essentially contractual analysis and one which has little relevance in the present statutory context. In particular, it is difficult to regard a Party Wall Award as voidable, rather than void, where it is ultra vires the Act. If the Award is void, it cannot be affirmed.

27. In the present context, I think that more assistance may be derived from the decision of the House of Lords in the case of Lissenden v C. A. V. Bosch, Limited [1940] A.C. 412. In that case, a workman obtained an award of compensation under the Workmen's Compensation Act. He accepted weekly sums payable under that award. It was held that this conduct did not preclude an appeal by him on the ground that the compensation should have been of a larger sum than that awarded.

28. Of particular assistance is the following passage in the speech of Viscount Maugham at pp. 418/419:

> *"In the light of these authorities it seems that the phrase "you may not approbate or reprobate," or the Latin "quod approbo non reprobo," as used in England is no more than a picturesque synonym for the ancient equitable doctrine of election, originally derived from the civil law…I will not attempt to summarize all the rules which are applicable to election in equity; but it is desirable for my present purpose to state some general propositions which are not I believe in doubt. In the first place, the doctrine…seems to have been confined in England as in Scotland to cases arising under wills, and deeds and other instruments inter vivos. In the second place the doctrine is founded on the intention, explicit or presumed, of the testator in the case of a will and of the author or donor in the case of instruments, namely, the intention that a man shall not claim under the will or instrument and also claim adversely to it…In the third place the doctrine proceeds upon the principle not of forfeiture but of compensation. The beneficiary electing against an instrument is required to do no more than to compensate the disappointed beneficiaries. The balance of the property coming to him under the instrument he may keep for himself. In the fourth place no person is taken to have made an election until he has had an opportunity of ascertaining his rights, and is aware of their nature and extent. Election in other words, being an equitable doctrine, is a question of intention based on knowledge.*
>
> *My Lords, I am quite unable to see how this doctrine can be made to apply to the rights of a litigant to appeal either from a judgment or from an award of a county court judge made under the Workmen's Compensation Act, 1925".*

29. I do not think that the doctrine of approbation assists the defendant in the present case. Firstly, I would be reluctant to hold that this doctrine applies in the present statutory context. For the reasons explained in Lissenden by Viscount Maugham, the doctrine

applies in situations which are very far removed from the present case. Secondly, I think that, if the doctrine did apply, there would have to be shown the relevant intention on the part of the claimant. This has not been demonstrated. In any event, this is not a matter suitable for Part 8 proceedings.

30. In summary, therefore, I do not agree with the defendant's interpretation of paragraph 4 (D). If necessary, I would also hold that the said paragraph was ultra vires the Act, and that the doctrine of approbation and reprobation does not apply to defeat the claimant's arguments.

31. For these reasons, I decline to grant the declarations which are sought on behalf of the defendant.

The compensation position apart from paragraph 4 (D) of the Award

32. Section 7 (2) of the Act provides that:

> *"The building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act".*

33. So far as counsel were able to discover, there is no authority as to the proper construction of this subsection.

34. In these circumstances, the claimant submits that the common law principles which apply to the assessment of damages for torts to land should apply under the subsection. The defendant, by contrast, submits that the Act provides a comprehensive statutory code, and that common law principles are not relevant.

35. On this issue I prefer the claimant's submissions. As the claimant points out, but for the Act many of the activities permitted by the Act would constitute, for example, nuisance. In those circumstances one would expect similar principles for assessing damages to apply. Moreover, if parliament had intended that the expression "loss or damage" should have some different meaning from that generally understood, it would no doubt have said so.

36. The starting point at common law is helpfully summarised in C. R. Taylor (Wholesale) Ltd. and Others v Hepworths Ltd. [1977] 1 W.L.R. 659, 667 as follows:

> *"These two basic principles are, first, that whenever damages are to be awarded against a tortfeasor or against a man who has broken a contract, then those damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort or breach of contract not occurred. But secondly, the damages to be awarded are to be reasonable, reasonable that is as between the plaintiff on the one hand and the defendant on the other".*

37. However it is apparent from the passage in McGregor on Damages (19th Ed.) dealing with Torts Affecting Land at paras 37-003 to 37-013 that the question of what is reasonable in any particular case is highly fact sensitive. In particular, there is a large range of factors which may be relevant, depending upon the facts, to determine whether reinstatement or diminution in value is the appropriate approach to damages. There is certainly no rule which prohibits the award of damages on either basis or which requires an award on one basis or the other in every case.

38. I also agree with the defendant's submission that the applicable principles in tort are very similar to, if not indistinguishable from, those which apply in contract. In particular, the principle established by the well known case of Ruxley Electronics and Construction Ltd. v Forsyth **[**1996] A.C. 344, namely that where remedial expenditure is out of all proportion to the benefit to be obtained, the appropriate measure of damages is not the cost of reinstatement but the diminution in the value of the work occasioned by the breach, holds good in tort as well.

39. In my view, the position is that reinstatement or diminution in value may be the appropriate basis for assessing damages depending upon the circumstances. It is impossible to identify all the relevant circumstances in the abstract. Further, even where diminution in value is the appropriate measure, the cost of reinstatement may well be a useful guide or starting point to determine what the diminution in value in fact is.

40. I would therefore refuse the first declaration sought by the claimant.

41. As regards the second declaration, I have considered whether a declaration along the following lines is appropriate in the light of the above discussion:

> *" The proper measure of compensation should be calculated in accordance with section 7(2) of the Party Wall etc. Act 1996, taking into account:*
>
> *(a) all the relevant circumstances;*
>
> *(b) the need, so far as money can, to put the defendant in the same position as it would have been had the damage to its property not occurred;*
>
> *(c) the requirement that the compensation to be awarded should be reasonable, as between the parties;*
>
> *(d) the principle that where remedial expenditure is out of all proportion to the benefit to be obtained, the appropriate measure of damages is not the cost of reinstatement but the diminution in the value of the work occasioned by the breach;*
>
> *(e) the factors, so far as relevant, set out in McGregor on Damages (19th Ed.) at paragraphs 37-003 to 37-013."*

42. However, I am satisfied, as a matter of discretion, that making such a declaration is inappropriate and unhelpful for the following reasons:

(1) The essential contention which the claimant sought to advance in these proceedings was that the appropriate measure of damages was not the cost of reinstatement but the relevant diminution in value. However, it is quite clear that one cannot reach any such conclusion;
(2) The issue of damages is, by its nature, fact sensitive. Not all the facts are yet available and the court has no agreed set of facts upon the basis of which to proceed in what are, after all, Part 8 proceedings;
(3) Seeking to enumerate all the relevant factors in the abstract is likely to be unhelpful and confusing. The cases show that a wide range of factors may be relevant and that these may lead to different conclusions depending upon the facts.

43. I therefore decline to grant either of the declarations sought by the claimant.

44. Counsel should make any submissions upon the appropriate form of order and any other consequential matters by 12 noon on 15th June 2017. If all consequential matters are agreed, there is no need for counsel to attend the handing down of the judgment. If any matters are not agreed, I will deal with them then.