Neutral Citation Number: [2017] EWCA Civ 1254

Case No: B5/2015/1406

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT MANCHESTER
RECORDER KHAN
3SK00787

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2017

Before :

LORD JUSTICE LONGMORE
and
LORD JUSTICE DAVID RICHARDS

Between :

(1) FRANK DICKINSON **(2) CAROL DICKINSON**	**Appellant**
- and -	
MOJGAN CASSILLAS	**Respondent**

David Nicholls (instructed by **the Bar Pro Bono Unit**) for the **Appellants**
Joshua Shields (instructed by **Stephensons Solicitors LLP**) for the **Respondent**

Hearing dates : 20 July 2017

Approved Judgment

Lord Justice David Richards :

1. The parties to this appeal are neighbours. Mr and Mrs Dickinson, the appellants, live at 98 Bexhill Road, Davenport, Greater Manchester, and Mrs Casillas, the respondent, lives at 96 Bexhill Road. Both properties are detached houses on a housing estate developed in the late 1980's. Mrs Dickinson and Mrs Casillas respectively are the registered freehold owners of these properties.

2. The parties have been at loggerheads since about 2003. The flank wall of Number 96 is built along the boundary line with Number 98. Oddly, the gas and electricity meters for Number 96 are set into that wall, so they can be read only from the property of Number 98. A narrow drive runs beside the wall on Number 98's side of the line. Mr and Mrs Dickinson consider that Mrs Casillas has no right to go on to their land either to read the meters or to inspect the flank wall to see if any repairs are needed and they also object to the gutters on a short extension to the porch of number 96 overhanging the airspace to their property. Although Mrs Dickinson alone is the registered proprietor of Number 98, Mr Dickinson has been at least as much involved in this dispute as his wife and I will for convenience refer to Number 98 as their property.

3. To resolve the dispute, Mrs Casillas issued proceedings in the County Court at Manchester in May 2013 for declarations of her rights, as she saw them, and an injunction to prevent Mr and Mrs Dickinson interfering with them. The claim was tried before Recorder Khan, with both sides represented by counsel. After a two-day hearing, in which the parties and other witnesses gave evidence, the recorder gave a reserved judgment. He found in favour of Mrs Casillas on all points and made declarations and injunctions accordingly. On issues of disputed fact, he preferred the evidence of Mrs Casillas. He was highly critical of Mr and Mrs Dickinson, as regards both their conduct before the proceedings were issued and their evidence at the trial.

4. Permission to appeal was refused by the recorder and by Patten LJ on the papers, but granted on a renewed oral application by Gloster LJ following submissions by newly-instructed counsel. At the hearing of the appeal, Mrs Casillas was represented by Mr Shields, who appeared at the trial, and Mr and Mrs Dickinson were represented by Mr Nicholls who did not appear below and who took the case on a *pro bono* basis. I am grateful for the careful submissions of both counsel.

5. The issues turn largely on the terms of the transfers of two properties from the developer of the estate to their original owners. As would be expected, their terms for the most part mirror each other. The developer owned the entire estate and sold the individual properties as each house was built.

6. Number 96 was the first of the two properties in question to be transferred. By a transfer dated 6 April 1988, the developer E. Fletcher Builders (Midlands) Limited transferred the freehold title in Number 96 to Mr G.M. Duval and Miss C.A. Rains, who in turn transferred the property to Mrs Casillas in 2002. Number 98 was transferred by a transfer dated 15 April 1988 from the developer to Steven Dickinson, one of Mr and Mrs Dickinson's sons. It was bought to be their home and they moved into it on completion of the house, where they have lived ever since. Title to the property was transferred to Mrs Dickinson in about 2002.

7. The transfer of Number 96 was expressed to be of the land comprising the particular plot and "the house and buildings erected or in the course of erection thereon". At the date of the transfer, the house was still in the course of construction. The transfer also carried the rights set out in the first schedule to the transfer for the benefit of the transferees and their successors in title (including, therefore, Mrs Casillas) and it was subject to the rights and easements set out in the second schedule in favour of the developer and its successors in title of the adjoining property which included what became number 98. Mr and Mrs Dickinson therefore have the benefit of those rights and easements. There were "restrictions and stipulations" set out in the fifth schedule imposed by clause 2 of the transfer on the transferees and their successors in title.

8. The rights conferred for the benefit of the owners of Number 96, central to this appeal, are contained in paragraphs 3 and 4 of the first schedule.

9. Paragraph 3 contains the right relevant to the issue of the overhanging gutters. It provides:

> "3. To erect and maintain roof verges eaves gutters and downspouts on buildings for the time being erected on the property transferred so that the same overhang and discharge surface water onto adjoining land included in the said estate and to have the foundations of the property hereby transferred underlying the said adjoining land."

10. Paragraph 4 is relevant to Mrs Casillas' claim to be entitled to go on to the land of Number 98 to inspect the state of her property and to read her gas and electricity meters. It provides:

> "4. To enter with workmen tools and materials on adjoining land included in the said estate for the purpose of effecting such maintenance repair and decoration of the property transferred as may with more convenience be dealt with by access from the said adjoining land."

11. The second schedule contains rights in favour the owners of Number 98 as regards both gutters and rights of entry as follows:

> "2. To erect and maintain roof verges eaves gutters and downspouts on buildings for the time being erected on adjoining land so that the same may overhang and discharge surface water onto the property transferred and to construct and maintain under the property transferred foundations of buildings constructed or to be constructed during the perpetuity period on the said adjoining land of the vendor.
>
> The right to enter with workmen tools and materials on such parts of the property transferred as shall not for the time being have been built upon for the purpose following:-
>
> (a) To erect buildings and boundary walls or fences on any adjoining land now or formerly of the company.
>
> (b) To construct inspect repair and replace sewer drains in and under the property transferred and to connect thereto and by means thereof to drain any

roads or buildings now constructed or hereafter to be constructed during the perpetuity period in or on any adjoining and adjacent land now or formerly owned by or hereafter to be acquired by the Company or its successors in title.

(c) For the purpose of effecting such maintenance repair and decoration of the buildings erected on the said adjoining land as may with more convenience be dealt with by access from the property transferred and of erecting buildings and boundary walls or fences on any part of the said adjoining land."

12. I will take each of the issues in turn, referring as appropriate to the judgment of the recorder and the submissions on behalf of the parties.

13. I start with the "inspection issue', that is, Mrs Casillas' claim to go on to the property at Number 98 to inspect her house to see if any works are needed. Mr and Mrs Dickinson accept, as they must, that Mrs Casillas is entitled by the express terms of paragraph 4 of the first schedule to the transfer "to enter with workmen tools materials and workmen....for the purpose of effecting such maintenance repair and decoration of the property transferred...". They submit that this does not include a right to enter to inspect the property to see if maintenance, repair or decoration is required or to enable builders and others to provide estimates for any works.

14. The recorder held that Mrs Casillas was entitled to have access for the purposes of inspection, because it was an ancillary right that was reasonably necessary to the exercise of the express right of access for the purpose of maintenance, repair and decoration. The only reasonable reading of paragraph 4 was that it included a right to access for inspection. The contrary interpretation, requiring the owner of Number 96 to arrive with tools, materials and workmen in case work was needed to be done, was absurd.

15. On this appeal, Mr Nicholls has submitted that, applying the principles of the construction of documents stated in *Arnold v Britton* [2015] AC 1619, paragraph 4 does not extend to a general right of inspection. Paragraph 4 does not in terms refer to any such right nor is it encompassed in the natural and ordinary meaning of the words of paragraph 4. The words of paragraph 4 are clear and unambiguous and do not extend to a right to inspect the condition of Number 96. By contrast, paragraph 2(b) of the second schedule confers a right on the owners of Number 98 to gain access to Number 96 to 'construct *inspect* repair and replace sewers drains in and under the property" (emphasis added). Further, any disrepair would at the date of the transfer have been visible from the road, if not from Number 96 itself. In addition, if there were deterioration to the brickwork which caused damp ingress, it would become visible on the interior wall.

16. In my judgment, the recorder was plainly right on this issue. A right of inspection to determine whether works of maintenance, repair or decoration are required is necessary to make effective a right of access to carry out those works. The recorder was right to say that it would be absurd if there were no right to inspect the property. Contrary to Mr Nicholls' submission, Mrs Castillas is not required to wait until damp has penetrated to her interior walls before seeing whether the flank wall needs repair, nor is it right to say that the property can be inspected from the road. Even if not expressed in paragraph 4, a right of inspection is a necessary implication. Mr Shields referred us to the Oxford Dictionary definition of "maintain" as "Keep (a building,

machine or road) in good condition by checking or repairing it regularly". In my view, this is the correct reading of "maintenance" in paragraph 4.

17. The second issue is whether Mrs Casillas is entitled to go on to the land at Number 98 to read her gas and electricity meters. Mr and Mrs Dickinson argued at trial that Mrs Casillas had no right of access to the meters to read them or for any other purpose. The meters were the property of the utility companies and they had statutory rights of access. Moreover, it was their evidence that the meters had been installed on the boundary wall by mistake, and therefore at the time of the transfer of Number 96, when the house was being built, there was no expectation of the any need for a right of access for the purpose of reading the meters. The terms of paragraph 4 should be read in the context of the factual position at the time, as is commonplace with the terms of a property transfer.

18. The recorder held that on a true construction of paragraph 4 Mrs Casillas was entitled to a right of access to read the meters. The meters need to be read, particularly if there is any dispute about the amount due. A dispute raises the risk of disconnection of supply, which would or might affect the condition of Number 96. The recorder acknowledged that there "may be a subtle difference" between access for the purpose of repairing the meters and for the purpose of reading them but it was "entirely artificial and, frankly, unworkable." As for the evidence that the meters had been installed on the boundary wall by mistake, the recorder expressly did not accept this evidence.

19. On this appeal, Mr Nicholls has in large part repeated the submissions made below. In terms purely of the true meaning of paragraph 4, there is more substance in the submissions on this issue than on the inspection issue. Maintenance, repair and decoration of a house does not obviously include reading its meters.

20. However, the meters were positioned by the developer on the boundary wall. It cannot have been intended that the purchaser of Number 96 and their successors in title would be unable to read the meters. It would be an absurd situation. The legal position is clear and was recently and authoritatively restated by Lord Neuberger in *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 WLR 2620 at [113] where he referred to:

> "a general and well established principle which applies to contracts, whether relating to grants of land or other arrangements. That principle is that the law will imply a term into a contract, where, in the light of the terms of the contract and the facts known to the parties at the time of the contract, such a term would have been regarded as reasonably necessary or obvious to the parties."

21. This is a clear case for the application of this principle. Even if a right of access to read the meters cannot be spelt out of paragraph 4, it is implicit in the transfer.

22. Mr Nicholls relied on the evidence given by Mr Dickinson that the placing of the meters on the flank wall was a mistake. But the recorder did not accept Mr Dickinson's evidence. Moreover, it is not in doubt that the house at Number 96 was in the course of construction at the date of the transfer. There is no evidence that the meters had not by then been installed, but even if they had not been, it is difficult to

see how construction could have been proceeding on the basis that the meters were to be installed elsewhere.

23. The third issue relates to the positioning of gutters. If the gutters or any other part of a building overhang the neighbouring property without either a right to do so or the consent of the owner of the neighbouring property, a trespass is committed. Given that the flank wall of the house at Number 96 was built on the boundary line, it was inevitable that gutters on the house as constructed would overhang the land at Number 98. This was anticipated by paragraph 3 of the first schedule to the transfer, just as the possibility of gutters on buildings on land at Number 98 overhanging Number 96 was anticipated by paragraph 2 of the second schedule. As part of the original plan for Number 98 a garage was built with one of its flank walls on the boundary line with Number 96.

24. In 2007, Mrs Casillas built a porch to the front door of her house. The gutter on the porch would have overhung Number 98. Before she completed the extension, Mr and Mrs Dickinson erected an iron and wood decorative feature on their side of the boundary which prevented the gutter being fixed.

25. It is the case for Mr and Mrs Dickinson that the right conferred by paragraph 3 of the first schedule extends only to the house and other buildings in the form they were constructed, or being constructed, at the date of the transfer. It does not permit Mrs Casillas subsequently to extend those buildings or construct new buildings, with gutters that overhang Number 98.

26. The recorder rejected this argument as inconsistent with the language of paragraph 3. If it had been intended to be limited in this way, it would have been drafted to refer to "buildings *in situ*" or "buildings standing on the property" or similar words. The recorder laid stress on the fact that the house was not completed by 6 April 1988 and so paragraph 3 could not be limited to buildings already erected at that date.

27. While I do not consider that this latter point provides support for the recorder's decision, given the reference in the transfer to "the house and buildings erected or in the course of erection", I think his decision was right. Paragraph 3 refers to gutters and downspouts "on buildings for the time being erected on property transferred". The critical words are "for the time being". This phrase, using "ambulatory words", as Lord Nicholls said in *Department for Environment, Food and Rural Affairs v Asda Stores Ltd* [2003] UKHL 71; [2004] 1 WLR 105 at [18], "envisages, and is intended to encompass, a changing state of affairs". They normally refer to the state of facts which may exist in the future as well as the state of facts at the present time. On that basis, they extend to the porch or other structures on the property of Number 96, whenever built.

28. This is not an invariable meaning and the context may show that it is intended to be restricted to the position at the date of the document. Mr Nicholls pointed to expressions used elsewhere in the transfer which clearly refer to later dates as well as to the date of the transfer. Paragraph 2 of the first schedule confers a right to connect to party drains, sewers and cables "*now or hereafter* serving the property transferred in common with any such adjoining or adjacent land *as now lie or may hereafter* be constructed…in through or under the said adjoining or adjacent land." Paragraph 2 of

the second schedule twice refers to "buildings constructed or to be constructed during the perpetuity period".

29. As against those references, the transfer contains several references to the "successors in title owner or owners and occupiers *for the time being of*" (emphasis added) or "the owner for the time being" of the property transferred or the adjacent property. It is clear from the context of those provisions that "for the time being" refers to any time, not just the date of the transfer.

30. In my judgment, the references relied on by Mr Nicholls do not provide a sufficient contrary indication to change the usual meaning of "for the time being" so as to refer only to the time of the transfer, particularly when account is taken of the other uses of that precise phrase in the transfer.

31. Mr Nicholls also relied on the restriction contained in paragraph 2 of the fifth schedule:

> "2. Notwithstanding the provisions of the Town and Country Planning General Development orders 1977/81 not to erect or suffer to be erected any aerial antenna building or structure whether of a permanent or temporary nature on any part of the property transferred except in accordance with plans and specifications that shall first have been approved by the Local Planning Authority."

32. Mr Nicholls submitted that, while Mrs Casillas obtained planning permission for the porch, it did not include consent to carry out work encroaching over the boundary, including gutters. Although pleaded in the defence, it is not addressed by the recorder in his judgment, which may indicate that it did not greatly feature, if it featured at all, at the trial.

33. The full planning permission dated 5 October 2006 contained the following statement "for information only":

> "1. This decision does not imply consent to carry out any work which may encroach over a common boundary. Such work includes excavations, positioning of the walls, fences or other details of construction such as roofs or gutters which overhang the boundary line. The applicant is therefore advised to obtain the consent of any landowner prior to the commencement of such work."

34. This was not a restriction on the permission but a warning to respect the legal rights of other property owners. In this case, the construction of the gutter on her porch would be in accordance with the right conferred on Mrs Casillas by paragraph 3 of the first schedule. It would not "encroach" over a common boundary in any relevant sense.

35. On the basis that the above issues are decided against Mr and Mrs Dickinson, they appeal against the finding of the recorder that there had been a substantial interference with Mrs Casillas' rights by the presence of a locked gate at the entrance to the drive running alongside the boundary wall to the house at Number 96. No injunction would be granted unless there had been a substantial interference with her rights or there was the threat of such an interference. Mr Nicholls pointed out that Mrs Casillas did not

enjoy a right of way over the property at Number 98 exercisable at all times and for all purposes but only a right of access for particular limited purposes. Unless there is an emergency, Mrs Casillas can reasonably exercise her rights of access by giving some reasonable notice to Mr and Mrs Dickinson who can then unlock the gate at a mutually convenient and reasonable time.

36. Whether there has been a substantial interference with the exercise of the rights of access is a question of fact, which the recorder addressed in his judgment. He correctly directed himself that, in order for Mrs Casillas to maintain her claim, she had to establish on the evidence that there had been a substantial interference with the exercise of her rights. He carefully and fully reviewed the evidence, making detailed findings about the credibility of the evidence given to him by the parties.

37. The recorder found that the gate was installed in or around 2003 and that before then Mrs Casillas and her agents had been able to, and did, enter the driveway of Number 98 for the purposes of maintenance and repair and that her meters had been read without difficulty. On numerous occasions since the gate was installed, Mrs Casillas had requested access but this had not been allowed by Mr and Mrs Dickinson. The recorder was satisfied on the evidence that they had behaved in a way that amounted to a substantial interference with the exercise by Mrs Casillas of her rights of access.

38. There is no basis for interfering with the recorder's findings. Mr Nicholls' submission that the matter can conveniently be dealt with by notice to Mr and Mrs Dickinson when access is required founders on the evidence of their conduct in the past.

39. The order made by the recorder requires Mr and Mrs Dickinson to remove the iron and wood decorative feature installed by Mr and Mrs Dickinson in a position that prevents the gutter on the porch from overhanging their land.

40. Mr Nicholls submitted that this was an order that should not in any event have been made. He submitted that any exercise of the right under paragraph 3 of the first schedule was subject to the state of Number 98 at that time. When Mrs Casillas or her builder tried to install the gutter on the porch, they could not do so in a way that overhung the land of Number 98 because of the presence of the feature. Mrs Casillas was not entitled to complain about that. Both properties carry the same right, so that the owner of Number 98 might have already constructed a building with gutters overhanging Number 96 at the place where the owner of Number 96 wished to do likewise. The owners of each property take the adjacent property as they find it.

41. This submission did not form part of Mr and Mrs Dickinson's case before the recorder. If it had been, there would have been evidence and cross-examination on the circumstances in which the feature was installed and the reasons for it. The fact that it was erected after work had started on the porch raises an obvious possibility that its purpose was to prevent the overhanging gutters. Whatever the merits of Mr Nicholls' submission in other circumstances, a serious issue would arise as to whether it was applicable in these particular circumstances. Without the relevant evidence, this submission cannot now be explored.

42. I accordingly consider that Mr and Mrs Dickinson cannot succeed on any of their grounds of appeal as regards the merits of the case.

43. They also appeal against the order for costs made by the recorder. He ordered that they should pay the costs of Mrs Casillas, to be assessed on the standard basis up to 8 January 2009 and on the indemnity basis thereafter. He further ordered that, because the substantive order made by the recorder was at least as advantageous as an offer under CPR Part 36 made by Mrs Casillas but refused by Mr and Mrs Dickinson, they were liable to pay an additional 10% on the amount of the costs payable by them.

44. The recorder gave a separate judgment on costs. On the basis of the evidence he had heard and his assessment of the evidence of Mr and Mrs Dickinson, he found that their approach to the case had been driven by a collateral reason or agenda, which was to get the meters moved. They had not come to court to assist the court in resolving the dispute but to assist themselves. Mrs Casillas had overwhelmingly succeeded. Mr and Mrs Dickinson accepted that two offers under Part 36 had been made, in December 2013 and July 2014, and that both had been refused. The order at trial was at least as advantageous as the offers made by Mrs Casillas, so that she was entitled to indemnity costs from the date that was 21 days after the first offer. The recorder also took account of an offer made by Mrs Casillas in December 2008, the failure of Mr and Mrs Dickinson to engage in any genuine or realistic attempt to settle the case and the conduct of Mr and Mrs Dickinson, which cannot have failed to include the recorder's adverse assessment of the honesty of their evidence.

45. These are all factors that the recorder was entitled to take into account in deciding not only to award indemnity costs but to do so from 9 January 2009. It cannot be said that the recorder has exercised his discretion on an incorrect basis or that his order is outside the wide discretion given to judges on issues of costs. There are no grounds for this court to interfere with his order.

46. As to the 10% uplift on costs, Mr Nicholls based his submission on the fact that the offer made in December 2008 predated the introduction with effect from 1 April 2013 of the provision in CPR 36.17(4)(d) for the uplift, so that by reason of para 22(7) of the Civil Procedure (Amendment) Rules 2013 the provision did not apply in this case. This ignores that a relevant offer under Part 36 was made in December 2013 after the new provision had come into force. There is no restriction in 36.17(4)(d) as to the indemnity costs to which the uplift applies.

47. We were told that Mrs Casillas's costs amount to well over £200,000. I assume this includes the uplift on costs under her conditional fee agreement with her solicitors. This case has a long and acrimonious history, which is bound to have increased the costs, and we do not know all the circumstances that may have led to this level of costs. Even allowing for that and for assessment of the costs on the indemnity basis, this appears to be an extraordinarily high figure for a case involving a minor property dispute. Although an assessment on the indemnity basis removes the requirement that the costs should be proportionate to the matters in issue, they must still be reasonably incurred and reasonable in amount. The burden of showing that they are unreasonable lies on Mr and Mrs Dickinson, but the parties can expect the costs to be scrutinised on assessment, unless (as I would hope) they might be agreed.

48. For the reasons given above, I would dismiss this appeal. Where most neighbours would have found a sensible solution to the problems that arose between them, Mr and Mrs Dickinson took their stand on what they considered to be their strict legal rights. To their great cost, they were wrong about those rights.

Lord Justice Longmore:

49. I Agree