Neutral Citation Number: [2018] EWHC 1805 (TCC)

Case No: BM70196CH

IN THE HIGH COURT OF JUSTICE

**BIRMINGHAM DISTRICT REGISTRY and APPEAL CENTRE**

**ON APPEAL FROM THE COUNTY COURT AT BIRMINGHAM**

**TECHNOLOGY AND CONSTRUCTION COURT**

**Mr Recorder Willetts,**

**Claim NoD50BM001**

Birmingham Civil Justice Centre

The Priory Courts

33 Bull Street, Birmingham

Date: 17/07/2018

**Before** :

MR JUSTICE BIRSS

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**Between :**

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|  | **(1) Martin Moore****(2) Camilla Hegelund** | Respondents |
|  | **- and -** |  |
|  | **National Westminster Bank** | Appellant |

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**Lee Finch** (instructed by **DMH Stallard**) for the **Appellant**

**Emily Betts** (instructed by **Wright Hassall**) for the **Respondents**

Hearing dates: 28th June 2018

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Judgment Approved

**Mr Justice Birss :**

1. This is an appeal from the judgment of Mr Recorder Willetts handed down on 6th December 2017 following a two day trial. The respondents bought a flat in Bideford in order to let it. The purchase price was £135,000. Part of that was made up by a loan from the appellant bank secured on a mortgage over the property. The mortgage was for £81,000. In their mortgage application the respondents indicated they wished the bank to produce a “Home Buyers Report”, which is a more extensive kind of survey of the property than a simple valuation. In error the bank did not carry out the necessary survey to produce a Home Buyers Report. Nevertheless the bank made a mortgage offer to the respondents, which indicated that the bank was prepared to lend the sum to help the respondents buy the property for the purchase price. When this happened the respondents understood they had been given a favourable Home Buyers Report.
2. In fact it turned out that the property was in a poor state and needed extensive repair works. The cost of that work is even higher because the property is Grade II listed and in a conservation area. The respondents do not have sufficient funds to have been able to undertake all these repairs. So far they have done about £35,000 worth, but no point is taken arising from the fact the works have not been completed. The judge held that the cost of the repairs would be £115,000. Although the bank argued at trial that that sum was exorbitant, there is no challenge to the finding on appeal that this was the cost of repair. The judge accepted evidence that £135,000 represented the most that would be paid for the property if it was in reasonable condition. There is no appeal from that finding either.
3. The respondents brought this claim for breach of contract. At the trial the appellant took every conceivable point, both evidential and technical, denied any contractual relationship existed at all and took other points which the judge described as unsustainable.
4. The judge found in favour of the respondents for breach of contract. The appellant does not appeal any of those findings.
5. The judge also dealt with the quantum of damages. The respondents contended that the correct measure of damages was the cost of repair (i.e. £115,000) because if they had received a Home Buyers Report as they ought to have done, it would have alerted them to the very real problems with this property and they would not have bought it. The cost of repair was the correct and fair measure of their loss.
6. The appellant contended that the true principle for assessment of damages was found by analogy with so called negligent surveyor cases in a line of Court of Appeal authorities starting from ***Phillips v Ward*** [1956] 1 WLR 471 (particularly the judgment of Romer LJ), ***Perry v Sidney Phillis*** [1982] 1 WLR 1297 (particularly Lord Denning MR), and ***Watts v Morrow*** [1992] 1 WLR 1421 (particularly Ralph Gibson LJ). The appellant submitted that these cases show that the correct measure of damages in the present case would be a sum equal to the diminution in value of the property and not the cost of repair.
7. On the facts the appellant relied on the evidence of an expert Mr Davies that the diminution in value of the property was £15,000. The respondents’ expert Mr Northridge did not agree. His evidence was that he could not have given a valuation of the property in a Home Buyers Report because he would have identified the problems and further detailed survey work would have been required. A figure of £20,000 was mooted by Mr Northridge, not as a valuation, but rather simply as the mathematical result of subtracting the costs of repair of £115,000 from £135,000.
8. The judge decided to award £115,000 in damages. There was also a point on consequential losses but they are not challenged on appeal.
9. The appellant appeals on the sole issue of the judge’s award of the costs of repair. I gave permission to appeal on that point on 23rd March 2018.
10. The appellant’s submissions were as follows. The appellant argued that the judge gave three reasons for rejecting the diminution in value approach. They were: first that the case was one of failure to provide a report rather than the provision of a negligent report (judgment paragraphs 42 and 43), second that there is a difference between negligent surveyor cases such as ***Phillips v Ward*** etc. and “transaction” cases in which the respondent would not have entered into the purchase transaction at all but for the breach (judgment paragraphs 41 and 42); and third the true extent of the loss in this case is the cost of repair and to do otherwise would undercompensate the respondents (paragraph 43(iii)).
11. The appellant contended that none of the judge’s reasons justify awarding damages based on the cost of repair rather than the diminution in value. There is no sound basis to distinguish the diminution in value line of authority and therefore the award of the cost of repair should be set aside and damages awarded on a diminution in value basis. When that is done: either the figure given by Mr Davies should be accepted (£15,000), or the court should determine that the claimant has failed to prove what the diminution in value would be and so no sum should be awarded for that at all, or else the appellate court should do its best with the material available and arrive at a figure for diminution in value. On that latter approach the appellant contended (i) that one of the judge’s findings makes it implicit that he believed the diminution in value was lower than £115,000, and (ii) that in evidence Mr Northridge indicated that the true value of the property must be more than £20,000. So the true diminution in value is between £15,000 and £115,000. There is no specific material from which one could deduce a figure in between these two but the appellant submits that doing the best one can, a figure can be arrived at and if that is done a figure of no less than about £80-85,000 is right for the value of the property and so the diminution in value ought to be no more than about £50-55,000 (since £135,000 – £80,000 = £55,000).
12. The respondents supported the judge. They contended that the negligent surveyor cases were not binding on the judge, that he did not err in deciding not to apply them by analogy. Moreover the cases do not set out an inflexible rule and that it was open to the judge to award the cost of repair. In any event on his findings of fact even if the judge ought to have awarded damages based on diminution in value, the only way to calculate it in this case was by using the cost of repair and the result would be the same. The respondents also submitted that if the court reached the conclusion that an assessment of the diminution in value along the various lines contended for by the appellant was required, the case should be remitted for further evidence. I will say now that I do not accept that latter submission. The trial was to determine liability and quantum. The argument about diminution in value is not a new point. It would not be in accordance with the overriding objective to send this case back for further evidence on that point.

*Diminution in value or cost of repair?*

1. ***Phillips v Ward*** was about an inaccurate surveyor’s report. Romer LJ gives a simple explanation at 477 -478 why the correct measure of damages should be diminution in value rather than cost of repair. The principle is followed in the other cases. The principle is really quite simple. Using the figures in ***Phillips v Ward***, by reason of the negligent report the claimant bought a property for £25,000, in effect thinking that was what it was worth. They then discovered defects which required additional expenditure of £7,000. At first sight £7,000 seems to be the correct measure of loss since that is the extra expense the claimant has been unexpectedly confronted with as a result of the defendant’s wrong. However it turns out that the property with the defects which the report failed to disclosure would be worth £21,000. So the cost of repair is £7,000 but the diminution in value is only £4,000. Having bought it, they now have an asset worth £21,000. The fact it costs £7,000 to repair does not mean it is worth £18,000 unrepaired. They could spend £7,000 repairing it if they wish or they could sell it for £21,000. If the claimant had received the report they ought to have received, which revealed the defects, then they might not have bought the property and kept their money or they could have bought it at the reduced value of £21,000 and spent £7,000 repairing it. In either case their loss is £4,000 not £7,000.
2. In my judgment this principle is plainly applicable in this case and the judge was wrong to approach the matter by distinguishing it. The transaction/negligent surveyor distinction is a distinction without a difference. Just as in the cases of a negligent surveyor’s report, in this case the appellant ought to have provided a survey to the respondents which would have indicated to them that the property had serious defects. In fact on Mr Northridge’s evidence, which the judge accepted, it would have said that a value could not be put on the property without further survey work. Just as in the cases from ***Phillips v Ward*** onwards, if the appellant had done what it ought to have done the respondents would have been provided with a survey which warned them about the true state of the property at as least far as the surveyor could tell. They could have decided what to do – pull out of the transaction or negotiate a lower purchase price, possibly involving further survey work. The fact the respondents in this case would have decided not to buy the property is not a distinction. Romer LJ expressly took that option into account in ***Phillips v Ward***.
3. As I have mentioned, as the judge found, the respondents would not have bought the property but for the appellant’s breach. While that is so the fact remains that they did buy it, and as an asset it has a value. For the sake of argument if the true value of the property in the state it was in when it was purchased was £120,000, as Mr Davies contended, then I can see no justification whatever for awarding the respondents the much larger costs of repair when they have an asset which, on the relevant hypothesis would have a value of only £15,000 lower than they paid for it. The fact they may wish to spend £115,000 to put it into what they regard as a reasonable state would be neither here nor there. So treated as a matter of principle, neither of the judge’s first two reasons would justify awarding damages on a cost of repair basis as opposed to a diminution in value basis, assuming each was ascertainable.
4. That leaves the judge’s third reason, which was that the true extent of the loss was cost of repair rather than diminution in value. Stated that way the third reason sounds circular but it is not meant that way. The judge came back to this in his judgment refusing permission to appeal. The respondents referred to that as a supplemental judgment, which is not quite accurate. Nevertheless as long as it is not contradictory, I believe it is legitimate and appropriate to take it into account in order to understand the judge’s full reasons for his decision.
5. The judge said:

“I preferred the evidence of Mr Northridge to that of Mr Davies for the reasons I gave. Accordingly if I was wrong not to apply ***Watts v Morrow*** there would be no basis for an award less than the cost of repair in any event. There being no contrary evidence on the cost of remedial works required and therefore the court would be left with no other practical indicator as to what would amount to a reasonable estimate of the diminution in value but the quantified cost of repair, which in my judgment would lead to the same conclusion (the ***Steward v Rapley*** approach).”

[second judgment paragraph 8(iii)]

1. There is a point on whether in this passage the judge contradicts a finding in his main judgment but I will come back to that.
2. To address this aspect of the judge’s reasoning it is necessary to consider how to assess the diminution in value. This arose in ***Steward v Rapley*** [1955-95] PNLR 451. The view of the claimant’s expert in that case was that the diminution in value was represented by the cost of repair. The Court of Appeal held that that did represent the proper measure of damages on the facts of that case. So while the cases distinguish between cost of repair and diminution in value, unsurprisingly perhaps there is no legal principle which demands that the two values are necessarily different or that an expert cannot use cost of repair to determine diminution in value in a proper case. Those are matters of fact.
3. Notably in ***Steward*** Staughton LJ gave a judgment (obiter) suggesting that that cost of repair might be the correct measure of damages if it was lower than the diminution in value.
4. The other relevant authority is ***County Personnel v Alan Pulver*** [1987] 1 WLR 916. It came in to the case first by being cited in ***Watts v Morrow*** but the judge properly informed the parties that he had obtained a copy. ***County*** is another case in which a professional (a firm of solicitors) gave negligent advice in the context of their client deciding to acquire a property (an underlease) but the problems with the property were not physical, they were concerned with the terms of the lease and its effect on the rent. The evidence put a figure on the cost to the claimant of buying themselves out of the underlease. That figure (£18,000) represented damages equivalent to the costs of getting rid of the defect they had not been properly warned of. Bingham LJ summarised the principles at p925-p926. He explained that the diminution in value rule in ***Philips v Ward*** was almost always appropriate where property is acquired following negligent advice by surveyors or solicitors but it is not an invariable rule and should not be applied mechanistically.
5. On the facts of ***County*** a valuation of the underlease which would be needed to work out a diminution in value would be speculative and unreal. It would produce a negative value for this underlease, whereas there was firm evidence in support of the £18,000 cost of buying out. The Court held that the matter had to be remitted on the footing that £18,000 was the right sum unless it could be shown not to be a reasonable attempt to mitigate, which seemed unlikely. Thus, as Recorder Willetts understood, ***County*** shows that the rule is not inflexible and if the facts warrant it, a different approach from diminution in value can be taken. Nevertheless, the judge’s reference to ***County*** in a passage from ***Watts v Morrow*** quoted at paragraph 41 of the judgment was incomplete. The passage is from the judgment of Ralph Gibson LJ in which he recognises the force of the point that cost of repair seems fair but after the quoted passage the Lord Justice goes on to reject the point despite that.
6. In summary the two relevant principles are that diminution in value is not an invariable rule and that diminution in value can in a proper case be determined by the cost of repair. The judge rightly recognised both principles.
7. The respondents argued that a further finding by the judge supported his conclusion. The further finding the respondents contended the judge had made was that the property was unsaleable. If the judge had made such a finding then it seems to me that it would support the respondents’ case but the submission is wrong. The relevant paragraph in the judgment which the respondents say makes a finding in their favour is in fact a record the respondents’ submission. The judge did not make this finding.
8. Standing back, the judge’s decision could be supported on two different bases. One, based on ***County***, could be that working out the diminution in value in this case would be too speculative and so cost of repair is recoverable, and the other is that doing the best one can, the diminution in value is represented by the cost of repair. The latter is the approach the judge took but either way £115,000 would be the result. Of course, if the diminution in value is £115,000 then the value of the property is £20,000.
9. The appellant’s case on appeal is that either way of supporting the judge’s third reason is wrong because Mr Northridge accepted (i) that £20,000 was not the value and (ii) that the property was worth more than that. They are right on the first point. Mr Northridge clearly accepted, in a question from the judge, that he was not saying £20,000 is a valuation. However as to the second point, in the relevant passage of cross-examination, Mr Northridge made clear he was not prepared to give a valuation and he did not agree that “the answer was somewhere between those two” (i.e. between £20,000 and £135,000). He did not know what the valuation was.
10. The appellant submits that the judge implicitly accepted that property was worth more than £20,000 because he implicitly accepted that the diminution in value, whatever it was, must have been less than £115,000. That is because in paragraph 42(iii) the judge said:

“in any event the approach urged on me by the defendant would leave the claimants inadequately compensated for a transaction they would, in my judgment, not have entertained but for the defendant’s breach of contact.”

1. The appellant submits the “approach” referred to is the diminution in value methodology in general and so necessarily this is a finding that the diminution in value is lower than the cost of repair. If that was what paragraph 42 (iii) meant then I agree with the appellant that it would undermine the judge’s reasoning. It would also mean that the appellant’s further submission, that paragraph 8(iii) of the judge’s second judgment actually contradicted paragraph 42(iii) of the first judgment, was correct.
2. I do not believe that the appellant is right about paragraph 42(iii). It is not what the judge meant. The sub-paragraph follows from sub-paragraph (ii) in which the judge makes the point that he has preferred Mr Northridge’s approach to that of Mr Davies. Mr Davies’ approach was that the diminution in value was £15,000. In sub-paragraph (iii) the judge is explaining that in his judgment awarding £15,000 would inadequately compensate the respondents. It is not an implicit finding that whatever the diminution in value figure is, it must be less than £115,000.
3. The appellant also submits that as a matter of common sense the property must have a value higher than £20,000 even with all the defects and therefore whatever the diminution in value is, it must be less than £115,000 and thus the award overcompensates the respondents. Furthermore since the respondents’ expert was not able to say what the diminution in value was, the respondents have failed to prove a critical aspect of their case.
4. I accept the appellant’s point on common sense that the property must have a value of some kind. Although he did not say so, that may be why the judge did not approach the matter by addressing the respondents’ case that the property was unsaleable. If he had made a finding that it was truly unsaleable or had a negative value as in ***County*** then that might have justified awarding the cost of repair but it is not what the judge did.
5. However despite the common sense, it does not follow that whatever value the property has, it must be anything like the figure contended for by the respondents in argument (somewhere above £80,000) or even necessarily more than £20,000. Although the respondents were wrong in the submission that the judge had found the property could not be sold, it would not be at all surprising that it was difficult to sell in the circumstances of this case.
6. I do not accept the appellant’s point that there was a defect in the respondents’ evidence of diminution in value. The clear evidence from the respondent’s expert was that he could not give a valuation. The respondents can hardly be criticised for that.
7. The question is – what was the judge to do given the state of the evidence? In my judgment the judge was entitled to take the view that the cost of repair represented the only practical indicator of what the diminution in the value of the asset was. That is how he expressed himself in the second judgment at paragraph 8(iii). That approach made sense in the particular circumstances of this case given the extensive defects, the fact that the repair costs are about 85% of the most the property could be worth in reasonable condition, the rejection of the appellant’s expert’s opinion that the diminution in value was as little as £15,000, and the evidence from the respondent’s expert that he could not give a valuation. The fact the respondent’s expert could not give a valuation did not preclude the judge from taking the approach he did.
8. It was open to the judge to have taken a different approach and it was also open to the judge to have come up with a different figure for the diminution in value, lower than the cost of repair, and awarded that. However the fact he did not do that does not undermine the judge’s decision. The judge was entitled to find that the damages were £115,000.
9. Finally I will say this. It is a common occurrence in assessing damages based on valuation that the paying party takes a polarised view and does not advance an intermediate position, even as a fall back. Receiving parties do this as well but in my experience paying parties do it more often. So in this case even on appeal the appellant’s case really was that the sum of £115,000 was wrong and the only viable alternative non-zero sum which could be awarded was £15,000. Although in paragraph 11 above I set out an intermediate submission of the appellant that the possible diminution could be about £50,000, even that concrete suggestion was not in the appellant’s skeleton argument (nor in the skeleton below). I infer that no intermediate sum was suggested at trial. My impression of the appeal hearing was that if I had not asked counsel for a figure, none would have been advanced. The imperatives of advocacy often drive parties to adopt this tactic but it can backfire. From his judgment it is obvious that the judge was sure that £15,000 did not represent a fair assessment of the diminution in value and was too little. The judge was clearly entitled to take that view. The only other concrete sum he had to go on was £115,000. On other occasions a judge in that situation might arrive at an intermediate sum doing the best he or she can. However if the appellant was not prepared to propose an intermediate sum, I do not believe that the judgment is undermined for not taking such an intermediate approach.

*Conclusion*

1. The appeal is dismissed.