IN THE HIGH COURT OF JUSTICE No. HT-2021-000072
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)

[2021] EWHC 3595 (TCC)

Rolls Building

Fetter Lane

London, EC4A 1NL

Friday 12th November 2021

Before:

MR JUSTICE EYRE

BETWEEN :

NEDJLA SURER

Claimant

- and -

STUART DRIVER Defendant

MS GILBERT (instructed by Kangs Solicitors) for the Claimant.

MR CLEGG (instructed by Setfords Solicitors) for the Defendant.

JUDGMENT

MR JUSTICE EYRE:

1
The Claimant and the Defendant are the owners of adjoining properties. The Claimant owns 28 Sunnydene Road in Purley and the Defendant owns number 30. They are adjoining properties with a party wall between them.

2
The background appears from the judgment which O'Farrell J gave on 5th March 2021 in respect of the Claimant's pre-action application for injunctive relief. O'Farrell J summarised matters thus:

"2. The applicant, as the Claimant then was, is the owner of the neighbouring property number 28 Sunnydene Road occupied by her son and her son's wife. The properties are neighbouring terraced houses. Therefore, they share a party wall. Number 30 Sunnydene is currently unoccupied. Although Mr Driver has owned the property since about 1997, he has not lived there for some six or seven years. The applicant's son and wife are the permanent occupiers of 28 Sunnydene.

3. It is apparent from the evidence before the court by way of witness statement of Mrs Surer and the witness statement of Mr Driver, together with the documents in the bundle, that there is a long history of disagreement between the parties. Today is not the appropriate time for the court to resolve all those issues but it was clear there is some bad feeling. It is also very clear from the evidence that Mr Driver's property had fallen into a serious state of disrepair. Correspondence was sent by Ms Surer to Mr Driver either directly or through her solicitors from as early as 31 July 2019. A number of letters were sent in September and December of that year, more recently in June and December 2020. That indicates that that over a relatively long period of time and the recent history of the dispute, complaints have been made by Ms Surer about the state of disrepair at number 30."

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Proceedings were commenced after the hearing in front of O'Farrell J and the Particulars of Claim allege at [6]:

"The Defendant has failed to maintain 30 Sunnydene and it has fallen into a dangerous state of disrepair. The particulars of disrepair include but are not limited to..."

Then a number of particulars were given in a variety of terms, some at a level of generality and others with rather more particularity.

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At [7] it was said:

"The state of disrepair of 30 Sunnydene has caused flooding, damp, extensive water ingress, and associated damage to 28 Sunnydene, and extensive mould to the party wall. Further, rats have infested 30 Sunnydene and are now encroaching into 28 Sunnydene."

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It is said that as a consequence, the Defendant was liable in nuisance and negligence. The particulars of nuisance were set out at [9] with four particulars which were said to follow from the Defendant failing to maintain and/or having wrongfully caused or permitted the state of 30 Sunnydene to deteriorate to the extent that it constituted a nuisance in that there was encroachment of lead flashing. It was said that damage had been caused in the respects set out in [7] and as in Mr. Clarke's expert report. There was said to be an encroachment of Japanese Knotweed and other hazardous and/or damaging vegetation and an interference with the Claimant's right to comfortable and convenient enjoyment of her property.

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Then at [11] there were particulars of negligence in large part expressed as being a failure to maintain the proper condition of 30 Sunnydene itself.

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The Defence is rightly described by Miss Gilbert as a prolix document which the Defendant prepared himself. It makes references to his knowledge or lack of knowledge of the state of the property and references to the conduct of the Claimant and her family. It also disputes the consequences of what was alleged or the state of the property and unhelpfully at various points refers to aspects of the claim as being “largely denied” and similar turns of phrase.

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On 29th April by a consent order O’Farrell J discharged undertakings which had been given to her earlier. Those undertakings had been given or certainly recorded in an order sealed on 8th March 2021 in circumstances where the learned judge had indicated that she would have been minded to grant a mandatory injunction but for the proffering of undertakings by Mr Driver. In addition the order provided for experts to inspect the properties and for there to be a joint statement of areas of agreement and disagreement. That joint report was prepared. It indicates significant areas of agreement but also areas of significant disagreement: in particular disagreement as to whether particular items of alleged harm or damage to the Claimant’s property result from the condition of the Defendant’s property.

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The matter comes before me on the Claimant’s application for summary judgment and/or strikeout of the defence. In summary Miss Gilbert’s submissions are as follows. She says that liability is inevitable. It is clear that 30 Sunnydene is in disrepair and clear also that there has been some encroachment and that some damage has resulted. She accepts that there are issues as to whether particular items of damage at no 28 resulted from the disrepair of no 30. She says that those are matters of causation and quantum and not of liability and that the Defendant will not be precluded from raising his arguments on those matters by a judgment on liability.

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In support of the latter contention Miss Gilbert drew my attention to the decision of Simon Picken QC sitting as a deputy judge in the case of Symes v St Georges[2014] EWHC 2505 (QB). In that case, Mr Picken was dealing with a clinical negligence claim where judgment had been entered in default and where the issue was whether the matters pleaded in various paragraphs of the Particulars of Claim were conclusive as to issues of breach of duty and causation. Mr Picken ultimately concluded at [61] that the defendants could, in that case, advance arguments as to causation and the like notwithstanding the default judgment. His approach was derived from the decision of the Court of Appeal and the case of Lunnun v Singh[1999] CPLR 587 from which Mr Picken quoted extensively at [35] and onwards of his judgment. Lunnun was a case in nuisance where there had again been default judgment as to the escape of water and sewage from a pipe on the defendant’s premises on to the plaintiff’s premises. In that case, the Court of Appeal had concluded that the defendant was not precluded by the default judgment from arguing as to causation and that it was open to the defendant to challenge the contention that particular items of loss were caused by the tort, namely the encroachment of water. Miss Gilbert says that that is analogous to the situation here with the consequence that the position is that liability follows and that there should be judgment for the Claimant but there will be opportunity for argument about causation.

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Mr Clegg for the Defendant says matters are not as straightforward as that. He says that the key is the joint expert report which shows that there are areas of disagreement between the experts as to the consequences of the state of disrepair of the Defendant's property. He says those are matters going to liability because of the need to show damage caused by particular acts of negligence, or by particular omissions, or by particular encroachment. He says that it is not appropriate to award judgment on liability because in respect of at least some items it is not apparent that liability will be established.

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The general approach I have to take on summary judgment is not contentious. In her skeleton argument Miss Gilbert helpfully rehearsed Lewison J's well-known enunciation of the applicable principles in Easyair Ltd (t/a Openair) v Opal Telecom Ltd[2009] EWHC 339 (Ch) and I have those principles well in mind.

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The real issue here is the level of generality at which it is appropriate to consider the question of liability. I need to reflect whether I am addressing a question of whether damage has been caused where proof of damage is an essential ingredient of a particular disputed tort or considering questions of the causation of particular loss flowing from already established torts. Mr Clegg says that this is a case in the former category whereas Miss Gilbert puts it in the latter category. It is not surprising that a high level of generality would be adopted in a clinical negligence case where there has been a failure of diagnosis and where one is looking to see what losses flow from that: the damage there being the failure of diagnosis. Further I note that Lunnun was a case of a default judgment from a tort of nuisance by way of encroachment.

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It seems to me that it is necessary to reflect on the particular causes of action advanced here. It is no criticism of the Claimant that there are three causes of action relied on which are run together to quite a considerable degree.

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Nuisance taking the form of nuisance by encroachment on another's property is a single act. The cause of action is complete once there is an encroachment once, as in Lunnun, the water from the pipe flows on to the land or, as in this case, the water from the overhanging gutter flows down the wall of no 28. Once there is the encroachment the cause of action is complete and the question then becomes one of considering what loss has been caused by that completed cause of action. The tort of nuisance by way of interference with the reasonable enjoyment of property or by way of damage to the property depends on the effect of the nuisance. It requires an interrelation between the alleged conduct on the tortfeasor's property and the interference or damage caused to the Claimant's property. Interference or damage is a necessary element of that cause of action and there is no liability without that interference or damage being caused. Similarly, the cause of action in negligence is complete not when there is an act or an omission (in a case where there is a duty to act) but only when damage results from that act or omission both are needed. There is no liability for a negligent act or omission without the consequent damage.

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Here, the disrepair of no 30 does not of itself give rise to liability without an effect on no 28: it is necessary to have both. As I have already intimated the claim here involves elements of each of the

two categories of nuisance to which I have referred and of negligence. There is some encroachment on the Claimant's land; there is arguably some nuisance by way of interference; and there is some damage by way of disrepair with a negligence liability arising. Those matters are interwoven in the claim and interwoven to a large extent in the expert reports. It follows that this is very different from a case of a single encroachment.

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The expert reports, and in particular the joint report setting out the Defendant's position, do show that there are aspects where there is a defence relating not just to the loss flowing from damage caused to the Claimant's property but also as to whether particular damage was caused or was the consequence of the acts or omissions of the Defendant. If particular items of disrepair to no 30 had no effect on the Claimant's property then inevitably there can be no liability in respect of those item.

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I do not suggest that Miss Gilbert was using language lightly but the difficulties in the terms used here is shown by the fact that in reply to Mr Clegg's submissions she said that liability is inevitable to some degree or other and that the question is solely "to what degree?" If that were to be the position then it would be very difficult for the court to say that summary judgment was appropriate because judgment would have to be for a particular degree of liability. What Miss Gilbert meant in reality was that there is going to be some liability upon the Defendant. The problem is that the court, the Claimant, and the Defendant do not yet know the extent of the acts or omissions for which liability will be found to exist nor the consequences of those acts.

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I am satisfied that this is not a case for summary judgment. The position might have been rather different if the case was founded upon a single act of encroachment. That is not the case and the various elements of the claim are interwoven. There is a defence with real prospects of success as to parts of the claim as to negligence and, indeed, nuisance. The elements of the claim are so bound up together that it would not be appropriate to give summary judgment.

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Although summary judgment is not appropriate the Defence as currently drafted is manifestly deficient. It raises irrelevant matters. It raises some lines of argument which are currently untenable because they are inconsistent with the account which Mr Driver now seems to have given to his expert about his knowledge of affairs on the property. In addition the references to matters being "largely denied" are ambiguous and do not enable the court or the parties to know what the true issues are. I am satisfied that the Defence, as pleaded, would obstruct the just disposal of this matter. Accordingly, I strike out the Defence. I will hear submissions from Mr Clegg and Miss Gilbert as to timing but I am minded to give a relatively short period of time for a properly pleaded Defence to be served and for the Claimant to be at liberty to enter judgment in the event of that not being done.

LATER

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The Defence that is to be served within fourteen days - so that is by the 26th - is to be based on the facts and matters referred to by the Defendant's expert in the statement of areas of agreement and disagreement. In particular, or in addition, it is not to contain any line of defence which is a withdrawal of an admission made either in the now struck out Defence or by the expert in those comments.

LATER

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This was an application by the Claimant for summary judgment alternatively for striking out and for the matter to proceed to a quantum only trial. That application has failed. I dismissed the summary judgment application. I struck out the Defence on the footing that it was potentially going to embarrass the conduct of the trial but I did not thereafter direct that the matter proceed to a quantum trial and I gave directions for a fresh Defence. That means that the Claimant is not, in my judgment, the successful party in terms of this application. However, although the Defendant has been successful in defeating the application I have to have regard to the conduct of the parties and to whether a party has succeeded on part of its case even if not wholly successful. The relevant conduct includes conduct before as well as during the proceedings and the manner in which a party has pursued or defended its case or a particular allegation or issue.

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The reality here is that the Defence as pleaded was a deficient document. It would be putting it too high to say that the Claimant was drawn into the error of making the summary judgment application but it is not surprising that faced with that deficient Defence the Claimant made the application. It follows that although, arguably, the Defendant is the successful party, the justice of the case is met by there being no order as to costs.

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