Neutral Citation Number: [2021] EWHC 1544 (Ch)

Case No: PT-2021-000083

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: Thursday, 11 February 2021

Before :

MR JUSTICE ZACAROLI

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Between :

ZOE CLAIRE BUCKNELL	**Claimant**
- and –	
ALCHEMY ESTATES (HOLYWELL) LIMITED	**Defendants**

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- -

Mr R. Clegg (instructed by **Hewlett Swanson**) for the **Claimant**.
Mr N. Isaac QC (instructed by **Veale Wasbrough Vizards**) for the **Defendant**.

Hearing dates: 13-21 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

Mr Justice Zacaroli:

1. This is an application for an interim injunction to restrain what is said to be an excessive and impermissible use of a right of way. The applicant, Ms Bucknell, is the owner of Hollywell Farmhouse in Kent. The farmhouse is a Grade 2 listed building. The respondent, Alchemy Estates (Hollywell) Limited, is the owner of the neighbouring land, a former farmyard ("the Yard"), which consists of two open-sided barns and some concrete layering. Each of the farmhouse and the Yard

are accessed by a driveway. The driveway runs along the front of Hollywell Farmhouse and its courtyard. Each of the farmhouse and the Yard were conveyed from a common owner to separate parties by conveyances and each conveyance contained a right of way over the driveway in favour of the Yard and a right of way over the Yard in favour of Hollywell Farmhouse. The dispute is concerned with the precise nature and scope of the right of way afforded over the driveway in favour of the Yard.

2. The defendant intends to use the driveway as, first of all, the means of access to construct two substantial dwellings, with three and four bedrooms respectively, on the Yard, and thereafter as the means of access for those dwellings. Planning permission for that development was obtained on 23 April 2020. The parties have engaged in substantial correspondence regarding the use of the driveway and have also entered into a mediation to try and resolve the dispute, but that was unsuccessful.

3. On 19 January 2021, the defendant's solicitors indicated that the defendant intended to start its development work during the week commencing 1 February 2021. The claimant therefore issued its claim form on 29 January 2021. The claimant sought injunctive relief on an *ex parte* basis on 1 February 2021. That application was heard by Mann J and the interim injunction was granted until the return date of today. The interim injunction restrained use of the driveway as access by vehicle, plant and machinery for the purposes of the development of the works on the Yard. It also restrained the use, whatever the purpose, by vehicles exceeding certain dimensions and a speed of 5 mph. The defendant was permitted to finish excavation work that it had commenced on 1 February by permitting lorries to remove the soil over the course of that day and the following day, together with the removal of the excavator itself.

4. The claimant alleges the defendant has breached the terms of the injunction on at least two occasions, but that is not a matter that needs to concern me today. At today's hearing, the claimant seeks the continuation of the interim injunction until trial. She seeks to prevent the development and thus, as she puts it, hold the ring.

5. The test to be applied on an application for an interim injunction is well known and is set out in the *American Cyanamid* case. The first question is: is there a serious issue to be tried? The underlying issue for determination at trial will be the scope of the right of way over the driveway in favour of the Yard. The right of way is in slightly different terms in the two conveyances in which it is found but they do not differ in a material way. In one of them, it is put as follows:

> "A right of way at all times and for all purposes with or without animals and vehicles over the roadway-coloured brown on the said plan for the purpose of access to and egress from the adjoining premises of the vendor…"

It goes on to deal with matters of payment for its upkeep.

6. It is common ground that the right of way in the conveyance is to be construed in light of the surrounding circumstances as at the date of its grant. That was in 1972. Thus, in White v Richards [1994] 68 P&CR 105 , a right of way over a "track" was a reference to something which existed at the date of the conveyance. It was necessary to start by ascertaining the physical characteristics of the track as at that date. Also, the right of way is to be construed in a way which does not permit a user which would interfere unreasonably or substantially with the rights of others having the same rights or which would cause a legal nuisance (see in this respect Jelbert v Davies [1968] 1 WLR 589).

7. In Thompson v Bee & Anor [2010] Ch 412 , a right of way for all purposes was held not to include a right of access for three new houses as it would be an unjustified level of interference with the rights of the claimant to use the track itself and the rights of the claimant to enjoy the rest of their

property.

8. There is a dispute over the width of the driveway. The claimant says it is only 2.76 m at its narrowest point. The defendant disputes that, contending that the claimant is measuring only the tarmac, which was not in place in 1972 when the right of way was granted and, in fact, the minimum width including verges is 4.1 m.

9. The claimant contends that there is insufficient width for large vehicles. As I have noted, it is not possible to rely on the width of the tarmac in aid of that contention, because as at the date of the grant the tarmac was not there.

10. The defendant says that a landowner is entitled to build on their land provided it does not cause unnecessary inconvenience to the neighbours Here, however, the question is not so much inconvenience caused by the building works but by whether the use of the driveway by heavy vehicles for the purpose of the building works is itself outside the scope of the right of way.

11. The claimant points to the following as giving rise to unreasonable interference with her own enjoyment of the right of way and/or creating a nuisance. First, the significant increase in traffic movements per se, which would make it difficult, she says, for vehicles to pass. She estimates that there will be 55 additional movements per week once the dwellings are built but 100-150 movements per week during the construction phase. In addition to those increases in traffic movements, she points to the potential for damage to services - that is drains, I think - running beneath the tarmac, damage caused by the vibrations from heavy vehicles, and damage (from the same source) to her listed home.

12. As to this, I note that there is no evidence of potential damage caused by vibrations. It is mere assertion. This would require expert evidence. The dispute has been going on for some time and the claimant has had an opportunity, if she saw fit, to obtain some evidence of this. But she has not done so. For that reason, I place little reliance on this particular element.

13. The claimant also relies on the fact that vibrations caused by vehicles passing next to that part of her premises where her husband carries on his business of delicate gun-making work would cause disruption to that business. Overall, the claimant relies on the quiet rural setting of her property and the impact of a substantial increase in vehicle movements, both during the construction phase and afterwards, on the enjoyment of her property.

14. The defendant suggests that a different form of test applies in this case based on the fact that this is an application for a *quia timet* injunction, quoting a passage in the current edition of the *White Book* , volume 2, at para.15-9, pp.2964-2965:

> "There must, if no actual damage is proved, be proof of imminent danger; in other words, a strong probability that unless restrained by the injunction, the defendant will act in breach of the claimant's rights and there must be proof that the damage, if it comes, be very substantial."

15. The defendant also relies on the following passage:

> "The harm must be so serious that if it occurs, it cannot be reversed or restrained by an immediate interim injunction and cannot be adequately compensated by damages (*Lloyd v Symonds [1998] EWCA Civ 511 , per* Chadwick LJ)."

16. Mr Isaac submits that, on the basis of this test, there is no serious issue to be tried at all. I was not taken to the cases referred to in the White Book but it is accepted that the cases referred to are dealing with a situation where the claimant sought a final instruction. Mr Isaac says that makes no difference. This is, however, not a quia timet case in the sense identified in those cases. The work

has started. There is no doubt the work will continue. This is not a case of trying to ascertain whether there is any imminent danger. The proposed works will undoubtedly continue and the development will be built.

17. Mr Isaac suggested that the test is that I have to be satisfied that the use by the defendant will inevitably be so substantial as to cause a nuisance. He submits that some development must be within the scope of the right of way and, therefore, mere use the right of way to carry out building works cannot be a breach of the right of way. It is all a question of whether the proposed use would be excessive and that will only be known once the work commences, at which point, the claimant would be able to apply on an emergency basis for an injunction if she considered the work being done or the vehicle traffic was, indeed, excessive. The defendant has asked the claimant to identify what vehicle use would not be excessive but has had no response.

18. I note that in Thompson v Bee & Anor [2009] EWCA Civ 1212 , for example, the Court of Appeal referred expressly to the ability of a court at first instance to consider with the parties at a trial what level of passage by vehicles would fall within the scope of the right of way and what would be excessive. That clearly has not taken place here but we are at a very early stage. It is a matter which would no doubt have to be considered at trial.

19. At this interlocutory stage, where the evidence and arguments on either side are necessarily incomplete, I do not think that the defendant's approach can be right. If there is a serious issue to be tried that (1) the use which is proposed would be outside the scope of the right of way, which Mr Isaac accepts I cannot decide today, and (2) if it is outside scope it would cause damage to the claimant by reference to her use and enjoyment of her property, again a matter which I cannot decide today, then it seems to me that provided the other requirements in the American Cyanamid test are satisfied, the claimant ought to be entitled to an injunction in the interim.

20. The claimant's case is that even if some use by vehicles once the development is built will be within permitted use of the right of way, which it seems to me it must be, it is the use that is required by the development works according to the planning permission that has been obtained which is itself outside the scope of the right of way because of the unreasonable interference with her right of enjoyment of her property. It is not possible on this application to resolve who is going to be right about that at trial. I therefore accept that the relatively low hurdle of a serious issue to be tried is overcome in this case.

21. Turning to the second and third elements of the American Cyanamid test, that is the adequacy of damages either way and the balance of convenience, the claimant asserts that the nature of the injury caused by the defendant continuing the development and using the driveway in the intervening period is of such a nature that cannot satisfactorily be compensated in damages. That is because it consists of persistent and ongoing disruption to her use and enjoyment of her property as her home. Although at an earlier stage in the dispute between the parties, the claimant offered to receive payment in return for, I think, certain services being laid under the right of way, I do not consider that to be relevant to the question I have to decide today which is whether the alleged excessive vehicular use of the right of way would cause her a nuisance and cause damage to her use and occupation of the property.

22. In her evidence in support, the claimant relies, for example, on the potential danger posed to her children, pets, and animals by use of the driveway in the manner contemplated by the defendant. It does seem to me that if there is indeed damage that will be caused by the use of the right of way, it is the sort of damage that is not capable readily of being compensated by damages. The claimant is also concerned that if the defendant is allowed to proceed between now and trial, at trial it would be much more difficult for the court to make any order which reverses the effect of the

development.

23. The claimant also asserts that any loss and damage caused to the defendant could, on the other hand, be adequately compensated by damages. The defendant has indicated in its evidence the sorts of financial costs that a delay to the project will cost (albeit that this evidence has been produced under a tight timescale and may be incomplete). It estimates approximately £3,000 a week in liquidated damages, which would be payable to the developer, and finance charges of about £30,000. Whilst the works need to be commenced as contemplated by the planning permission within three years, the work has already, in fact, been commenced for that purpose.

24. There is a further issue related to the time period within which works are commenced following a party wall award. That is six months, although the defendant points to the fact that if works are abandoned for a period of six months then a further application is required. That, however, is something which ultimately can be measured in terms of money both in terms of the additional delay and the actual costs of obtaining the award.

25. In his witness statement, Mr Stoneham, who is the person effectively in control of the defendant, suggests that if he is unable to complete the development then he would face bankruptcy. It is said that this development is the defendant's sole asset into which has been invested all his personal savings. He refers to a £1 million loan which he was obliged to personally guarantee. He says:

> "If the defendant is restricted from exercising rights over the right of way, it will lead to financial catastrophe for me personally and potential bankruptcy. I took full and proper advice prior to pursuing the development option. Any dispute in relation to access was not even in my contemplation prior to September 2020, otherwise I clearly would not have already invested £400,000 in this scheme."

26. As I read that evidence, however, it is going to the question of loss if the development as a whole is lost, as opposed to the question of delay caused by any injunction I make today. Paragraph 70 of his statement deals expressly with delay and that is where the figures that I have already referred to come from. It seems to me that the damage to the defendant by delay in being able to continue with the development is of a sort which is adequately compensated by damages. The claimant has indicated she is prepared to continue a cross-undertaking in damages and she has outlined resources available to her in the sum of up to £2 million in order to substantiate that cross-undertaking.

27. Accordingly, I conclude that the potential loss to the claimant is not of the sort which would be readily compensated by damages but the potential loss to the defendant is. That is a powerful consideration in relation to the balance of convenience. In addition, as to balance of convenience, the preservation of the status quo is an important consideration. The status quo here is the position before any works were carried out.

28. Putting all of that together, it seems to me the right exercise of discretion in this case is for me to continue the injunction.