

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Monday, 11 November 2024  
NCN NUMBER [2024] EWHC 3407 (KB)

BEFORE:

**MASTER DAGNALL**

BETWEEN:

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**JAMES PATRICK NOLAN**

Claimant

- and -

**ANDREW ALISTAIR CARNEGIE**

Defendant

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**MR SIMON BRILLIANT** appeared on behalf of the Claimant  
**MR ANDREW ALISTAIR CARNEGIE** appeared in person

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**APPROVED JUDGMENT**  
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1. MASTER DAGNALL: This is my judgment in relation to the defendant's application for reverse summary judgment against the claimant, Mr Nolan, made by application notice of 14 August 2024.
2. The situation in this dispute is as follows, the defendant, Mr Carnegie, owns and owned property whose name is West Court and Tower Court, Adhurst St Mary, Petersfield, Hampshire GU31 5AD.
3. There is an access road and areas from the public highway to West Court and Tower Court owned by the claimant, who also owns other property in the area. By a deed of grant of easement of 1 November 2013 made between the Mr Nolan and Mr Carnegie, Mr Nolan granted Mr Carnegie various access rights over the access way and also a right to park up to six cars in a particular area in front of Tower Court, the very substantial majority of which area is covered by the various parking spaces.
4. The parties fell into various disputes, including because of Mr Carnegie's wish to carry out works of repair and renewal to West Court and Tower Court. Mr Nolan's desire, as was recorded in paragraph 11 of a judgment of Charles Hollander QC, sitting as a deputy judge of the high court on 19 March 2018 (a judgment which I will refer to as “the 2018 judgment”), to seek to extract money from the Mr Carnegie. Such desire was to result in various different episodes of litigation between the parties, and also involving another person who may have been associated with the Mr Nolan.
5. Mr Nolan sought to reallocate the parking space areas; which reallocation Mr Carnegie resisted, contending that Mr Nolan was not entitled to do that.
6. Mr Carnegie wished to erect scaffolding on the claimant's land at the edge of West Court and Tower Court in order to carry out various of the repair and renewal works. Mr Carnegie offered Mr Nolan the sum of £500 as a voluntary licence fee. Mr Nolan rejected that offer effectively contending, as Mr Nolan does in this litigation, that a much larger sum should be paid.
7. These disputes resulted in various litigation, and which included a claim brought by Mr Carnegie, in those proceedings as claimant, against Mr Nolan, the claimant in the

proceedings before me but there as defendant, in the High Court of Justice Chancery Division, under number HC-2017-002701.

8. In those proceedings each side sought injunctions but not other remedies against each other. The matter came before Mr Hollander QC, who determined those issues in the 2018 judgment. He determined, firstly, that the claimant here i.e. Mr Nolan was not entitled to reallocate or re-designate the parking spaces. Secondly, he held that the defendant here, Mr Carnegie, was not entitled to erect scaffolding on Mr Nolan's land. The judge held simply that the rights under the easement were rights of access and parking. They did not extend to the erection of scaffolding. As a result of that judgment, Mr Carnegie removed his scaffolding from Mr Nolan's land.
9. That was in 2018, and there appear to have been further disputes between the parties subsequently. Then on 12 September 2023, Mr Nolan issued these proceedings as claimant. He then he (i) contends that the erection and maintenance of scaffolding was a trespass, and (ii) claims compensation for loss and damage on the basis that he would be entitled to damages calculated on the basis of a hypothetical negotiation between himself and Mr Carnegie, and in which hypothetical negotiation the parties would have agreed for a payment to be made by Mr Carnegie's side, the amount of such payment being referable to a percentage of the enhancement of the value of West Court and Tower Court as a result of the carrying out of the works which the scaffolding had enabled.
10. Mr Nolan has pleaded that the relevant enhancement value was 1.18 million, and that a hypothetical negotiation would have resulted in Mr Carnegie's side paying 50 per cent of that as a price for being able to have the scaffolding erected and in place so that works could be carried out, and that this results in a claim for compensation of £590,000.
11. The matter has come before me at a number of hearings, with Mr Nolan generally being represented by Mr Brilliant of counsel, as he is before me. Mr Carnegie has appeared before me in person today with the assistance of a Mackenzie Friend.

12. At an initial hearing, I asked Mr Carnegie, since he was acting in person, as to whether he wished to advance any application that the claim was an abuse of process on the basis that no damages claim had been raised in the 2018 proceedings which were determined by Mr Hollander QC. Although I asked Mr Carnegie this twice, in order to check that he understood what he was saying and to confirm his answer, he maintained to me that he was not seeking to raise any such argument. Accordingly, I have proceeded with this case on that basis.
13. What Mr Carnegie has asserted is a number of matters, but principally two. First, that it would in fact have been possible to carry out the works by use of specialist scaffolding type operations from within West Court and Tower Court, and without need to erect scaffolding on the outside and thus on Mr Nolan's land, and so that in a hypothetical negotiation Mr Carnegie's side would have asserted that and simply refused to pay anything for the right to erect and maintain the scaffolding. That assertion is contrary, it seems to me, to what Mr Hollander QC recorded in paragraph 19 of the 2018 judgment, "The claimant [Mr Carnegie] says that it is realistically impractical to access the properties for purposes of maintenance and repair, other than by use of scaffolding."
14. Secondly, that in any event, but in particular if the first contention is wrong, he, Mr Carnegie, could have applied to court, and indeed would have done so if forced to, for and have obtained an order under the Access to Neighbouring Land Act 1992 ("the 1992 Act") which would have fully enabled him to erect and maintain scaffolding and as a result carry out the works.
15. Sections 1, 2 and 3 of the 1992 Act read as follows:

“1Access orders.

(1)A person—

- (a) who, for the purpose of carrying out works to any land (the “dominant land”), desires to enter upon any adjoining or adjacent land (the “servient land”), and
- (b) who needs, but does not have, the consent of some other person to that entry,

may make an application to the court for an order under this section (“an access order”) against that other person.

(2) On an application under this section, the court shall make an access order if, and only if, it is satisfied—

(a) that the works are reasonably necessary for the preservation of the whole or any part of the dominant land; and

(b) that they cannot be carried out, or would be substantially more difficult to carry out, without entry upon the servient land;

but this subsection is subject to subsection (3) below.

(3) The court shall not make an access order in any case where it is satisfied that, were it to make such an order—

(a) the respondent or any other person would suffer interference with, or disturbance of, his use or enjoyment of the servient land, or

(b) the respondent, or any other person (whether of full age or capacity or not) in occupation of the whole or any part of the servient land, would suffer hardship,

to such a degree by reason of the entry (notwithstanding any requirement of this Act or any term or condition that may be imposed under it) that it would be unreasonable to make the order.

(4) Where the court is satisfied on an application under this section that it is reasonably necessary to carry out any basic preservation works to the dominant land, those works shall be taken for the purposes of this Act to be reasonably necessary for the

preservation of the land; and in this subsection “basic preservation works” means any of the following, that is to say—

(a) the maintenance, repair or renewal of any part of a building or other structure comprised in, or situate on, the dominant land;

(b) the clearance, repair or renewal of any drain, sewer, pipe or cable so comprised or situate;

(c) the treatment, cutting back, felling, removal or replacement of any hedge, tree, shrub or other growing thing which is so comprised and which is, or is in danger of becoming, damaged, diseased, dangerous, insecurely rooted or dead;

(d) the filling in, or clearance, of any ditch so comprised;

but this subsection is without prejudice to the generality of the works which may, apart from it, be regarded by the court as reasonably necessary for the preservation of any land.

(5) If the court considers it fair and reasonable in all the circumstances of the case, works may be regarded for the purposes of this Act as being reasonably necessary for the preservation of any land (or, for the purposes of subsection (4) above, as being basic preservation works which it is reasonably necessary to carry out to any land) notwithstanding that the works incidentally involve—

(a) the making of some alteration, adjustment or improvement to the land, or

(b) the demolition of the whole or any part of a building or structure comprised in or situate upon the land.

(6) Where any works are reasonably necessary for the preservation of the whole or any part of the dominant land, the doing to the dominant land of anything which is requisite for, incidental to, or consequential on, the carrying out of those works shall be treated for the purposes of this Act as the carrying out of works which are reasonably

necessary for the preservation of that land; and references in this Act to works, or to the carrying out of works, shall be construed accordingly.

(7) Without prejudice to the generality of subsection (6) above, if it is reasonably necessary for a person to inspect the dominant land—

(a) for the purpose of ascertaining whether any works may be reasonably necessary for the preservation of the whole or any part of that land,

(b) for the purpose of making any map or plan, or ascertaining the course of any drain, sewer, pipe or cable, in preparation for, or otherwise in connection with, the carrying out of works which are so reasonably necessary, or

(c) otherwise in connection with the carrying out of any such works,

the making of such an inspection shall be taken for the purposes of this Act to be the carrying out to the dominant land of works which are reasonably necessary for the preservation of that land; and references in this Act to works, or to the carrying out of works, shall be construed accordingly.

2 Terms and conditions of access orders.

(1) An access order shall specify—

(a) the works to the dominant land that may be carried out by entering upon the servient land in pursuance of the order;

(b) the particular area of servient land that may be entered upon by virtue of the order for the purpose of carrying out those works to the dominant land; and

(c) the date on which, or the period during which, the land may be so entered upon;

and in the following provisions of this Act any reference to the servient land is a reference to the area specified in the order in pursuance of paragraph (b) above.

(2) An access order may impose upon the applicant or the respondent such terms and conditions as appear to the court to be reasonably necessary for the purpose of avoiding or restricting—

- (a) any loss, damage, or injury which might otherwise be caused to the respondent or any other person by reason of the entry authorised by the order; or
  - (b) any inconvenience or loss of privacy that might otherwise be so caused to the respondent or any other person.
- (3) Without prejudice to the generality of subsection (2) above, the terms and conditions which may be imposed under that subsection include provisions with respect to—
- (a) the manner in which the specified works are to be carried out;
  - (b) the days on which, and the hours between which, the work involved may be executed;
  - (c) the persons who may undertake the carrying out of the specified works or enter upon the servient land under or by virtue of the order;
  - (d) the taking of any such precautions by the applicant as may be specified in the order.
- (4) An access order may also impose terms and conditions—
- (a) requiring the applicant to pay, or to secure that such person connected with him as may be specified in the order pays, compensation for—
    - (i) any loss, damage or injury, or
    - (ii) any substantial loss of privacy or other substantial inconvenience,

which will, or might, be caused to the respondent or any other person by reason of the entry authorised by the order;

- (b) requiring the applicant to secure that he, or such person connected with him as may be specified in the order, is insured against any such risks as may be so specified; or
  - (c) requiring such a record to be made of the condition of the servient land, or of such part of it as may be so specified, as the court may consider expedient with a view to facilitating the determination of any question that may arise concerning damage to that land.
- (5) An access order may include provision requiring the applicant to pay the respondent such sum by way of consideration for the privilege of entering the servient land in pursuance of the order as appears to the court to be fair and



reasonable having regard to all the circumstances of the case, including, in particular—

- (a) the likely financial advantage of the order to the applicant and any persons connected with him; and
- (b) the degree of inconvenience likely to be caused to the respondent or any other person by the entry;

but no payment shall be ordered under this subsection if and to the extent that the works which the applicant desires to carry out by means of the entry are works to residential land.

(6) For the purposes of subsection (5)(a) above, the likely financial advantage of an access order to the applicant and any persons connected with him shall in all cases be taken to be a sum of money equal to the greater of the following amounts, that is to say—

- (a) the amount (if any) by which so much of any likely increase in the value of any land—
  - (i) which consists of or includes the dominant land, and
  - (ii) which is owned or occupied by the same person as the dominant land,

as may reasonably be regarded as attributable to the carrying out of the specified works exceeds the likely cost of carrying out those works with the benefit of the access order; and

(b) the difference (if it would have been possible to carry out the specified works without entering upon the servient land) between—

- (i) the likely cost of carrying out those works without entering upon the servient land; and
- (ii) the likely cost of carrying them out with the benefit of the access order.

(7) For the purposes of subsection (5) above, “residential land” means so much of any land as consists of—

- (a) a dwelling or part of a dwelling;
- (b) a garden, yard, private garage or outbuilding which is used and enjoyed wholly or mainly with a dwelling; or

(c) in the case of a building which includes one or more dwellings, any part of the building which is used and enjoyed wholly or mainly with those dwellings or any of them

(8) The persons who are to be regarded for the purposes of this section as “connected with” the applicant are—

(a) the owner of any estate or interest in, or right over, the whole or any part of the dominant land;

(b) the occupier of the whole or any part of the dominant land; and

any person whom the applicant may authorise under section 3(7) below to exercise the power of entry conferred by the access order

(9) The court may make provision—

(a) for the reimbursement by the applicant of any expenses reasonably incurred by the respondent in connection with the application which are not otherwise recoverable as costs;

for the giving of security by the applicant for any sum that might become payable to the respondent or any other person by virtue of this section or section 3 below.

### 3 Effect of access order.

(1) An access order requires the respondent, so far as he has power to do so, to permit the applicant or any of his associates to do anything which the applicant or associate is authorised or required to do under or by virtue of the order or this section.

(2) Except as otherwise provided by or under this Act, an access order authorises the applicant or any of his associates, without the consent of the respondent,—

(a) to enter upon the servient land for the purpose of carrying out the specified works;

(b) to bring on to that land, leave there during the period permitted by the order and, before the end of that period, remove, such materials, plant and equipment as are reasonably necessary for the carrying out of those works; and

(c) to bring on to that land any waste arising from the carrying out of those works, if it is reasonably necessary to do so in the course of removing it from the dominant land;

but nothing in this Act or in any access order shall authorise the applicant or any of his associates to leave anything in, on or over the servient land (otherwise than in discharge of their duty to make good that land) after their entry for the purpose of carrying out works to the dominant land ceases to be authorised under or by virtue of the order.

(3) An access order requires the applicant—

- (a) to secure that any waste arising from the carrying out of the specified works is removed from the servient land forthwith;
- (b) to secure that, before the entry ceases to be authorised under or by virtue of the order, the servient land is, so far as reasonably practicable, made good; and
- (c) to indemnify the respondent against any damage which may be caused to the servient land or any goods by the applicant or any of his associates which would not have been so caused had the order not been made;

but this subsection is subject to subsections (4) and (5) below.

(4) In making an access order, the court may vary or exclude, in whole or in part,—

- (a) any authorisation that would otherwise be conferred by subsection (2)(b) or (c) above; or
- (b) any requirement that would otherwise be imposed by subsection (3) above.

(5) Without prejudice to the generality of subsection (4) above, if the court is satisfied that it is reasonably necessary for any such waste as may arise from the carrying out of the specified works to be left on the servient land for some period before removal, the access order may, in place of subsection (3)(a) above, include provision—

- (a) authorising the waste to be left on that land for such period as may be permitted by the order; and
  - (b) requiring the applicant to secure that the waste is removed before the end of that period.
- (6) Where the applicant or any of his associates is authorised or required under or by virtue of an access order or this section to enter, or do any other thing, upon the servient land, he shall not (as respects that access order) be taken to be a trespasser from the beginning on account of his, or any other person's, subsequent conduct.

- (7) For the purposes of this section, the applicant's "associates" are such number of persons (whether or not servants or agents of his) whom he may reasonably authorise under this subsection to exercise the power of entry conferred by the access order as may be reasonably necessary for carrying out the specified works."
16. Mr Carnegie says that in relation to both methods of dealing with the problem, such would not have involved him or any hypothetical reasonable person paying any money to Mr Nolan. If the works could be simply carrying out from inside the properties, there would have been no reason to pay any money. If a 1992 Act order could be obtained, such would have been on the basis that no compensation would have been ordered to be paid by Mr Carnegie to Mr Nolan.
  17. While Section 2 of the Act enables the court to impose terms and conditions with regards to compensation; Mr Carnegie says that there would have been no prospect of any order being made under Section 2(4) providing for any, or more than minimal, compensation because the amount of loss, damage, injury or inconvenience, which would be caused to Mr Nolan would be minimal. The scaffolding simply occupied a very limited area of about 1.2 metres wide extending from the Front West Court and Tower Court into an area Mr Nolan's land. Part of that area was completely unusable by Mr Nolan because of the parking rights. The other remaining area was so thin that the scaffolding would cause no real practical difficulty or problem or loss of value for Mr Nolan at all.
  18. Mr Carnegie contends that the erection and maintenance of scaffolding in those circumstances would cause no loss, damage, loss of privacy or other substantial inconvenience to Mr Nolan. He contends that in any hypothetical negotiation the parties would realise that and no monetary payment would have been agreed to take account of the section 2(4) aspect.
  19. Mr Carnegie contends that as far as the question of compensation by way of consideration for the privilege of entering the servient land under Section 2(5) is concerned, that is subject to a provision that no payment would be ordered under that subsection if and to the extent of the works which the applicant's desire to carry out by means of the entry are works to residential land. Mr Carnegie contends that West

Court and Tower Court were at the relevant times, residential land, and so that in their hypothetical negotiation the parties would not agree any monetary payment in relation to that aspect either.

20. Mr Brilliant accepted at a previous hearing that West Court and Tower Court were both residential land, and he has accepted before me at this hearing that they are both residential land. That is something which needs to be recited within the eventual order to be made at this hearing.
21. Mr Carnegie contends therefore, in those circumstances, no Section 2(4) or Section 2(5) payments would have been ordered to be made by the court, and that in any hypothetical negotiation the parties would have realised that and so would have agreed for the scaffolding to be erected without any (or any real) payment being made by Mr Carnegie's side. In those circumstances, Mr Carnegie contends that there is simply no real prospect of the claimant Mr Nolan, obtaining any substantial amount of money in these proceedings.
22. Mr Brilliant submits to the contrary. Firstly, he takes a procedural point to the effect that in the application notice Mr Carnegie stated in Section 3 in answer to the question, "What order are you asking the court to make and why?"; the following answer "An order in the terms of the draft order accompanying this application, pursuant to CPR 24.3, on the grounds the claimant has no real prospect to succeeding on the issue set out in paragraph 5 of the particulars, and there is no other compelling reason why the issue should be disposed of at trial."
23. Mr Brilliant drew my attention to the fact that paragraph 5 of the Particulars of Claim is simply a statement, "The redevelopment could only be carried out by the erecting of scaffolding on the frontage land, the scaffolding." Mr Brilliant therefore says, pointing to this, that the application notice appears to ask the court to determine the question on a summary judgment basis of whether or not scaffolding needed to be erected in order for Mr Carnegie's works to be carried out. He adds that the application notice in this reference makes no reference to the 1992 Act at all; and further that the 1992 Act proceeds, as I will come to, on the basis that it is assumed that the relevant access to the servient, that is to say Mr Nolan's, land is actually required to carry out the works i.e.

the 1992 Act can only be in point if the scaffolding actually had to be erected there on Mr Nolan's land for the works to be carried out, while the application notice effectively says that such was not the case. Mr Brilliant's preliminary point, therefore, is to the effect that the argument which Mr Carnegie wishes to advance before me, cannot be run when looking at wording of the application notice.

24. Mr Carnegie responds to this in two ways. Firstly, he directs me to the wording in the application notice, which refers to, "The draft order accompanying this application." The draft order seeks an order and declaration that:

"(1) the defendant, that is to say Mr Carnegie, would have been entitled to an order pursuant to the Access to Neighbouring Land Act 1992, to erect scaffolding to the frontages of Tower Court in West Court for the purpose of maintaining the facade and roofs of both properties.  
(2) the order under the LA 1992 would not have included any sum payable by way of compensation.  
(3) in those circumstances, the claimant is entitled to no more than nominal damages and respect of his claim."

The Order also seeks by way of summary judgment for the damages claim to be struck-out. Mr Carnegie says, therefore, in those circumstances, it is actually quite clear that what he is doing is relying on the 1992 Act; and as the application notice and its wording are to be read with the draft order as a whole.

25. Second, Mr Carnegie would submit that, in any event, and as Mr Brilliant has quite properly and fairly accepted before me, both sides have prepared for this hearing on the basis that the argument is primarily about the 1992 Act. He therefore submits that, if there is any difficulty, I should allow the application notice to be amended.
26. I have given full consideration to the wordings of the documents and also the court's overriding objective in CPR 1.1, with regards to these particular issues.
27. The first question is whether or not the wording of the application notice actually extends to there being advanced the 1992 Act argument. It seems to me that is a matter of ordinary construction of the application notice, to be considered on an ordinary

construction basis of asking how a reasonable reader would see what the words meant and what was sought to be done by the application notice. The reasonable reader will into account the words used, the factual matrix of matters recently known to both parties, and the underlying commercial purpose of the application notice. The will consider all the various possible constructions together on a holistic, iterative basis, rather than one by one and coming to a position of having to accept some default meaning having simply rejected others

28. Applying that approach, it seems to me that the application notice, while it was at least unfortunately phrased for the reasons given by Mr Brilliant, has to be seen as a whole, and that the terms of the draft order have to be read with the wording in paragraph 3 of the application notice itself. I do not think that I should simply disregard the draft order which was included with the application notice and expressly referred to in the relevant paragraph 3. Looking at the application notice as a whole, it seems to me the proper construction is to the effect that Mr Carnegie is seeking to rely on the 1992 Act points, especially as that is what the draft order expressly says.
29. Even if that was wrong, it seems to me that, although would probably then be a cost consequence, it would be right for me to allow the application notice to be amended to enable Mr Carnegie to advance the 1992 Act points. Mr Nolan's side seems to have understood perfectly well that Mr Carnegie was relying on the 1992 Act point, and to have prepared for this particular hearing on that basis, and indeed Mr Brilliant seemed to me to have rightly accepted that such was the case. In those circumstances to, in some way, dismiss this application and require Mr Carnegie to issue a new application with a new hearing would involve exactly the incurring of time and waste of court resource which the overriding objective would deprecate. It seems to me that I would have granted permission to amend the application notice generally in those circumstances, and simply have proceeded with the application as it is.
30. Therefore, although it does seem to me that Mr Carnegie caused a problem for himself by reason of including the reference to paragraph 5 Particulars of Claim, I do construe the application notice so as to advance the 1992 Act points, and, had I not, I would have granted permission for it to stand as amended so as to do so..

31. Mr Brilliant second point is in general to point me to CPR 24.3, the provision relating to summary judgment which reads as follows:

“24.3 The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—

(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

32. Mr Brilliant points out, as I accept as clear, that in order for Mr Carnegie to succeed, the court must have come to a decision both that Mr Nolan has no real prospect of succeeding either on the claim, or on a particular issue or issues within it And that there is no other compelling reason why the case or issue should be disposed of at a trial. Those are two separate requirements.

33. Mr Brilliant would remind me of the general approach of the court to summary judgment applications, and in particular to its approach to the question of, "No real prospect of succeeding."

34. The well-known principles are set out in the White Book notes at 24.3.2, which read as follows:

“24.3.2 “no real prospect of succeeding”

The following principles applicable to applications for summary judgment were formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd’s Rep. I.R. 301 at [24]:

i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;



ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law,

the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”

35. I bear in mind that it is made very clear there that the court must not conduct a main trial. That the court may also consider that there is some real foundation, although there must be a real foundation, and not be a matter of what is generally turned to mere Micawberism, for believing that further relevant material might surface within the litigation process which would affect the court’s ultimate determination of the particular claim or issue. Both of those matters are further expanded upon in the White Book notes at 24.3.2.1, 24.3.2.2 and 24.3.2.3, which I have all borne in mind.
36. I have also borne in mind, as set out in the passages I have already cited, that on a summary judgment application, the court is and should be perfectly prepared to deal with short points of law or construction and with matters where it is clear that the court has all the relevant material before it, and that there is not going to be further material advanced at trial which would impact on the relevant question(s) or issue(s).
37. Mr Brilliant made various submissions with regards to the 1992 Act. First, he reminded me of the jurisdictional conditions within Section 1 for the making of an access order. In particular, the jurisdictional condition, which is the primary one upon which he relied, in Section 1(2)(b), that the court will only make an access order if it is satisfied that the works to the dominant land, that is to say Mr Carnegie's land, "Cannot be carried out or would be substantially more difficult to carry out without entry upon the servient land." Mr Brilliant seemed to me otherwise to be accepting, rightly in my view, that the works for which the scaffolding was erected and maintained, fell within the meaning of “basic preservation works” within Section 1(4).

38. Mr Brilliant's submission was that Mr Carnegie's attempt to rely on the 1992 Act is inconsistent with his assertion, also made in these proceedings, that in fact, the works could be carried out without the external scaffolding erected on the defendant's land, on Mr Nolan's land, and instead by scaffolding or something equivalent to scaffolding erected within West Court and Tower Court. In those circumstances. Mr Brilliant contends that, since that issue exists and is in fact advanced by Mr Carnegie, who has advanced an alternative case that the works could be carried out in that way, that there is a real prospect that a 1992 Act order could not have been obtained.
39. Mr Brilliant submits that the court, as a first stage under the 1992 Act, would have to decide whether the works could be carried out from within Mr Carnegie's land. He Mr Brilliant submits that whether or not that is possible is something which, as Mr Carnegie, in my view rightly accepts, is not something which can be determined by the court on a summary judgment application and which would require expert evidence. Accordingly, Mr Brilliant submits that Mr Carnegie simply cannot succeed on a summary judgment application in relation to the 1992 Act.
40. Mr Brilliant's second submission is that even if a 1992 Act order could have been obtained that is no full answer to Mr Nolan's case that he should be entitled to damages on the basis of a hypothetical negotiation between persons in the position of Mr Carnegie and Mr Nolan. He submits that in principle the court would grant effectively a buyout or way leave damages remedy in relation to the trespasses which Mr Hollander QC found in the 2018 Judgment had been committed by Mr Carnegie by way of the erections and maintenance of the scaffolding.
41. Although the parties have not sought to go into the law in this area, it seems to me that the way it is put in the Particulars of Claim is to contend that a wayleave damages remedy (i.e. a damages remedy equivalent to what hypothetical parties in the positions of Mr Nolan and Mr Carnegie would have agreed to be a proper and appropriate price for what would otherwise be a trespass) would be the appropriate remedy at common law. Alternatively, although this might require an amendment, Mr Brilliant would be seeking a similar outcome by way of a damages award in addition to an injunction under Section 50 of the Senior Court Act 1981. However, in any event, he has

advanced the common law argument, and Mr Carnegie has not, at this hearing, sought to contend that it is misconceived as a matter of law.

42. Mr Brilliant then goes on to say that a claim for substantial wayleave damages is not misconceived, as a matter of fact. He says that consideration of what would have happened on a hypothetical negotiation ought to take into account all matters which might be raised in such a negotiation; and in particular that someone hypothetically in Mr Nolan's position could hypothetically say to someone hypothetically in Mr Carnegie's position something along the lines that “Even if you can obtain a 1992 Act order, and would be very likely to do so; that is going to involve a court application that will have considerable cost where you may need to involve lawyers. Further, it is less always difficult to predict what an individual judge will do. That process will thus involve you in considerable cost, which you may well not be able to get back from me under some sort of cost order. It will also involve you in a process which will take considerable time, and which will cost you a considerable amount, including as a result of your money being tied down in relation to your development project, the incurring of holding costs in relation to the land, and the delay of your development and your only obtaining the proceeds of the development project at a later date as a result of its being delayed by me and the court process, and so that you will have lost the use of such proceeds during the delay period.”
43. Mr Brilliant contends that those sort of matters would be factored into our hypothetical negotiation; and which he says might very well result in an eventual hypothetical agreement by someone in Mr Carnegie's position to pay some significant sum of money, even if it might only be in the low five figures, as opposed to the high six figures for which the Particulars of Claim contend.
44. Mr Carnegie responds to say in relation to Mr Brilliant’s first point that he is simply running alternative cases, and that he will succeed on one or another. He says that it should not be open to Mr Nolan to contend that because Mr Carnegie might succeed on showing that he could have carried out the works without the scaffolding, rather than having to fall back on the 1992 Act, he should not be able to say that in either circumstance there would have been no hypothetical negotiation which could have

been expected to result in any payment being agreed to a hypothetical person in Mr Nolan's position.

45. As far as the questions of hypothetical negotiation is concerned Mr Carnegie submits that as far as the hypothetical costs of any hypothetical application to court under the 1992 Act was concerned, he would have carried on relevant process himself in person, as he has done with other litigation, and indeed this litigation. He says that he would not have incurred any real cost in making an application to court, and if he had done so he would have been confident of recovering such a cost in any such litigation, as on his succeeding in a 1992 Act application he would have obtained a costs order in his favour against Mr Nolan. Accordingly, he says that the potential for his incurring a cost would have played no role in any hypothetical negotiation.
46. As far as expenditure of time is concerned, Mr Carnegie says that he could probably have arranged his affairs such that he would effectively simply "bank" West Court and Tower Court, while he obtained the necessary 1992 Act order. Therefore, there would be no real monetary cost to him, and certainly not such as would result in a negotiation where he would be prepared to pay Mr Nolan money in order to solve the problem.
47. I have had to apply the no real prospect of success approach to these particular matters, as well as also considering as well if there is any other compelling reason for a trial.
48. With regards to Mr Brilliant's first point, that there is an issue which requires expert evidence as to whether the 1992 Act would be available, it seems to me that there is a certain area of unreality in relation to both sides' cases. As far as Mr Carnegie is concerned, the alternative case (no need for scaffolding) that he is advancing is, as I have already said, contrary to what was recorded by Mr Hollander QC, as being Mr Carnegie's then case in 2018. His case at that point was that he had to have the scaffolding in order to carry out works, at least initially. Secondly, in relation to Mr Nolan's case, Mr Nolan's primary case is that Mr Carnegie could not have carried out the works simply from within West Court and Tower Court (and without the scaffolding), and effectively was faced with the 1992 Act or nothing.

49. I have considered these various matters, and it seems to me that subject to one point, to which I will come, that in principle Mr Brilliant's first argument should fail.
50. Mr Nolan's claim is that damages should be awarded on the basis that someone in Mr Carnegie's position would be in a position where they felt forced to negotiate with the person in Mr Nolan's position, and paid them money.
51. Mr Carnegie's response is to say that no such negotiation would take place. That being because either (i) the person in his position would be able to carry on the works without the scaffolding, in which case there would be no need for a negotiation, or (ii) the person in his position would be able to quite clearly obtain an order under the 1992 Act, without need to pay money, in which case, again, there would not be a negotiation.
52. It seems to be that this twin pronged response cannot be countered successfully with the contention, which is effectively that advanced by Mr Brilliant, that at this point it cannot be ascertained as to which of those two solutions would be available, albeit that logically, on the material before me, one or other of them would be available. The mere fact that it cannot be determined which of the prongs would succeed is an answer to Mr Carnegie's contentions.
53. Mr Nolan's side accepts, in my view, rightly, that one of the two prongs would succeed, whatever happened, rather than contending that there is a real prospect of neither of them succeeding. It seems to me that that must follow, because the only resistance to the 1992 Act prong, is, in effect, that the other prong would operate first i.e. that the works could be done without the need for the scaffolding at all. Therefore, it does not seem to me that is an answer.
54. That, however, is subject to one particular point; being that if the first prong approach was the required one, namely that the works could be carried out from inside West Court and Tower Court, that may well have involved some measure of cost to be incurred by Mr Carnegie over and above what would be required by the carrying out of scaffolding works. This is a matter to which I have averted at previous hearings, and is one of the matters as to which permission has been granted for expert evidence to be obtained. It does seem to me that it is possible that such a circumstance would be

borne out; and, in which case, at first sight, Mr Nolan would be able to contend that in those circumstances there would have been a hypothetical negotiation, and which would result in Mr Carnegie's side paying out something in order to save that extra cost.

55. On the other hand, I bear in mind that if the reason for that extra cost is because those works carried out internally would render the overall works "Substantially more difficult to carry out." than by use of the scaffolding, then the jurisdictional requirement in Section 1(2)(b) of the 1992 Act would be satisfied, and an access order for the scaffolding could have been obtained.
56. I have asked myself as to whether that approach would drive me to a logical conclusion that there is nothing in Mr Brilliant's argument that the first prong is relevant i.e. on the basis that either there would not be a substantial difference in cost between the two means, and so no justification for a negotiation for a price, or if there was such a substantial difference, that would be because the works would be substantially more difficult to carry out by way of the internal operations (without the scaffolding) and which would justify an access order (without compensation).
57. At first sight, there is substantial force in that point. However, on a summary judgment application, it does not seem to me that, without any expert evidence, I can really come to a conclusion that Mr Nolan does not have a real prospect of success; and notwithstanding that it does seem to me, and I do not think Mr Brilliant has really contended otherwise, that, apart from the question of whether the works could have been carried out internally (without scaffolding) without substantially more difficulty, it is clear that a 1992 Act order would have been granted on an application without compensation (it being accepted that these are residential buildings and that there is no real damage sustained by Mr Nolan's side by reason of the presence of the scaffolding). It does not seem to me that on the material presently before me that I can conclude that it is clear that the relevant jurisdictional requirement of the 1992 Act is satisfied so as to obviate Mr Brilliant's argument, or that, if that jurisdictional requirement were satisfied, it is clear that the claim for some substantial hypothetically negotiated figure would necessarily fail.

58. I have some hesitation about this because it does seem to me that Mr Nolan is facing here a distinctly difficult logical problem, of contending both that there would be seen by hypothetical parties to be a potential substantial extra costs in carrying out the works internally (without the scaffolding) and that the absence of the scaffolding would not make it substantially more difficult to carry out the works. However, I do not feel that I am in a position, without expert evidence, to fully determine whether that problem is simply insuperable.
59. As far as Mr Brilliant's second point is concerned, being that there could sensibly be an hypothetical negotiation resulting in Mr Carnegie's side making a substantial payment as a result of the costs and time which would be taken in a 1992 Act process; again, it seems to me that is not a point which I can determine on a summary judgment basis, and that Mr Nolan does have a real prospect of success in there being some real negotiated payment in such circumstances.
60. This is for the following particular sets of reasons. Firstly, the parties have not provided me with any substantial amount of authority as to the principles of such a hypothetical negotiation; and including, which it seems to me to be an important point, as to such matters as (i) whether (a) this is simply a purely objective test, asking what would reasonable persons in the position of each landowner have done or (b) whether it is subject or relevant in any way to the question of what the individual, Mr Carnegie, and the individual, Mr Nolan, would have done; (ii) as to how relevant it is what other assets and projects Mr Carnegie himself actually had. Those matters, it seemed to me, may well impact on this particular question.
61. Secondly, it does seem to me that there is something of a general question, which is necessarily to an extent fact sensitive, as to whether the court should order hypothetical negotiation or wayleave damages to be paid in favour of somebody who is simply saying that they can cause problems due to court delays, and the delays of a litigation process, and even though they are ultimately going to lose that particular process in court. I have some hesitation as to whether that is an approach which the court should allow. At first sight, it seems to proceed on the basis that parties can demand monies from others to which they are not entitled as a matter of law but simply because it may be obvious, or reasonably arguable, that the relevant litigation process would involve



delays. However, those matters may themselves be somewhat fact sensitive. In any event, I would require citation of authority in order to consider it properly.

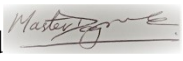
62. Thirdly, it seems to me, having heard Mr Carnegie's general responses to Mr Brilliant's second point, that those responses are distinctly fact sensitive ones, relating to his own personal financial and developments position. Those matters may well be the subject matter of relevant disclosure or at least of witness evidence, and a process in which his evidence as to those responses could well be challenged. It seems to me that those matters are not suitable to a simple summary judgment application without disclosure, witness evidence and cross-examination.
63. Fourthly, Mr Carnegie has reminded me the fact that he offered a voluntary licence payment of £500. It does not seem to me that that must result in the question being answered in his favour. The fact that he was prepared to voluntarily offer £500 would seem to suggest that there was something potentially in the cost/time point. In any event, the mere fact that an offer was made previously does not, it seems to me, mean that Mr Nolan has no real prospect of obtaining some financial order in his favour. If he obtained less than the previous offer, that might well result in having to pay all the costs of the exercise even though he had obtained a damage order from the court. Therefore, it does not seem to me that the previous offer necessarily provides Mr Carnegie with a defence to these proceedings.
64. Fifthly, have borne in mind generally that in 2018 Mr Carnegie did not choose to go down the route of making an application under the 1992 Act. Mr Carnegie says that that was because he believed, incorrectly as a matter of law, that he did not need to do so. Mr Nolan submitted that this evidenced that Mr Carnegie felt at that time that he needed to put in place urgently a mechanism i.e. the scaffolding, to enable him to carry out the works on West Court and Tower Court; and therefore Mr Carnegie, or a hypothetical person in his position, would have paid something in return for an immediate right to erect and maintain the scaffolding in order to save the cost and time of going to court. That does seem to me a matter for evidence and trial, and a further reason not to simply grant reverse summary judgment against Mr Nolan's claim.

65. I do not think that I can resolve these various points and matters without conducting some form of impermissible mini-trial, and therefore it seems to me that Mr Nolan does have a real prospect of success.
66. However, that is only a real prospect of success in relation to the claim as a whole. What this hearing and process has enabled, it seems to me, is also a consideration as to whether or not Mr Nolan has a real prospect of success on particular issues. It seems to me that he does not have a real prospect of success on two particular issues, which can be usefully framed, and the removal of which from the dispute will assist in achieving the overriding objective, and especially where CPR 1.4 places something of a duty on the court to seek to identify and resolve issues at an early stage where that can be properly done.
67. The first issue, upon which it seems to me Mr Nolan has no real prospect of success, is an issue which has to be framed on a slightly hypothetical basis, although that is not a problem as the relevant hypothesis will be resolved in due course within this case in any event. The issue is that “As long as a court would be satisfied that without the erection or maintenance of the scaffolding the works carried out by Mr Carnegie on West Court and Tower Court could not have been carried out or would have been substantially more difficult to carry out; would an access order have been made on an application for such by Mr Carnegie under the 1992 Act which would have enabled Mr Carnegie to enter Mr Nolan's land and erect and maintain the scaffolding?” Mr Carnegie contends that the answer to that question is clearly “Yes”.
68. It seems to me that was almost accepted by Mr Brilliant. In any event, on the material before me it is quite clearly the case Mr Nolan has no real prospect of succeeding on a contrary contention. It was only the Section 1(2)(b) point which was raised by Mr Brilliant as being a reason why the court would not grant an access order upon an application having been made for such, it being common ground between the parties that the relevant works were basic preservation works. Mr Brilliant has not sought to contend that there is any reason within any relevant section of the 1992 Act to refuse an access order. I also cannot see any other compelling reason for there being a trial of that issue, and it seems to me it is perfectly proper to determine that aspect at this particular point.

69. That issue is framed on the hypothetical basis of the 1992 Act jurisdictional condition being satisfied; and the parties are entitled to have a trial as to whether or not that was the case should either wish to do so. If the jurisdictional condition was not satisfied then it would necessarily follow that Mr Carnegie's first prong would succeed, that is to say that it would then be clear that he could have carried out the works, simply by operating internally within West Court and Tower Court in a manner which rendered them not being substantially more difficult to carry out in comparison with the situation if he had utilised the scaffolding. That is a matter which I have effectively already directed is to be resolved in this litigation. Therefore, it seems to me to be perfectly proper to determine that otherwise, apart from that, a 1992 Act order would have been made, and which will avoid that issue needing to be considered further in the proceedings.
70. The second issue which it seems to me that I can determine, is that “Whether there would have been no condition or compensation imposed under Section 2 of the 1992 Act, and in particular, no condition as to payment of compensation under Section 2(4) or consideration under Section 2(5) had an access order been granted to enter to erect and maintain scaffolding?” Mr Carnegie submits that the answer to that question is clearly “Yes” (i.e. he would not have been required by the court to make any payment). Mr Brilliant has not contended otherwise
71. It seems to me quite clear, having seen the material as to the very limited invasion of Mr Nolan’s land, that there would have been no award of compensation under section 2(4) (or otherwise) for loss, damage, injury or substantial loss of privacy or other substantial inconvenience beyond something which, at most, would be simply nominal. The parties have agreed that Mr Carnegie's land is residential land, and so that no payment could be ordered under Section 2(5). I therefore see no real prospect of Mr Nolan succeeding on this issue.
72. Again, it seems to me to be desirable, where there is no real prospect of success with Mr Nolan contending otherwise, to make this summary determination. It may be that Mr Brilliant would seek to persuade me that there might be some nominal payment for loss in terms of loss of use of the 1.2 metre wide area at the edge of West Court for a limited period of time, and I might consider that; but, otherwise, it seems to me that

Mr Nolan has no real prospect of success. There is no other compelling reason for a trial of that issue. That does not prevent Mr Nolan from contending that, rather than going through the process of obtaining an access order, a hypothetical person in the position of Mr Carnegie would have negotiated to make some a payment. All I am doing is determining that a court would not have required when granting an access order under the 1992 Act anything more than a nominal payment.

73. Therefore, while I am not granting reverse summary judgment in relation the claim, I am granting summary judgment in relation to those issues, and which will have to be carefully expressed within the eventual order.

Approved  16.1.2025

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Email: [civil@epiqglobal.co.uk](mailto:civil@epiqglobal.co.uk)