

IN BRISTOL COUNTY COURT

Case No: 2TW00309/2TW00268

Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Tuesday 5th March 2013

Before:
RECORDER BROWNE Q.C.

B E T W E E N:

FLANAGAN AND FLANAGAN

and

E WHITING AND K MAY

Transcript from a recording by Ubiquis
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JUDGMENT
(Approved)

RECORDER BROWNE Q.C.:

1. This is a judgment on the preliminary issue in twin cases transferred to Bristol County Court, the first being Mr P Flanagan, Mr M Flanagan v Mr James McAllister, case number 2TW00269 and the second being case of the same title and proceeding as claim 2TW00309. In the second case, I am told, and I think it is correct, that a Mr Whiting and a Mrs May are also respondents to the appeal.
2. In each of these cases the Messrs Flanagan, who are owners of number 69 High Street, seek to appeal against party wall awards dated respectively the 6th October 2012 and the 23rd November 2012 made by Mr McAllister as the surveyor duly appointed by the parties under the Party Walls etc. Act 1996.
3. Effectively, I have already determined that because Mr McAllister was the court of first instance and was effectively acting as arbitrator between the two parties in making the two awards, he should play no part in this case as a respondent and accordingly I have dismissed him from the proceedings as a party for the reasons I have already expressed.
4. That leaves the determination of the issues arising in both actions as to the validity or otherwise of the two party wall awards dated as I have said, the 2nd October 2012 and the 23rd November 2012. Upon discussion with the parties, including Mr McAllister, it became apparent that in order to determine the validity of those notices, it was going to be necessary to consider a very substantial volume of documentation going back to at least December 2007, indeed it must be to the early part of 2007. I have seen none of that documentation. By no means was all of it available in court. It certainly was not as I understand it organised in a form which would make it capable of consideration today and further I strongly suspect that one day's court time which is all that has been allotted to this case would be wholly inadequate to the exercise of considering the information available,

reading all the documents and effectively exercising again the discretion being exercised by Mr McAllister in arriving at the two disputed awards.

5. In those circumstances I have indicated to Mr Flanagan and Mr Whiting and Mrs May that I have no alternative in respect of the substantial challenge to the awards but to adjourn those challenges for another date with consequential orders which I shall make in due course as to disclosure of documents etc.
6. However, in addition to the factual challenge mounted by Mr Flanagan, he has also challenged the validity of the whole process which led to the awards upon the basis that because Mrs May was not joined as one of the joint owners when the initial notice was served under the Party Walls etc. Act 1996, so the entire process is invalid and therefore I can use or should in consideration of that point simply set aside the entire process so that there is no need then to consider further the factual challenges that may in due course arise.
7. I should add in parenthesis that in addition, Mr Flanagan has sought to raise a number of other points of law but those points on analysis and examination related to particular items within each of the two challenged awards and at my suggestion I think Mr Flanagan was content that those legal challenges should be dealt with as and when the factual challenges are determined hereafter.
8. That, therefore, leaves the fundamental challenge as to the whole process upon the basis that Mrs May should have been joined as one of the two owners. As a matter of fact, Mr Whiting accepts that Mrs May was a joint tenant and therefore that if it is necessary for both owners to be named within the initial notice under the Act, then that should have taken place.
9. Mr Flanagan invites my attention to the case of *Lehmann v Herman*, a decision of the Chancery Division and I do not have the full citation, but it is helpfully summarised within Paul Chynoweth's Party Wall Casebook, printed by Blackwell Publishing Limited and the

edition I have is the 2007 edition, and Mr Flanagan takes me, as I say, to the decision in *Lehmann v Herman*. This is in fact a decision of the Chancery Division under the London Buildings Act Amendment Act 1939 but he submits that the effect of the decision is equally binding upon the Party Walls etc. Act which simply extended the earlier provisions which are applied to London to the whole of the country.

10. In *Lehmann v Herman* the position was that Mr and Mrs Lehmann lived next door to Mr and Mrs Herman, as might be anticipated. It was the intention of Mr Herman to carry out work upon a party fence wall and he therefore served notice upon Mr and Mrs Lehmann of his intention to do so. They sought an undertaking from Mrs Herman to treat herself as bound by the notice but she refused to do so. Mr and Mrs Lehmann then applied to the court for a declaration that the party structure notice was invalid as it had not been served by both joint tenants.
11. The court concluded that when considering the definition of owner within the Act and the relevant definition is to be found within Section 5 of the London Buildings Act 1930, it was necessary for those serving a notice though not those upon whom the notice is served, that all owners should be a party to the service of the notice. It is urged upon me that the definition of owner under Section 5 of the London Buildings Act 1930 for current purposes is materially the same as the definition of owner under Section 20 of the 1996 Act.
12. Whilst the test has now been sub-divided to some extent, it seems to me that there is no material distinction between the two and in the light of the observations of the Chancery Division it seems to me that Mr Flanagan probably is right in saying that in these circumstances, in order to protect the interest of the neighbour, both owners of the property should serve the notice. Thus at first sight, it looks as though Mr Flanagan has a good point and that the whole of the process may be the subject of challenge in the light of the invalidity of the service of the original notice.

13. By way of response, Mr Whiting says that in effect whatever point Mr Flanagan may wish to raise at this stage, he has known throughout that Mrs May was one of the two joint tenants of their house. He says that as part of the original conveyancing transaction when Messrs Flanagan bought number 69, they had the deeds to number 67 within their pack. Those deeds showed Mrs May's interest. Thus, at the very point of which the first notice was served, if the point was to be raised it should have been raised then.
14. Further, Mr Whiting says, thereafter a long and expensive and apparently tortuous process has been gone into. Mr Flanagan knew, or should have known, exactly what the position was in relation to ownership and it would be quite unconscionable now to permit him to unravel the entire process upon the basis that there was invalidity in that notice.
15. Mr Whiting says that both parties have acted substantially to alter their position in the faith that the process was genuine and that in those circumstances, even if Mrs May should have been joined in the original notice, I should hold that Mr Flanagan is now estopped from raising that issue so as to undermine the entire process.
16. I am troubled by the fact that Mr Flanagan says that he is unable to accept or deny that he actually knew of Mrs May's ownership of the property at the time of the original conveyance. However, it seems to me that there is no evidence materially to gainsay that proposition and I have seen that Mr Whiting has maintained that in his earlier witness statement within the Bath proceedings which were eventually resolved against Mr Flanagan.
17. In those circumstances, it seems to me that at the very least it is right for me to proceed upon the basis that as a matter of probability, Mr Flanagan either knew or could have known of Mrs May's involvement. He would also have been put on notice of the fact that Mrs May may well be a party to the ownership since she apparently lived in the premises right up to a period some time in the middle of 2011. Mr Whiting tells me that Mrs May actually had dealings with the Flanagan's. I know that is denied but there is another feature

of the evidence there.

18. In all the circumstances, I have to look at the equity of the position and ask myself whether in my view it would be equitable now to permit Mr Flanagan to go back on the whole of that process and to set aside the initial award and everything that has flowed from it upon the basis that he did not know that Mrs May was an owner and had he known he would have taken objection and that would have unscrambled the whole process.
19. Having considered the matters to which I have referred it seems to me it would not now be equitable to allow Mr Flanagan to, as I put it, unscramble the entire process upon the basis of that one omission, if such it was. In those circumstances whilst I hold that as a matter of strict technicality it is probably correct, that Mrs May should have been named on the original notice, I do not believe that Mr Flanagan was truly misled as to the position as to the ownership of number 67 and in those circumstances I hold that it would be inappropriate to set aside the entire process that has been occurring under the Party Wall etc. Act 1996 in the light of that omission.
20. So, Mr Flanagan, I therefore find against you so far as that point of law is concerned for the reasons I have expressed at some length. As we have agreed, or as I have indicated, I do not know whether I have just said, in my view it is quite impractical to try the rest of this dispute today because the material simply is not available and there is certainly no time to consider it even if it were available. So the balance of the case will have to be adjourned. I told you that in the event that I hold that there was a legal deficiency within the process that invalidated it I would reserve Mr McAllister's costs but in the event that I did not reach such a conclusion I would order you to pay his costs. I have concluded there is no such legal invalidity and therefore I order you to pay Mr McAllister's costs in the sum of £904 or something. I note in making that order that Mr McAllister did not seek to recover the costs of his attendance today so that there is a modest reduction so far as that is concerned. Does

anyone have a note of the figure? I made a note and I cannot find it. Here we are, £964. So I order Messrs Flanagan to pay Mr McAllister's costs in association with these proceedings in the sum of £964.

21. Otherwise, it seems to me that the costs of today will have to be costs in the case. In other words, they will abide by the outcome of the proceedings. I would repeat my warning to both parties that I suspect that further prosecution of this case is going to ratchet up enormous costs, quite, quite out of all proportion to the amounts at stake and I would urge you to see whether there is not some process whereby you can arrive at a conclusion with which you can both live. I suspect neither of you will be happy with it but with which you can both live, so as to draw a line under this very unhappy affair and to prevent the further accrual of very, very substantial costs which in my view otherwise are going to be unavoidable.

MR WHITING: I take the point, Your Honour and that's exactly why I've tried to employ professionals to distance ourselves emotionally.

RECORDER BROWNE: I will make directions in relation to the future conduct of proceedings. It seems to me that the first step probably needs to be disclosure between the parties. I think that the, are you content Mr Whiting that Mr McAllister copies his entire file to both of you at this stage?

MR WHITING: 100%.

RECORDER BROWNE: You would be happy with that, I expect, Mr Flanagan?

MR FLANAGAN: Yes sure. Yes.

RECORDER BROWNE: Yes. And may I take it that if I order that Mr McAllister copies his entire file to each of you, each of you will undertake to pay the costs, his costs of copying his files? I mean that in itself is going to be several hundred pounds each obviously.

MR FLANAGAN: That would be recoverable to future court case if-

RECORDER BROWNE: What, in the event you succeed?

MR FLANAGAN: That's right.

MR WHITING: We haven't bought this action Your Honour. All we want to do is to do the repairs. It seems unfair that we would burden ourselves with further costs when all we're trying to do is progress the works to complete them.

RECORDER BROWNE: Well, this I am afraid is why, as I have already indicated, these neighbour disputes are such a potent way of inviting bankruptcy.

MR WHITING: We have already suffered farcical costs-

RECORDER BROWNE: Well I am not, you know, the difficulty is that these disputes escalate and escalate and escalate. How many sets of proceedings do we have here now? We have got two here, the Bath proceedings, you have got to pay the costs of those I think have you not, Mr Flanagan?

MR FLANAGAN: Yes, we paid them.

RECORDER BROWNE: You have paid those have you?

MR FLANAGAN: Yes.

RECORDER BROWNE: Right. Then you have got the Trowbridge proceedings, the Northampton proceedings, that is next Monday.

MR FLANAGAN: Yes.

RECORDER BROWNE: I mean, you know, this is getting one would have thought completely out of hand. In any event, you have agreed that Mr McAllister shall copy the file to each of you and that you agree together that those costs, the costs of copying shall form part of the costs of the proceedings in due course and that that can be dealt with thereafter.

MR WHITING: Yes.

RECORDER BROWNE: I then am going to order you, Mr Flanagan, to organise that file, to put it into chronological order, to paginate it and to make a list of documents to include all Mr McAllister's documents and to serve that upon Mr Whiting and Mrs May within, I will give you 56 days because it is obviously a very major exercise and I order you, Mr Whiting, to give disclosure of such documents as are not already disclosed by Mr McAllister within the same period, by list.

I then order that there shall be witness statements should be served within 56 days of disclosure by lists and I then order that there shall be a case management conference in this case which shall take place first open date after the 56 days, four months is it not? So that is taking us to July. First open date after the 1st August 2013.
