The Party Wall etc Act 1996: Compensation and Treatment of Easements

Arena Property Services Ltd v Europa 2000 Ltd
[2003] EWCA Civ 1943

Building extensions; Compensation; Damages; Easements; Party walls; Prescription; Trespass

Introduction

The precise relationship between the Party Wall etc Act 1996 and the established common law rules relating to party walls remains something of a mystery.[1] *Arena Property Services Ltd v Europa 2000 Ltd* provided the Court of Appeal with its first opportunity to consider this, in the context of the Act's treatment of easements. The case is of particular interest as it also addresses some of the related contradictions in the statute's compensation regime.

The case concerned two terraced properties at Nos 96 and 98 Farringdon Road, London EC1. The properties were three storeys in height and were separated by a party wall. Arena Property Services Ltd owned a 20-year leasehold interest in No.96. The freehold interest in No.98 was jointly owned by two individuals, Macit and Bas. Refurbishment works were undertaken to both properties between November 2000 and August 2002 and during the course of these, Europa 2000 Ltd acquired a 99-year lease in the first and second floors of No.98.

Arena had issued a claim, in the county court, for damages for nuisance caused by the works at No.98. The present proceedings relate to a counterclaim in that action by Europa arising out of the works at No.96.

The Facts

In November 2000, Arena served a party structure notice on Macit and Bas in respect of the proposed works to No.96, as required by s.3 of the 1996 Act. This proposed a number of building operations to the party wall and made reference to the appropriate paragraphs within s.2(2) of the Act. In particular, in order to facilitate the construction of an extension, it contained a

[1] P. Chynoweth, *The Party Wall Casebook* (Blackwell Publishing Ltd, 2003), pp.3–8.

proposal to remove parts of a soil pipe under paras (f), (g) and (h).[2]

The soil pipe served the first and second floor premises at No.98 but passed across the party wall at first floor level and then travelled vertically down on the outside wall of No.96. At a point just above the ground, it then passed back, cutting through the party wall itself, and was connected to the mains drainage on No.98's side of the boundary.

In due course, surveyors were appointed to resolve matters under the Act[3] and, in October 2001, they published their statutory award.[4] This (*inter alia*) authorised the removal of the soil pipe to the extent that it affected either No.96 or the party wall. Arena then removed these portions of the pipe in March 2002.

Unfortunately, these arrangements failed to take Europa's interest in No.98 into account. Despite ongoing negotiations to grant them a 99-year lease of the first and second floors of this property, Macit and Bas had failed to disclose the existence of the notice to them. Europa therefore entered into a contract to purchase the lease in December 2000 (one month after service of the original party structure notice) and completed their purchase in May 2001 (10 months before the soil pipe was eventually cut) without any knowledge of these matters.

The Claim

The first and second floors of No.98 were fully refurbished by August 2002 but Europa were unable to let them due to the absence, by this stage, of the soil pipe. They, therefore, brought the present proceedings against Arena to recover their loss of income for the relevant period. They sought damages for trespass or, alternatively, compensation under s.7(2) of the 1996 Act.

Europa argued that they were entitled to use the portion of the soil pipe on Arena's side of the boundary by virtue of an easement which their predecessors in title had acquired by prescription. They also pointed out that they became an adjoining owner, as defined by the 1996 Act, from the moment they entered into the

[2] These paragraphs collectively authorise a building owner to "cut into a party wall", to "cut away from a party wall . . . any . . . projection on or over the land of the building owner" and to "cut away or demolish . . . .parts of any wall or building of an adjoining owner overhanging the land of the building owner . . . .to the extent that [this] is necessary . . . .to enable a vertical wall to be erected or raised against the wall of the building owner . . . ."

[3] As required by s.10(1).

[4] In accordance with s.10(10).

contract to purchase the lease in December 2000.[5] From that date, they therefore claimed to be entitled to the Act's protection in two respects.

First, any right to remove the soil pipe, under paras (f), (g) or (h) of s.2(2), was conditional upon an express obligation to make good any resulting damage to Europa's property under s.2(5).[6] They argued that this included an obligation to re-route the soil pipe and, as this had not been done, that Arena had no right to undertake the work. The act of removal, in March 2002, was therefore unlawful and Europa sought damages for trespass on this basis.[7]

Secondly, they argued that, as an adjoining owner, they were entitled to compensation under s.7(2) for the losses which they had incurred. That section provided adjoining owners with a right to compensation for "any loss or damage" which they suffered "by reason of any work executed in pursuance of [the] Act".[8] Europa's losses arose from the removal of the soil pipe which had purportedly been undertaken in pursuance of the Act. They therefore sought compensation for them, under this section, as an alternative to their claim for damages.

First Instance Decision and Appeal

The trial judge found that Europa had failed to adduce sufficient evidence to demonstrate the acquisition of a prescriptive easement. As both of their arguments (above) rested on the prior existence of an easement, he dismissed their claim on that basis. However, although not directly relevant to his decision, his observations on Europa's two arguments are of more general interest in understanding some of the contradictions in the Act.

He did not accept that Europa had any claim for damages, as he considered that there was no obligation, under the Act, to re-route the soil pipe. He found that the obligation in s.2(5) was

[5] Under s.20, the definition of "owner" includes "a purchaser of an interest in land under a contract for purchase or under an agreement for a lease, otherwise than under an agreement for a tenancy from year to year or for a lesser term".

[6] s.2(5): "Any right falling within subsection 2(f), (g) or (h) is exercisable subject to making good all damage occasioned by the work to the adjoining premises or to their internal furnishings and decorations."

[7] Presumably on the assumption that the soil pipe remained their property, even though placed on land owned by Arena. Although apparently not pleaded, the claim could also have been pursued in nuisance on the basis of the interference with the easement.

[8] s.7(2): "The building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act."

confined to the making good of consequential damage and did not extend to an obligation to re-route.

He found that the claim for compensation was equally flawed as, at the time the soil pipe was cut, the easement would have already ceased to exist. He considered that the Act provided its own code which entirely superseded the common law. The easement to use the soil pipe was thus legitimately extinguished by the surveyors' award and the pipe's subsequent removal was then a case of *damnum sine injuria* which could, by definition, provide no entitlement to compensation.

Europa appealed against the decision but this too was dismissed. The Court of Appeal held that the judge was fully entitled to conclude that they had failed to adduce sufficient evidence to demonstrate the existence of an easement for the soil pipe. Although Europa had therefore fallen at the first hurdle, Lord Phillips M.R. noted that their appeal "might have raised some interesting points under the Party Wall etc Act 1996" and some of these points were explored in the Court of Appeal.

Requirement to Make Good Under Section 2(5)

Unfortunately, the Court expressed no opinion on the trial judge's view that the obligation to make good, in s.2(5) of the Act, did not also include an obligation to re-route a soil pipe which was subject to an easement. The judge's findings on this point were at variance with standard surveying practice,[9] and with some of the published professional guidance in this area.[10] Surveyors' awards invariably include provision for the proper functioning of boundary facilities where these are interfered with as an inevitable consequence of works authorised by the Act.[11]

The judge's view also conflicts with the practice at common law whereby the interference with the fabric of an easement was permitted providing the substance of the easement was preserved by alternative means.[12] In these circumstances, it is disappointing that the Court of Appeal apparently saw s.2(5) as peripheral to the more central question of the Act's machinery for awarding monetary compensation.

[9] Both under the 1996 Act and under the earlier London Building Acts, which the 1996 Act largely replicates.

[10] See, for example, Pyramus & Thisbe Club, "The Party Wall Act Explained" in *The Green Book* (Parrott House Press, 1996), pp.25 and 26.

[11] For example, where overhanging gutters are cut off, provision would invariably be made for alternative drainage arrangements.

[12] *Bond v Nottingham Corp* [1940] Ch. 429; *Brace v South East Regional Housing Association Ltd* [1984] 1 E.G.L.R. 144.

Compensation Under Section 7(2)

The Court's consideration of these issues focused instead on the role of s.7(2). This section actually appears to have been included in the 1996 Act in error, or at least without sufficient thought as to its effect. It substantially re-enacts s.50(2)(d) of the London Building Acts (Amendment) Act 1939 Act which formed part of a coherent compensation and making good regime within that legislation.

In the 1939 Act, it related only to loss or damage caused by underpinning works[13] to an adjoining owner's building within the Act's adjacent excavation provisions.[14] More modest compensation and making good arrangements (including those referred to above and now contained in s.2(5)) applied where less intrusive works were undertaken under the Act.[15]

The extension of the draconian s.50(2)(d) provisions to all works carried out under the Act, without the simultaneous repeal of these other arrangements, creates a contradiction which still has to be resolved by the courts. It is, for example, unclear whether the new provisions are intended to entirely replace these other arrangements, or to function alongside them in some way.

The Court of Appeal did not attempt to resolve this contradiction in the present case but did comment on the underlying purpose of compensation under the Act. In particular, it confirmed the often misunderstood distinction between statutory compensation for damage caused by lawful works and common law damages in tort where the works are unlawful.[16] Arden L.J. described this distinction in her judgment, and also provided some guidance on how compensation might be assessed:

> "I also accept [Europa's] submission that a right to compensation arose under section 7(2) of the 1996 Act. *Ex hypothesi*, that provision confers a right to compensation even though work is lawfully done in accordance with the 1996 Act. If that were not so, a claim would lie in common law.

[13] Underpinning or other works to strengthen or safeguard the foundations of the adjacent building.

[14] These provided a building owner with a right (and in some situations, an obligation) to carry out underpinning work to an adjoining owner's building when he undertakes deep excavations on his own land within certain distances of an adjacent building. Almost identical provisions now appear in s.6 of the 1996 Act.

[15] London Building Acts (Amendment) Act 1939, ss.45(1)(c), 46(1)(e)–(i) and 56(1)(e)(ii); 1996 Act, ss.1(7), 2(3)–(7) and 11(6).

[16] Discussed in P. Chynoweth, "Unnecessary inconvenience and compensation within the party wall legislation" in *Structural Survey* (2000), Vol.18, No.2, pp.99–104.

> Accordingly, in my judgment, if there was an easement . . . the right order [for the trial judge] to have made was that an inquiry should be directed as to the appropriate amount of compensation. The assessment of that compensation would have to take into account that Europa merely had a leasehold interest in part of 98 Farrington Road, and that, if it be the fact, it had a right as against the freeholders of 98 Farrington Road to require them to cause the soil vent pipe to be constructed on their side of the party wall to the main sewer."

Section 7(2) and Easements

The possibility of a causal relationship between the interference with an easement and the availability of compensation, referred to in the second paragraph of this extract, is of particular significance.

The trial judge had found that appointed surveyors were able to extinguish easements by their awards. The subsequent works could not, therefore, be said to be interfering with an easement which, by then, would already have ceased to exist. As the works were, therefore, entirely lawful he did not consider that the question of compensation could arise.

The Court of Appeal took a different view. It had already noted that compensation under s.7(2) was "*ex hypothesi*" only available where work was lawfully undertaken under the Act and therefore rejected the notion that compensation could not be available in the current circumstances.

However, if an easement was indeed extinguished from the moment that the surveyors published their award, this might produce results which went far beyond those contemplated by the Act. In particular, once extinguished, the adjoining owner's rights in the easement were lost forever, even if the authorised work was never undertaken, and even as against a third party.

The Court of Appeal therefore concluded that surveyors' awards were not themselves capable of extinguishing easements. They simply authorised works to the subject-matter of an easement. The easement remained effective until the moment that the works were undertaken. At that moment, the easement was extinguished and compensation became payable, under s.7(2), for the resulting losses inflicted on the adjoining owner. The Court's reasoning was explained by Arden L.J. in the following terms:

> " . . . [Europa] . . . submits that the award did not extinguish the easement. If it had so extinguished the easement, Europa could not even have sued a third party who blocked the pipe, even if Arena decided not to carry out any work on the party wall after all.

> Moreover, the award itself stated that nothing in it was to affect any easement. Contrary to the judge's judgment, section 7(2) clearly confers a right to compensation for work lawfully done . . .
>
> . . . In my judgment [Europa are] correct in [their] submission that the award made by the surveyors pursuant to the dispute which had arisen following service of Arena's party structure notice did not of itself extinguish the easement. The award merely authorised Arena to carry out the work. The easement was not extinguished until Arena blocked the pipe so that no use could be made of it by any adjoining owner of 98 Farringdon Road. In my judgment, the judge was in error on this point."

Extinguishment of Easements

It is implicit in Arden L.J.'s reasoning that the Act, if not a surveyor's award, is nevertheless capable of authorising the extinguishment of easements. In one sense, this is logical as some of the rights given to building owners within s.2(2) (including, as in this case, the right to cut off projections) are clearly incompatible with the continued existence of easements.

However, it is difficult to reconcile this interpretation with s.9 which expressly provides that nothing in the Act "shall authorise any interference with . . . easements in or relating to a party wall".[17] Arden L.J. noted that there was a "difficult and important question" about the relationship between s.9 and the right to undertake work under the Act but, as the matter had not been raised at the trial, the Court of Appeal declined to explore it further.

Despite this, the Court did consider whether s.9 referred to all forms of easement or simply to those, such as easements of support, which might be regarded as the incidents of the party wall itself. Europa had suggested that any easement in respect of the soil pipe, could not be said to "relate" to the party wall in this way, and that it must therefore fall outside s.9. Arden L.J. regarded this as an artificial distinction. An easement in respect of the soil pipe could not "be split into a number of separate easements" and was therefore included within the meaning of s.9.

This does expose an inconsistency in the totality of the court's observations on the 1996 Act. If any easement to use the soil pipe fell within s.9 then the surveyors had no authority to authorise

[17] s.9: "Nothing in this Act shall: (a) authorise any interference with an easement of light or other easements in or relating to a party wall; or (b) prejudicially affect any right of any person to preserve or restore any right or other thing in or connected with a party wall in case of the party wall being pulled down or rebuilt."

works which would interfere with it. Any such works would therefore be unlawful. This would lead to liability in damages and not, as had been suggested by Arden L.J., to an entitlement to compensation under s.7(2).

Conclusions

There was nothing remarkable about the actual decision in this case. Europa sought either damages or compensation for losses caused by an interference with an easement. Their claim failed, both at first instance and on appeal, because they had failed to adduce sufficient evidence to demonstrate the existence of the easement.

The case is of more interest for the light it sheds on the difficulties in interpreting some of the apparently contradictory provisions within the 1996 Act. In this context, the Court of Appeal made a number of observations about the way the Act would have operated if Europa had succeeded in demonstrating the existence of an easement for their soil pipe.

It concluded that the Act could legitimately authorise a permanent interference with the easement. The surveyors' award could therefore validly authorise the removal of the pipe and, at the moment of removal, the easement would be extinguished. The work would be entirely lawful and Europa's claim for damages must therefore fail. However, compensation would be properly payable to them under s.7(2) as their losses would have arisen from "work executed in pursuance" of the Act.

If correct, this analysis represents a radical departure from the practice under the London Building Acts. Although the full scope of compensation under s.7(2) has yet to be established, it seems unlikely that Parliament intended it to be used to buy out the property rights of adjoining owners. Indeed, the courts have consistently rejected the notion that the London Building Acts were capable of authorising the permanent expropriation of adjoining owners' property rights, including the permanent interference with an easement.[18] It is possible that this analysis might also have been more difficult to sustain if the Court of Appeal had

[18] See, for example: *Titterton v Conyers* (1813) 5 Taunt. 465; *Wells v Oddy* (1836) 1 M. & W. 452; *Crofts v Haldane* (1867) L.R. 2 Q.B. 194; *Re Metropolitan Building Act Ex p. McBride* (1876) 4 Ch. D 200; *Barry v Minturn* [1913] A.C. 585; *Burlington Property Co Ltd v Odeon Theatres Ltd* [1939] 1 K.B. 633; *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 All E.R. 295.

first confronted the "difficult and important question" about the effect of s.9 referred to in Arden L.J.'s judgment.

Whatever the eventual scope of s.7(2), it is submitted that the functioning of the 1996 Act is much closer to that of the London Building Acts (Amendment) Act 1939 than the Court of Appeal appears to suggest. The stated purpose of the 1996 Act was "to extend the tried and tested provisions of the London Building Acts to England and Wales"[19] and, with one or two notable exceptions, the wording of the two Acts is identical.

Like the London Building Acts, the 1996 Act clearly authorises the temporary interference with easements during construction operations.[20] However, based on the widespread understanding of equivalent provisions in these earlier Acts,[21] s.9 would seem to exclude the possibility of any works which might permanently deprive an adjoining owner of his easement.

On this basis, Arena would have had no right to remove the soil pipe without simultaneously preserving the substance of the easement. In practice, this would have required the pipe to be re-routed, as was previously the practice at common law as well as under the London Building Acts. Indeed, as has already been noted, this is now standard practice under s.2(5) of the 1996 Act. In these circumstances, the dubious possibility of buying out an easement with compensation under s.7(2) should never need to arise.

Paul Chynoweth
University of Salford

Holding Back the Tide of Negligence: *Rylands* Resurgent

Transco PLC v Stockport MBC
[2003] UKHL 61

LT Foreseeability; Insurance; Land use; Local authorities powers and duties; Rylands v Fletcher liability; Water supply

Introduction

Although enshrined in the pleader's mantra—"Negligence, Nuisance, *Rylands v Fletcher*"—the imposition of tortious liability

[19] *Hansard*, HL, Vol.568, col.1535 (January 31, 1996).
[20] Discussed in S. Bickford-Smith and C. Sydenham, *Party Walls: The New Law* (Jordans, 1997), p.104.
[21] London Building Act 1894, s.101; London Building Act 1930, s.127; London Building Acts (Amendment) Act 1939, s.54.