Case No: B2/2012/1405

Neutral Citation Number: [2011] EWCA Civ 1826
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LEEDS COUNTY COURT
(HIS HONOUR JUDGE COCKCROFT)

Royal Courts of Justice
Strand, London, WC2A 2LL
Thursday, 29th November 2012

Before:

MR JUSTICE DAVID RICHARDS

- -

C&N HOMES LIMITED

Applicant

- and -

THORPE & CO SOLICITORS

Respondent

- -

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Mr Stephen Glover (instructed by C& N Homes Limited) appeared on behalf of the **Applicant**

The **Respondent** did not appear and was not represented

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Judgment

Mr Justice David Richards:

1. This is a renewed application for permission to appeal. The appellant, C&N Homes Limited, is a builder and a residential property developer, which brought proceedings for damages for professional negligence against its former solicitors, Thorpe & Co. On 21 May 2012, HHJ Cockcroft, sitting at the Leeds County Court, dismissed the claim.
2. The alleged negligence arose in relation to a development undertaken by C&N Homes on a site in Norton, North Yorkshire, which it had purchased in or about 2003. Another developer, Persimmon Homes Limited (Persimmon), had developed adjoining land. Thorpe & Co acted as solicitors for C&N Homes on the original purchase of the site, on the sales of individuals plots, and on other related matters. The partner dealing with it was a Mr Stephen Mackinder. There was no complaint about his work on most of these matters, or in relation to previous work which he had undertaken for C&N Homes. Mr Conner, the controlling director of C&N Homes, himself in his evidence described Mr Mackinder as being extremely thorough in providing comprehensive evidence.

3. The alleged negligence relates to the ownership of a small triangle of land ("the triangle"). The route ultimately chosen by C&N Homes for the access drive to the houses to be built by it on the site encroached, or would encroach, on the triangle. It transpired before construction of the relevant part of the access drive that Persimmon was the registered proprietor of the triangle. By 2007-2008, construction of the access route had reached the point that, although not actually encroaching on the triangle, avoiding the triangle would involve C&N Homes in some considerable expenditure. Against this background, C&N Homes negotiated with Persimmon for the purchase of the triangle. Taking advantage, perfectly lawfully, of its ransom position, Persimmon was able to strike a deal for a purchase of the land of the triangle by C&N Homes at a price of £25,000. C&N Homes claimed that it was negligence on the part of Thorpe & Co which deprived it of the opportunity of acquiring the triangle from Persimmon at an early stage, either for no consideration or for a lower price than that which it ultimately had to pay. It also claimed that it suffered further losses as a result of the negligence.

4. As regards the instructions to Thorpe & Co, and the advice given by Thorpe & Co, the particulars of claim focussed principally on events in 2005, when advice as to ownership of certain pieces of land and related matters was given by from Thorpe & Co. The particulars of negligence, set out in paragraph 26 of the particulars of claim, are all expressed in terms of a failure to advise C&N Homes, either in February 2005 or at any time prior to construction of the access route, that if C&N Homes did not have title to the triangle it would not be able to secure defective title indemnity insurance in relation to it, that the triangle was in fact registered land with Persimmon as the registered proprietor, and as to other related matters.

5. It was alleged in the particulars of claim, and it was a case advanced at trial, that Thorpe & Co had been negligent in the advice which they gave in 2005. The judge dealt with that in paragraphs 42 and 43 of his judgment, identifying in paragraph 41 the alleged negligence and asking whether the solicitors had taken or had failed to

take steps in and give advice that they should have done. He held that the answer to these questions was plainly "No". He continued:

> "In 2005 the claimant already knew, if they thought about it, that they had no title to this land and could not build on it without title, but in 2005 the triangle was not within anyone's contemplation, it fell outside the proposed development. Mr Mackinder was not instructed to investigate the title to the land of which it formed part."

It was plain, the judge held, that Mr Mackinder's advice was confined to parcels of land other than the triangle.

6. I should add this point, because it becomes relevant later, that at paragraph 13, in the context of the advice given in 2005 in relation to another piece of land but relevant to the access route, Mr Mackinder had written:

> "If you want to make it part of the road you will have to buy it off [Persimmon]."

The judge continued:

> "That advice was, of course, appropriate, though hardly necessary."

And in the following paragraph the judge said:

> "Mr Conner confirmed in cross-examination that after twenty years in the construction industry he did not need to be told that when land he wished to build on was owned by someone else you acquire the right to build before proceeding any further."

7. That paragraph in the judgment is the subject of criticism in counsel's skeleton argument on this application. He submits that it does not fairly reflect the relevant part of the cross-examination. I have read the relevant part of the cross-examination, and in my judgment the finding made and the reference made by the judge in the paragraphs I have read out are a fair finding for him to make on the evidence before him.

8. On this application for permission to appeal, C&N Homes do not seek to challenge the decision of the judge as it relates to advice given in 2005. While it has criticisms of the judge's findings and decision in that respect, it will not challenge them, if permission to appeal is given.

9. A major part of the case developed at trial, and which really forms the centre of the present application, related to an exchange of correspondence in February and March 2007. At that stage, as I have earlier mentioned, the entrance to the access route had not been built. Mr Conner on behalf of C&N Homes was giving thought to the construction of the route, which would require the exercise of options to purchase

some land. He delivered or sent a letter dated 12 February 2007 to Mr Mackinder, which was very short and stated simply

> "Please, would you obtain information about the ownership of areas of land shown on the attached plans."

The attached plans show two areas of land adjacent to the likely route of the access drive, and Mr Mackinder replied by letter of 1 March 2007 as follows, so far as relevant:

> "The land you have hatched on your own plan and coloured red on the ordinance survey plan you sent me (which includes the triangle) still belongs to Persimmon Homes. It is obviously a remnant from when they developed George Cartwright Close, et cetera. This often happens, for example, they are still technically owners of the roadway. If you have not spoken to them about it please do not do so, insurance may help here."

10. C&N Homes' case, as it was developed during the trial and as it was advanced in closing to the judge, was that this was positive advice given by Mr Mackinder, and that C&N Homes was entitled to rely on it so as to build the access road over the triangle, notwithstanding that it was owned by Persimmon Homes, without dealing with Persimmon Homes but on the basis that it would be covered by defective title insurance.

11. The judge rejected this case. He did so on three grounds. First, it formed no part of the pleaded case against the solicitors, and it could not be advanced without amendment to the pleadings. He expressed the view that there could not be an amendment to the particulars of claim without an adjournment. Secondly, he considered the merits of the claim on the basis that an amendment was unnecessary. He concluded that it involved no negligence on the part of Thorpe & Co, or Mr Mackinder in particular. Thirdly, he held that, in any event, the losses which were said to have flowed were either not established or were too remote.

12. So far as the amendment point is concerned, I have already referred to and paraphrased the essential parts of the particulars of negligence. They are all based, clearly, on a failure to advise. There is no pleaded case of negligent positive advice. This is important, because a pleaded case would set out precisely what was said to be the effect of the advice and would also plead the facts relevant to the claimant's understanding of the advice and its reliance on the advice. It was, it appears, submitted by counsel for the claimant that the claimant's reliance on a positive case based on the letter of 1 March 2007 did not require amendment because it fell within the terms of the pleaded particulars. The judge rejected that, and in my judgment was clearly correct to do so.

13. Mr Glover, who appears today for the claimant as he did at the trial, has informed me that objection was not taken to questions which he put in cross-examination to

Mr Mackinder about the letter. He does not recall whether counsel for the solicitors raised in closing any objection to the case being run, notwithstanding the lack of amendment, and he does not believe that the judge put to him any questions related to it. Nonetheless, the judge decided that the case could not proceed without amendment.

14. What is clear, I believe, is that there was no express concession by the solicitors that the claimant was entitled to run a case based on an allegation of positive negligent advice. I consider, in circumstances such as this, that it would require a clear concession before the amendment point would be closed and I take the view that the judge was entitled to rule on whether an amendment was necessary. In the circumstances, if that is right, I do not consider that there is any real chance of a successful appeal.

15. I will, however, as the judge did, go on to consider his decisions that there was no negligence involved in the letter of 1 March 2007. He considered this in paragraphs 54 to 56 of his judgment:

> "54. More than five years after the event, Mr Mackinder was unable to recall why he advised as he did."

I should just interpose to say that the first Mr Mackinder knew, in the context of these proceedings, of this letter was when he read Mr Conner's witness statement dated 9 March 2012, and he actually saw the letter, he says in evidence, about two weeks before the trial. If, of course, the matter had been clearly pleaded originally, then he would have had rather more opportunity to focus on it. Continuing in paragraph 54 of the judgment:

> "He did not seek to justify it but left it to the court to determine whether it was wrong. It is vital when determining that issue, to put that letter into proper context. As at March 2007, Mr Mackinder had suddenly become aware of a problem for his clients, which was none of his own making: the redesigned roadway with planning consent infringed on the triangle. He admitted in evidence that had the trespass already incurred insurance would not avail the claimants, but there is no evidence, other than Mr Conner's witness statement, as to the stage the development had reached at that time, and more importantly there is no evidence at all that the stage the development had reached was brought to Mr Mackinder's attention at the time his advice was sought.
>
> 55. Now absent actual trespass, default insurance may indeed have proven helpful. Premature discussions with Persimmon could have invalidated

> any such cover. The advice was in cautious terms. Mr Mackinder plainly did not know whether or not such insurance would be available, still less would the claimants have believed that such cover was in place. They cannot have believed that Mr Mackinder's injunction was other than temporary, a holding device while all considered how best to extricate the claimants from a problem of their own making. I believe that the advice was received as such: this was no injunction for all time, because within the year the claimants were talking to Persimmon without further advice from Mr Mackinder. They cannot have understood from the letter that they should simply press on regardless with the development if it was not already too late for the trespass to be avoided.
>
> 56. The onus of proof is of course on the claimants to establish negligence and in my judgment they would have failed, even had I allowed these arguments to proceed, to satisfy me on a balance of probabilities that Mr Mackinder's advice in that letter was negligent advice."

This passage in the judgment is attacked, on the basis that, read in its context, the letter of 1 March 2007 can properly be read only as advising C&N Homes that it can proceed to build the access route without discussion with Persimmon or trying to acquire the relevant land and that defective title insurance would provide a solution.

16. Like the learned judge, I do not consider that it is possible to read the letter in that way. First, there is considerable doubt as to what Mr Mackinder knew when he wrote the letter as to the context of the inquiry and the answer he was giving. Mr Conner himself in his evidence could not remember exactly what prompted him to write his letter of 12 February. He certainly did not write in terms, and there is no evidence that he informed Mr Mackinder, that, depending on the answer given by Mr Mackinder, he would proceed to build the route regardless. Secondly, as the learned judge says, the letter is written in cautious terms. It is suggesting that insurance cover may help. It is not plausible to read the letter as suggesting, on the rather vague basis that insurance may help, that C&N Homes can proceed to build the route over land which it by then knew to be owned by Persimmon. I earlier referred to the judge's comments on the evidence given by Mr Conner that he knew that he could not simply build on land which he knew to be owned by someone else. Against that background, and in the context in which the letter was written, it does not in my judgment contain any advice which could be characterised as negligent.

17. For the reasons, therefore, given by the learned judge, I do not consider that there is any real prospect of successfully appealing his decision that there was no negligence involved in that letter. It is, accordingly, unnecessary to comment on the other grounds relied on in this application relating to the claimed loss and causation. Accordingly, I refuse permission to appeal.

Order: Application refused.