



Neutral Citation Number: [2022] EWHC 1109 (Ch)

Appeal Ref: CH-2021-000108

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**CHANCERY APPEALS (ChD)**

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London  
EC4A 1NL

Friday, 21<sup>st</sup> January 2022

Before:

**THE HONOURABLE MR JUSTICE FAN COURT**

B E T W E E N:

**DR EBRAHIM SOUFIANI**

Intended Appellant (the “Appellant”)

Defendant in the decision below

-and-

**MR MOHAMMED RAHMAN**

Intended Respondent (“the Respondent”)

Claimant in the decision below

**MR H SINGH** (legal consultant of **ASR Solicitors**) appeared on behalf of **the Appellant**  
**MR T TALBOT-PONSONBY** (Counsel, instructed by **DAS Law**) appeared on behalf of **the Respondent**

Hearing date: 21<sup>st</sup> January 2022

**Approved Judgment**

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**MR JUSTICE FANCOURT:**

1. This is a renewed application by Dr Ebrahim Soufiani, who was the defendant in the trial in the court below, for permission to appeal against the order made by HHJ Lethem on 23 April 2021.
2. The order was made following a two-day trial, and the outcome was that the claimant succeeded in his claim for damages for trespass or nuisance arising from activities carried out by the defendant in his garden. The garden of the defendant's house butts up against the garden of the claimant, Mr Rahman's, house.
3. The Judge awarded damages for the trespass, and ordered the defendant to carry out work to reinstate and rebuild a wall that had been removed, and to fill in voids underneath the foundations of an outbuilding at the bottom of the claimant's garden.
4. The works have not yet been done. In the course of considering the application for permission to appeal, I granted a stay of the effect of the order until after the application for permission to appeal could be fully considered, and, if granted, the hearing of the appeal.
5. On 8 November 2021, I refused permission to appeal on the papers. The sealed order is dated 24 November 2021. In my order, I identified that there were, essentially, two grounds of appeal that were pursued in the rather narrative form of the amended grounds of appeal.
6. The first related to the Judge's refusal on the first day of trial to grant relief against sanctions in relation to the witness statement made by the defendant. The second ground of appeal related to circumstances in which the Judge declined, in the course of closing submissions, to take into account particular documents that were handed to the Judge by counsel for the defendant, together with, or forming part of, the closing submissions in the trial.
7. The application has been pursued, and I granted permission today to Mr Hari Singh, a former solicitor, to represent the interests of Dr Soufiani in renewing the application for permission to appeal.
8. Mr Singh addressed, again, the two grounds that I had identified in refusing permission to appeal. It is convenient to deal, first, with what he says about the second ground. He says, in short, that the Judge was wrong to refuse to take account of documents that the appellant's counsel at the trial sought to give the Judge in the course of closing submissions.
9. These, he makes quite clear, were documents that had been sent by Mr Singh, acting on behalf of the appellant, to the single joint expert, before the trial had taken place. They were:
  - 1) 13 photographs, and one video relating to the scene of the dispute.
  - 2) A two-page letter, written by a Dr Noor, that the Court had previously, at a case management conference, considered might be material to the single joint expert's considerations.

- 3) A letter from the London Borough of Redbridge in 2019, making certain comments on the condition of the outbuilding in the respondent's garden.
  - 4) The email from Mr Singh to the single joint expert, sending the other documents.
10. The Judge declined to engage with these further documents that were being provided to him for the first time in the course of closing submissions. The Judge made the point that if they gave rise to any argument about the opinions expressed by the single joint expert relating to the building or the works that were recommended, or any other aspect of the trial, they were matters that should have been put to the single joint expert in questions that the parties had the opportunity to ask the single joint expert, arising out of his report; and that it would not be right for these documents to be introduced at a late stage in the trial, by way of, effectively, further submissions.
  11. In my judgment, the Judge was perfectly entitled to reach the conclusion that he did. As Mr Singh has now confirmed, all these documents were, in fact, sent to the single joint expert. It was also confirmed that the single joint expert annexed or included the documents as part of his report.
  12. The real complaint of Dr Soufiani is that these annexures did not find their way into the trial bundle. However, even if they had, there was very little that the appellant could have made of them at that stage in the trial. They were documents that had been seen by the single joint expert, and, therefore, presumably, considered by the expert when preparing his report.
  13. The expert did not give oral evidence at the trial; he only gave evidence in writing. There was, therefore, the opportunity to put questions to the expert following his report, for example, "Why have you recommended the works that you have, without taking account of the need, first, to deal with the structural instability of the building?".
  14. However, that opportunity was not taken. It was clearly too late to take that opportunity by the time of the trial because the expert was not there giving evidence. The Judge was entitled to form the view that he would be unable to make anything of these documents, by way of argument and submissions, without them having been raised as questions of the single joint expert.
  15. The first ground of appeal is that the Judge was wrong to refuse relief against sanctions in relation to the appellant's own witness statement. I dealt with the circumstances of this, and my conclusion was that the Judge was perfectly entitled, as a question of case management, to reach the decision that he did, in my reasons in writing for refusing permission to appeal on the papers.
  16. Mr Singh, today, re-emphasises on behalf of the appellant the point that the majority of the witness statement was only served one day late, and that the Judge did not look at the witness statement before reaching his decision on whether relief against sanctions should be granted.
  17. As to the witness statement being only one day late, that is partly true, and partly untrue. It is partly untrue because the annexure or appendix to the witness statement was not provided until months later. Some of the appendices to the witness statement are what have been referred to as "important documents", including the London Borough of Redbridge document. Accordingly, it cannot be said that the appendix was of no consequence.

18. The Judge took the view that the witness statement had not been properly served until about three or four months later, when the appendix was also served. He was entitled to reach that conclusion.
19. He was also entitled to take into account the fact that, despite promptings and recognition at an earlier case management conference that an application for relief against sanctions needed to be made, that application was not made until a few days only before the trial date. The consequence of that was that the Judge had to spend the first half day of the two-day trial dealing with an application for relief against sanctions.
20. As I indicated in my written reasons, the Judge did not, as perhaps he should have done, read the witness statement to see what it contained and how material the contents were, and how prejudicial, therefore, the inability to rely on that evidence would be; but the Judge assumed in the appellant's favour that substantial prejudice would be caused to the appellant as a result of refusing relief against sanctions.
21. For all the reasons that I have previously given, the Judge was perfectly entitled, as a matter of his discretion and case management, to refuse to grant relief against sanctions, and there is no prospect at all of that decision being overturned on an appeal.
22. I come then to the final ground advanced by Mr Singh this morning, and that is that, as a result of the Judge not having looked at some of the documents that I have just referred to, in particular a letter from the London Borough of Redbridge, which expresses concern about the structure of the outbuilding, the Judge proceeded to make an order which required highly dangerous operations to be carried out, and that might even be unlawful.
23. The letter from the London Borough of Redbridge, however, said only this:

*“As you are no doubt aware, the collapse of the retaining wall between the two properties is resulting in the erosion of the soil, and thus, destabilising the outbuilding. This is further exacerbated by the poor quality of the structure, which does not appear to have adequate foundations. It is therefore considered to be in a dangerous condition, and access to its vicinity should be avoided”.*
24. I do not consider that that paragraph would have told the Judge anything that he did not already know, as a result of his conduct of the trial and reading the expert report of Mr Fetto. The warning about avoiding access to the vicinity of the building was clearly not meant to preclude the attendance by engineers and builders in order to remedy the problem that had arisen.
25. In the order made by Judge Lethem, an order is specifically made that Mr Fetto must carry out a design and check of the existing building, including, “exposing existing foundations, checking the corner bonding of the masonry, checking the existence and integrity of holding straps to the roof joists, before works are to be carried out”. The works specified include the “refilling of all outbuilding foundations and voids, with suitable well-consolidated and compacted materials”. The description of the works to be carried out in the order, comes, I am told, from the expert report of Mr Phetto.

26. It seems to me, therefore, that the argument that the Judge was wrong to order the works that he did because of the danger arising from the condition of the outbuilding, cannot succeed on an appeal.
27. The reason is because the issue was addressed by the single joint expert, and the works that the Judge ordered to be carried out include the necessary preliminary steps to check the stability of the building and associated structures. In addition, the specification of the works to be carried out include works that are necessary to undo the damage that had been done to the foundations of that building.
28. If there were any doubt about the lawfulness of the works to be carried out, that would be a matter that should properly be raised with Building Control at the Local Council.
29. If, for any reason, it is apparent that some variation of the specification of the works is appropriate, that is a matter that can be dealt with by an application back to the Court at first instance, to vary the terms of the order in the light of new circumstances such as a direction from the Council.
30. That must implicitly be so in circumstances where the Court has made an order that various works are to be carried out. Until the works have been carried out, the Court retains supervisory jurisdiction in connection with the injunctive relief that was granted.
31. It is, in my judgment, wholly inappropriate to seek to address that issue by way of an appeal against the terms of the order that was made consistently with the terms of the single joint expert's report. Any such appeal would have no prospect of success.
32. For these reasons, I consider that there is no prospect that any of the grounds of appeal addressed in the amended grounds of appeal would succeed on appeal, and I therefore, refuse permission to appeal.

Transcript of a recording by Ubiquis  
291-299 Borough High Street, London SE1 1JG  
Tel: 020 7269 0370  
legal@ubiquis.com

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This transcript has been approved by the judge.