

CA on appeal from TCC Liverpool (His Honour Judge Mackay) before Sedley LJ; Sir Murray Stuart. 18th June 2001

1. **LORD JUSTICE SEDLEY:** Sir Murray Stuart-Smith will give the first judgment.
2. **SIR MURRAY STUART-SMITH:** This is an appeal from the judgment of His Honour Judge MacKay, sitting in the Technology & Construction Court in Liverpool, given on 11th May 2000. The claimant is a builder. He entered into a contract with the defendant to carry out certain building works at the latter's house at Lathom Close, Ashbrow, in Lancashire. Mr Blyth had instructed an architectural technician, Mr Ashton Gray, to prepare some plans for the works. Tenders had been invited based on the plans and the claimant's tender in £33,225 was accepted.
3. The work took much longer than it should have done, being carried out between April and November 1996. At the conclusion of the work the claimant claimed about £9,000 in respect of his unpaid bill and claims for extra work which he had done. The defendant refused to pay, he claimed that the work had been done badly and that, far from paying money, he was owed money by the claimant. In the result the judge made the following order:
 - "1. *The claimant do pay to the Defendant the sum of £9,046.50.*
 2. *The claimant do pay to the Defendant the additional sum of £500.00 representing interest on the damages sum pursuant to the provisions of CPR Part 36.21(2).*
 3. *The Claimant do pay to the Defendant the additional sum of £500.00 representing interest on costs pursuant to the provisions of CPR Part 36.21(3).*
 4. *The Claimant do pay the Defendant's costs of the claim and the counterclaim, such costs to be assessed by way of detailed assessment."*
4. Judge MacKay refused the claimant's application for permission to appeal but that was granted by Roch LJ on paper, permission to appeal being confined to three grounds, two of which I shall deal with in this matter, the third relating to costs.
5. The way in which the sum was awarded to the defendant was made up of a number of complaints and the judge's finding in relation to them. The two with which we are concerned were set out in the judgment as A and B. The first related to a turning circle for which the judge said the claimant was in breach of contract and he awarded the defendant a sum of £2,400. The second related to the layout of the kitchen for which the judge gave the defendant the sum of £7,500 which he said was the diminution in the value of the property due to the claimant's breach of contract. Both those items are the subject of this appeal. The remaining complaints which the judge found established came to just over £5,000 and so in effect he found the counterclaim established for £15,522 and thereafter deducting what was due to the claimant he arrived at his figure of £9,046.
6. The first ground of appeal is as follows. The learned judge, having ruled that the defendant could not rely on evidence of diminution in value in relation to the extension having been built slightly out of square, wrongly permitted the defendant to give oral evidence on that issue, and thereafter wrongly assessed the defendant's claim for damages in respect of that issue on the basis of such diminution in value.
7. The problem arose because the original kitchen was not at right-angles to the house. One of the alterations involved in the contract was the extension of the kitchen effectively extending it both on the west side and on the south side. It is clear that because of the original kitchen not being at right angles the extension work also was likely to have corners which were not at right angles.
8. It is convenient to refer at this point to the report produced by the two expert witnesses; but I must explain how that report came about. It was prepared by the builder's expert, Mr Gilkes, and said by him to have been agreed by the defendant's expert, Mr Monkhouse. Mr Monkhouse, however, said that he had never agreed that report. That issue came as a matter in dispute for trial before Judge Urquhart and he, having heard evidence, decided that the defendant's expert was wrong and that he had in fact agreed. So from the time of that order and decision which was made on 21st February 2000 the report had the status of an agreed report. Unfortunately Judge MacKay does not seem to have

appreciated that, so much so that he ordered a supplementary report and permitted the experts to depart from it. In so doing in my judgment he fell into error.

9. I turn then to what is said by the experts in the report on this issue. It is as follows (page 42 of the bundle): *"The original kitchen which formed an integral part of, and around which the extension was formed, was already built out of square and not parallel to the original wall of the main house.*

This was not highlighted on the drawings.

Only on a very close scrutiny and when subjected to very fine detailed checking by the most precise measurement is it discovered drawings show a difference of 100/110mm (4"), when the width of the extension measured across the front, is compared with the width measured across the back.

Again only with the aid of a protractor is it possible to determine the south west corner of the extension is drawn at right angles and the south east corner (where the wall abuts the original gable), is not at right angles.

It is therefore easy now to realise the dilemma faced by the contractor, and it is understandable for him to have taken his measurements when marking out on site from the walls of the original kitchen.

Had the extension been built in accordance with the drawings the south west corner would have (as the Architect intended) a right angle but the south east corner would not. As surveyors we can readily imagine and understand how this mistake arose and believe it was probably only discovered when construction was well advanced.

To rectify it then would only transfer the problem to another corner, but ideally some consultation ought to have been undertaken with Mr Blyth and some warning given of the difficulties that would invariably be encountered by those engaged to fit the kitchen units and lay floor covering."

10. It is apparent, therefore, that if the building had been constructed in accordance with the drawings the corner which would have been at slightly less than a right angle would have been the south-west and not the south-east corner. To all intents and purposes this makes no difference to the value of the house, or any amount that should be awarded by way of general damages. In my judgment Mr Creaner's complaint in relation to ground one is made out. The judge should not have gone behind the agreed experts' report on this point. He should not, therefore, have allowed evidence of diminution in value to be given. In truth, for the reasons explained by the expert, there was no such diminution. Indeed Mr Boyd frankly accepted that if the judge ought to have accepted the experts' report he could not sustain the judge's decision.
11. It is unnecessary to deal with Mr Creaner's other points in relation to this; namely, that the matter was only raised at the last moment and not properly pleaded. That is the substance of the matter and in my judgment it ought to have resulted in the judge making no award of damages either by way of general damages or by way of diminution in value.
12. Ground three is in relation to what is called the notional turning area. As well as extending the kitchen, as I have indicated, the works involved were demolition of the existing garage and reconstruction of a building more or less the same size and more or less the same site though slightly further south; but the garage doors were reorientated so that they were on the east elevation instead of as previously on the southern elevation. The house itself is unhappily sited on the bend of the road and so it is very important for cars to come out forwards and not emerge backwards for the obvious danger that that would provide. Plan three provides a notional turning area. This meant that a car parked in the northern of the two garages would back out, reverse to the north, and then drive out down the drive. Unfortunately what the plans did not provide was for the re-grading of the driveway to accommodate the difference in levels between the garage and the house, and the builder had not provided for that in his tender. Again one can refer to the experts' report. Although their comments were agreed they were not agreed on the final solution. What they said was this (page 43): *"Plaintiff states the levels and general topography dictated the level of the garage floor, the variance between the old and new levels is only in the order of 3". Architectural drawings show a difference of 0.53 metres – 1'9" between the level at the south west corner of the garage and the ground level in front of the kitchen.*

Consequently there is a significant height difference over a relatively short distance of 6.8 metres 22'6" which would have necessitated a significant angle of slope/fall towards the side wall of the kitchen.

In any event the turning area on the drawings is shown as notional.

Formation of a surfaced turning area would involve a significant amount of hard surface sloping down towards the house and invariably would encourage surface water to run towards the property unless a channel gully was formed which was not shown on the drawings.

As surveyors we were unable to agree as both unaware of what was agreed at the time on site.

The current situation as now exists does result in a more difficult manoeuvring operation but not impossible."

13. The claimant's evidence was that he discussed with the defendant what should be done, and it was agreed that a retaining wall should be constructed which accommodated the difference in the level, and a patio made outside the kitchen extending about 3 or 4 feet from the wall of the kitchen, that being at a lower level than the drive. The retaining wall then turned round in a curve and ran in an east-west direction to the north end of the garage. Behind this wall was also built a small square walled area round an existing maple tree. The effect of those works was that it was impossible to provide a turning area.

14. The learned judge in his judgment dealt with this matter in this way (page 5): *"The plan shows a notional turning circle but it does not show any gradient, it does not provide any detail. The point it taken by the builder, "well, the defendant had an idea of building a wall across for security so that shows that he wasn't thinking about the turning circle.' That may well be the case in the sense that the defendant had an idea of building a wall which would have eaten substantially into the turning circle, but I am satisfied that at the beginning of these negotiations and discussions with the builder, and at the end of these negotiations and discussions with the builder when the job was near completion the defendant wanted a turning circle. I am satisfied that he wanted a turning circle, and I am satisfied he did not get one, or one which was safe and secure. I was impressed by the defendant when he said that at the end of the contract the builder was adamant that he would not grade this driveway, and really the defendant was faced with a 'take it or leave it' situation, and so that the defendant said 'That is why I agreed to the patio being built and a little wall and the coping stones and the rest.' He was trying to secure some sort of frontage to his house and some sort of stability for his driveway which would otherwise be open and crumbly, in the absence of what he thought would happen and which is reflected on the plans, namely that there would be a graded area where cars and vehicles could turn round."*

15. The defendant's evidence on this matter is to be found in the proceedings on 10th May 2000 (pages 3 and 4) and is as follows:

"Q. You've also said in relation to your turning circle nothing was really discussed between you, is that right? –

A. Well, no, that's not right. You have to understand that by the time we got to the part with the turning circle, Mr Stringfellow had already been on the site for six or seven months, and we were very keen to get him off the site but when we got to talking about how he was going to finish off the drive he wasn't going to do any more work on grading the drive and I said to him that he couldn't leave the drive as it was because there was a fall down to the level outside the house and you would have ended up... Well, as people backed their cars up there it would have crumbled and it would have got worse, so his solution to that was to use some of the stone that he already had on site to put in a retaining wall, and when I pointed out to him that you could still back up to it and the car could fall over the retaining wall, he built the retaining wall higher and put these coping stones round it so that the car would bump into that before it fell over or bumped into the house.

Q. His evidence was that at a time when the work could have still been done as per the contract you came to him unprompted, as it were, and said to him you wanted a retaining wall built. You heard that evidence? –

A. Yes, I heard the evidence.

Q. Is that accurate? –

A. No, it's not accurate. It's incorrect.

JUDGE MACKAY: *So this idea wasn't your idea? – A. No, it was not my idea.*

Q. It was his idea, and you say you accepted it as it were because you wanted something doing? –

A. I accepted it because he wasn't going to do anything else. He wasn't going to bring any... He would have to have brought a machine onto the site to sort out the grading and he wasn't about to do that.

Q. Do you reckon that he could have graded the area, even though the garage was a bit higher than originally thought of? –

A. It could have been graded but it exacerbated the problem which was already there.”

16. It seems to me that the correct analysis is this. Although the plans refer to a turning area which is described as notional, no provision was made in the plans, and therefore in the contract, for grading the ground between the garage and the house. As earth moving machinery would have been required and the claimant was not willing to do that, presumably without being paid for it. That the defendant did not want to do. Also because the builder had been on the site for very much longer than expected, he wanted him off the site.
17. The solution seems to have been that suggested to the defendant by the claimant and the defendant must, in my judgment, have assented to it, namely, to build the retaining wall as I have described. That had the advantage of solving the drainage problem; but it meant that there could be no turning area. It seems to me that the defendant must have agreed to that, even though he did so reluctantly because he was on the site and he clearly would not have permitted the claimant to do that if it had not been agreed. As Mr Creaner points out it has never been alleged that the claimant was in breach of contract in constructing the retaining wall and the patio and it must, therefore, have been something which was agreed albeit reluctantly.
18. In those circumstances it seems to me that there was a variation of the contract necessitated by the inadequate specification in the drawings; therefore I would allow the appeal on that point as well.
19. The result is that the counterclaim is reduced by £9,900. This means that instead of there being a balance in favour of the defendant of £9,046.50 there is a balance in favour of the claimant of £853.50.
20. The appeal in relation to the question of costs will be determined when we have heard further argument on the point.
21. **LORD JUSTICE SEDLEY:** I agree. I add only my appreciation of the economy and realism with which both counsel have addressed us today and of the non-confrontational approach which each of them has taken to his task.

(Costs argument followed)

22. **LORD JUSTICE SEDLEY:** Sir Murray Stuart-Smith will add the ancillary matters.
23. **SIR MURRAY STUART-SMITH:** As a result of our judgment on ground three, the turning circle point, it now transpires that the claimant is entitled to an extra £390 for the cost of building the retaining wall and the patio. That will have to be added to the figure of £853.50, making a total of £1,243.50. So effectively the judge's order will be set aside and judgment will be entered for the claimant for £1,243.50.
24. That leaves the question of costs. Under the principles laid down in 1958 in the leading case of **Hanak v Green** [1958] 2 QB at 9 where matters arise out of the same transaction and it is unfair for one party to insist on full payment without taking into account the claims of the other side, what is normally done in these cases is for a judgment to be given for the balance. In **Hanak v Green** it was a modest balance and in this case also, it is a relatively modest balance compared with the amounts of the claim and counterclaim. Nevertheless it is a balance in favour of the claimant and he is entitled to have the counterclaim dismissed on the basis that it does not exceed the amount of his claim by £1,243. In the ordinary way, therefore, unless there were other factors to be taken into account the claimant would be entitled to judgment for that sum, the costs on the claim and the counterclaim be dismissed with costs.
25. Mr Boyd has sought to rely upon the fact that in August of 1999 a Part 36 offer was made by the defendant that in effect both sides should walk away, neither paying the other anything, and there should be no order for costs. He says that that was nearly right; it was £1,243 wrong and it did not

meet the judgment of this court in this case. Moreover the claimant's solicitors said that they would accept £2,500 in settlement for the claim. They were not right either; they were £1,200 out.

26. It seems to me that we should approach this matter of costs regardless of the Part 36 offers, neither of which were right, both of which ought to have led to a sensible agreement in this case but unfortunately neither of them did. Disregarding, therefore, any question of Part 36 offers ought some other order to be made more favourable for the defendant than the one which I have said would be the ordinary order? Mr Boyd says that a good deal of the time of the court was taken up in dealing with matters of the counterclaim upon which the defendant succeeded. That is no doubt right, and I think that to some extent that should be reflected in the order for costs. In my judgment the proper order here is that the claimant has the costs of the claim and the counterclaim limited to 80 per cent of those costs.

27. **LORD JUSTICE SEDLEY:** I agree.

(Appeal allowed; four-fifths of the claimant's costs below to be paid by the defendant; costs in the appeal awarded to the appellant; assessment of costs of both parties' expenses to be borne by the appellant).

MR P CREANER (instructed by Messrs Kevills, Chorley) appeared on behalf of the Appellant

MR J BOYD (instructed by Messrs Bannister Preston, Manchester M44 6FE) appeared on behalf of the Respondent