

CA : Application to appeal from Epsom County Court (His Honour Judge Hill) before Ward LJ. 25th March 1999.

JUDGMENT : LORD JUSTICE WARD:

1. This matter comes before me as the single Lord Justice for leave to appeal the order of His Honour Judge Howell of 21 December 1998 when he was dealing with a dispute, bitter as ever, between neighbours. That the plaintiff is a solicitor and the defendant is a banker, serve only to cause dismay that this dispute should be continued.
2. The judge gave judgment for the plaintiff for damages limited to £60. He refused to grant a declaration that the defendants enjoyed no right of entry onto the plaintiff's land, despite having found that fact. He ordered the defendants to pay the plaintiff's costs up to 31 May and the defendants' costs were to be paid by the plaintiff thereafter.
3. The application is to appeal against the order, in so far as it dismissed the plaintiff's claim, that the defendants had no easement of drainage of sewage effluent over the plaintiff's land; secondly, to appeal the refusal to make the declaration; thirdly, as to costs.
4. As to the drainage question, Mr Fancourt, for whose submissions and especially for whose skeleton argument I am indebted, submits that the judge was not entitled to find in the defendant's favour, applying the rule in **Wheeldon v Burrows** (1879) 12 Ch D 31, (a) because that was not pleaded, nor did it form any part of the defendant's case in the court below; (b) because the facts simply did not support the finding; and (c) because the plaintiff was denied the opportunity to assert that a discharge of sewage effluent in 1946 would have amounted to an illegality in the absence of a licence from the water company to permit that discharge. It would have been contrary, submits Mr Fancourt, to the Rivers Pollution Prevention Act 1876. He complains that he had no opportunity to advance that case because he had no warning that it would be made.
5. Mr Fancourt submits, in respect of the declaration, that the judge, in exercising his discretion and refusing to make a declaration having found the facts which would otherwise have justified it, was irrational. He would attack the costs order on the basis that if he gets home on the two matters about which he complains in this court, the judge would have been bound to come to a different conclusion as to the costs.
6. In my judgment, the application in respect of the declaration is a difficult one to advance. Costs, as always, are another matter in the judge's discretion, but I see some force in the submissions advanced on the **Wheeldon v Burrows** point. At the same time my sympathies are much allied with the view of Sir Anthony McCowan who refused leave for the pithy reasons that the judge did not err in law, that he was entitled to draw the inferences he did and that his exercise of discretion cannot be said to be plainly wrong. He did not however have the benefit of Mr Fancourt's written skeleton argument, nor of his submissions. That persuades me that the appropriate course to take in this case is to adjourn this application for leave, to be heard inter partes with the appeal to follow. The time estimate is for half a day. It should be heard by a two-man court of which at least one member should be a Lord Justice with Chancery experience.
7. I add only this footnote. These being intelligent people who continue to live together as neighbours, there is misery ahead. There is very little of **real substance** in this appeal. There is much at stake in terms of amour propre, and perhaps a little amount of the costs and that is perhaps ironic. I would urge these parties to seek the help of this court's **ADR** service in order to explore whether a compromise would not only enable this litigation to be killed off sooner rather than later, but that some sense of compromise might bring a greater sense of happiness and peace in the respective homes of neighbours who continue to live together and should do so with civility rather than continuing acrimony. That may be a vain hope.

Order: Application adjourned. Inter partes appeal to follow. Two LJs, one with Chancery experience. **ADR** if so advised. Costs in the appeal.

MR T FANCOURT (Instructed by Messrs Farrer & Co, London, WC2A 3LH) appeared on behalf of the Applicant.
The Respondents did not attend and were not represented