Case No: B2/2012/2465

Neutral Citation Number: [2014] EWCA Civ 99

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CANTERBURY COUNTY COURT
His Honour Judge Simpkiss
Case Number 9DA02088

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 14th February 2014

Before:

LORD JUSTICE MOORE-BICK
LORD JUSTICE RIMER
and
LORD JUSTICE VOS

- -

Between:

	KAREN DONOVAN **NIGEL DONOVAN**	**Appellants**
	- and -	
	ALI ASHGAR RANA **MOHAMMED BIBI ALI**	**Respondents**

- -

(Transcript of the Handed Down Judgment of
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Mr Nicholas Isaac (appearing under the Bar's Direct Access Scheme) for the Appellants
Mr Peter Fox (appearing under the Bar's Direct Access Scheme) for the Respondents

- -

Judgment**LORD JUSTICE VOS:**

Introduction

1. The Claimants and the Defendants are now the owners of adjoining properties in Nickleby Road, Gravesend, Kent which is accepted to be a suburban residential area. Mrs Karen Donovan (born Purdell), the first Claimant and the first Appellant (whom I shall call

"Mrs Donovan"), sold the plot of land adjoining her property at 35 Nickleby Road ("No 35") as a building plot with an express right of way over the "Blue Land" that formed part of No 35. The Blue Land was a small plot that separated the building plot from Nickleby Road. The Defendants ("Mr and Mrs Rana") are the successors in title to the original purchasers of the building plot, and have now built a new house called "Shalimar", Nickleby Road upon it (which I shall nonetheless refer to in this judgment as the "building plot").

2. The question in this case is whether Mrs Donovan (and the second Claimant, her husband, Mr Nigel Donovan) were entitled to damages as a result of Mr and Mrs Rana having allowed their workmen to dig up the Blue Land to connect the normal utilities to the building plot. It appears that, without Mr and Mrs Donovan's express permission, Mr and Mrs Rana have connected their drainage, water, gas, electricity and telephone to the mains services a few metres away in Nickleby Road. Mrs Donovan originally claimed an injunction, but has now limited her claim to damages.

3. HH Judge Simpkiss dismissed Mr and Mrs Donovan's claim on the basis that it was the common intention of the parties to the original transfer of the building plot that it would be used to build a modern dwelling-house or a "*standard property in a busy residential area*" "*which complied with all local authority requirements*", where such properties have "*modern facilities connected up to the street*". He inferred that the intention also was that the building plot should have connections to the utilities, so that there was the "*implication of a right to connect through the [Blue Land] following on from the principles set out by [Nourse LJ] in Stafford v. Lee [(1992) 65 P. & C.R. 172]*". The judge held that Mr and Mrs Donovan's argument that there was no express right of access was "*putting the cart before the horse*", because once one had established a common intention to install utility connections, it followed that the "*rights of access that have already been granted can be used for the purposes of putting in those connections*".

4. Mr Nicholas Isaac, counsel for the Appellants, challenged the judge's conclusions on essentially three grounds. First, he submitted that, since the transfer expressly excluded any further rights of access, he was wrong to imply an easement that included such further rights. Secondly, he said that, whilst it was common ground that the building plot was sold with the common intention that a house would be built on it, the judge was wrong to infer the further intention that the house would be connected to all normal utilities; such an inference was neither pleaded nor proved. Thirdly, Mr Isaac submitted that the judge was wrong to find an implied grant of easements that far exceeded what was necessary to give effect to the common intention of building a house, contrary to Stafford v. Lee supra.

5. For reasons that will appear, I have concluded that the judge was right, and that the appeal should be dismissed.

Background facts

6. In April 2004, Mrs Donovan sold the building plot with the benefit of outline planning permission for a single dwelling-house at an auction arranged by Clive Emson for £147,000. Mr Nicholas Haynes ("Mr Haynes") was the buyer. The advertisement for the auction referred to the building plot as "*a super individual building plot situated in a pleasant residential area in the sought after area of Chalk, where building plots are extremely rare*". The auction particulars included extensive general and special conditions. For present purposes, it is sufficient to say that the special conditions included provisions in similar terms to those that I shall shortly refer to in the subsequent transfer (the "Transfer"), and further provisions saying that: (a) the parties acknowledged that the agreement incorporated all terms that the parties had expressly agreed, (b) the transferee would not without the written consent of the transferor use the building plot for the purpose of any profession, trade, business or manufacture or for any purpose other than as a single private dwelling-house, and (c) the transferee would lay on the Blue Land a tarmac or such other surface as might reasonably be requested by the transferor before occupying the new dwelling-house on the building plot.

7. In May 2004, the building plot was transferred to Mr Haynes. The Transfer included the following express additional provisions:-

   i) Under the heading "*Rights granted for the benefit of the Property [the Building Plot]*":-

      "*the right for the transferee and her successors in Title, the owners and occupiers for the time being of the property and persons authorised by her or them at all times by day or by night to pass and re-pass with or without motor vehicles to or from the property over and along the land hatched blue on the plan [the Blue Land] (being part of the transferor's retained land) for all purposes connected with the use and enjoyment of the property but not for any other purpose ...*".

   ii) Under the heading "*Rights reserved for the benefit of other land*":-

      "*Save for any rights of way or access expressly referred to in the Special Conditions of Sale no rights of way or access for the benefit of the property over the transferor's retained land ... shall be deemed to be expressly implied granted or reserved*".

   iii) Under the heading "The Transferor covenants with the Transferee as follows":-

      "*(a) to erect within one year from the date hereof, upon the property, the dwelling house to the satisfaction of the Local Authority.*

...

The transferee and its successors in Title the owners for the time being of the property shall not be entitled to any right of access or light or air or other easements or rights which would restrict or interfere with the future use of the sellers retained land for building or any other purpose".

8. It is suggested that there are a number of obvious errors in these passages, including the inclusion of paragraph (a) quoted above under the heading "*the Transferor covenants with the Transferee as follows*", and the use of the words "*expressly implied*" in the second quotation above. Mr Isaac submitted, and I agree, that it was obvious that the words "*expressly implied*" should be read as meaning "*expressly or impliedly*". The inappropriate heading seems to me to be a matter of no consequence.

9. In September 2004, Mr Haynes obtained detailed planning permission in respect of the building plot.

10. After Mr Haynes went bankrupt, Mr and Mrs Rana bought the building plot in September 2007 from Mr Haynes's mortgagee.

11. On 1st April 2009, Mrs Donovan issued a Claim Form seeking an injunction "*to halt works trespassing land owned by me, restoration of land plus costs*".

12. On 18th October 2011, Mr and Mrs Rana filed an amended Defence relying on the allegedly self-evident intentions of the parties giving rise to an easement of necessity for laying services through the Blue Land, and both an "*inferred*" and an "*implied*" easement of necessity.

13. On 11th September 2012, after a 2-day trial, HH Judge Simpkiss dismissed the Appellants' claim, and ordered them to pay the Defendants' costs.

14. Lewison LJ refused permission to appeal on paper, but Rimer LJ subsequently granted the Appellants permission to appeal.

<u>Do the express provisions of the Transfer exclude the implied easement for which the judge held?</u>

15. Mr Isaac submitted that the express rights granted to the transferee did not include a right to dig up the Blue Land so as to lay utility connections, nor to maintain them. In this submission, he is plainly right as the judge acknowledged. All that is expressly

granted is a right of way over the Blue Land "*for all purposes connected with the use and enjoyment of the property but not for any other purpose*". Mr Isaac then submitted that any additional easement is excluded by the provision saying that "*no rights of way or access ... shall be deemed to be expressly [or impliedly] granted or reserved*", and by the provision saying that the transferee: "*shall not be entitled to any right of access or light or air or other easements or rights which would restrict or interfere with the future use of the sellers retained land for building or any other purpose*". He criticises the judge's reasoning by submitting that the point cannot be answered by saying that the Appellants had put the cart before the horse. If the express provisions negate the right contended for, no inconsistent term can be implied.

16. If Mr Isaac were right in this last submission, his argument would, as it seems to me, be irresistible, but for my part I do not think he is. The transferee was granted an express right of way over the Blue Land "*<u>for all purposes connected with the use and enjoyment of the property</u> but not for any other purpose*" (emphasis added). In my judgment, one such purpose would be the laying of connections to utilities. In these circumstances, if there were an easement of necessity allowing such connections to be laid or maintained, a right of way to facilitate it would already exist on the Blue Land. Mr Isaac did not place any great reliance on the difference between "*rights of way or access*" referred to in the first inhibition in the Transfer and the simple "*right ... to pass and re-pass ... over and along the [Blue Land]*" contained in the express grant. In other words, he accepted that, if, as I think is the case, the express right of way is granted for all purposes including the installation and maintenance of utility connections (if such are otherwise permitted), the absence of a reference to "*access*" is not fatal to Mr and Mrs Rana's case. Though Mr and Mrs Rana needed a right to access the Blue Land in order to install the utility connections, the express right of way was sufficient if exercised in a way that did not obstruct the Appellants' reasonable enjoyment of the Blue Land.

17. The two inhibitions that I have set out above, in my judgment, concern, in the first case, the implication of <u>additional</u> rights of way or rights of access over and above what has been expressly granted, and, in the second case, easements that would restrict or interfere with the transferor's future use of No 35 for building or any other purpose. The proposed easement allowing the installation and maintenance of utility connections does not violate these provisions. The express right of way in the grant in the Transfer is adequate for the purpose of the proposed easement, if it is otherwise permitted, as I have already said. No additional right of way or access is required. And the inhibition on all other easements only applies insofar as they would restrict or interfere with the Appellants' future use of No 35 for building or other purposes. The only future use that Mr Isaac could think of that might be interfered with was the installation of a septic tank or an underground oil tank on the Blue Land. Such usages seem far-fetched to me, since the Blue Land was required to be covered in tarmac, no doubt so that it could be used by both the Appellants and the occupiers of the building plot as an access-way. But even if such usages were possible, they would not be affected by the installation and maintenance of utility connections serving the building plot.

18. In my judgment, the judge was right to hold that the express provisions of the Transfer

did not exclude the implied easement which he held to exist.

Was the judge wrong to imply an easement permitting the transferee to connect to the utilities (and presumably maintain the connections)?

19. The appellants' second and third points are closely connected and can be conveniently dealt with together. It is first necessary to set out some of the legal background, which has not been a matter of contention before us.

20. In Pwllbach Colliery v. Woodman [1915] A.C. 634, the House of Lords considered whether the appellants who held a mining sub-lease could justify committing a nuisance. The nuisance in question was to allow coal dust to fall on the land of the appellants' neighbouring lessee, a butcher. The appellants claimed to be justified in committing this nuisance because they had been granted the right to carry on the trade of miners (amongst other trades), and because the jury had found that they were carrying on their operations in a reasonable manner and in accordance with the usual practice in the neighbourhood. The House held that the nuisance could not be so justified, although their Lordships gave differing reasons for that outcome.

21. Earl Loreburn held simply that the under-lease did not permit anyone to commit a nuisance. Lord Atkinson said that he thought the fatal defect in the appellants' case was that, despite the jury's finding, the operations could have been carried out without causing the nuisance. He dealt with the authorities only because it was so resolutely submitted that the appellants did not have to show that the operations causing the nuisance were necessary for the enjoyment of their rights in order to avoid liability. The authorities that he cited concerned the usage of rights in a way that was indeed necessary for the enjoyment of the right or privilege granted. In that context, Lord Atkinson concluded at page 643: "*[f]rom these authorities it is, I think, clear that what must be implied is, not a grant of what is convenient, or what is usual, or what is common in the district, or what is simply reasonable, but what is necessary for the use and enjoyment, in the way contemplated by the parties, of the thing or right granted*" (original emphasis).

22. Lord Parker of Waddington squarely considered the question of whether the sub-lease entitled the appellants to commit the nuisance. The following passage from his speech is the most often cited:-

> "*My Lords, the right claimed is in the nature of an easement and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements [as to which, see the rule in Wheeldon v. Burrows (1879) 12 Ch. D. 31], the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. The principle is expressed in the legal maxim "Lex est cuicunque aliquis quid concedit*

concedere videtur et id sine quo res esse non potuit". Thus the right of drawing water from a spring necessarily involves the right of going to the spring for the purpose. The implication suggested in the present case does not fall under this principle; there is no express grant of any right to which the right claimed must be necessarily ancillary, nor is there any evidence that the nuisance is necessarily incidental to the Defendant's mining operations.

The second class of cases in which easements may be impliedly created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used. See Jones v Pritchard [1908] 1 Ch. 630 and Lyttelton Times Co. v Warners [1907] A.C. 476. But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use".

23. Lord Parker concluded on the basis of the law as he had stated it that there was no evidence that the appellants' usage that led to the coal dust falling on the neighbour's land was in the contemplation of the parties when the sub-lease was granted. Lord Sumner did not think that the sub-lease could be read as empowering the appellants to erect and use the plant "*even at the cost of causing a nuisance to the neighbours*". Finally, Lord Parmoor held that no right to cause the nuisance could be inferred as being the common intention of the parties unless it could be said that it was "*practically impossible to carry on the business of mining upon the demised site without causing a nuisance*", of which there was no evidence.

24. In <u>Wong v. Beaumont</u> [1965] 1 Q.B. 173, the Court of Appeal (Lord Denning MR, Pearson and Salmon LJJ) held that the right to install a ventilation duct was to be implied into a lease on the grounds that it was necessary to carry on the covenanted user of keeping the premises open as a popular restaurant. Lord Denning MR expressly applied the second of Lord Parker's formulations in <u>Pwllbach Colliery</u> <u>supra</u> at pages 180-1, and both Pearson and Salmon LJJ expressly agreed at pages 183G and 184G respectively.

25. In <u>Stafford v. Lee</u> <u>supra</u>, the Court of Appeal held that an implied right of way to the public highway arose where it was found that the parties had intended the plot-sized land-locked woodland that was transferred to be used for the construction of a dwelling. In an *ex tempore* judgment, Nourse LJ (with whom Russell LJ agreed) said this at page 175, having cited Lord Parker's dictum referred to above:-

"*Intended easements, like all other implied easements, are subject to the*

general rule that they are implied more readily in favour of a grantee than a grantor. But even there, as Lord Parker points out, the parties must intend that the subject of the grant shall be used in some definite and particular manner. If the grantee can establish the requisite intention, the law will then imply the grant of such easements as may be necessary to give effect to it.

There are therefore two hurdles which the grantee must surmount. He must establish a common intention as to some definite and particular user. Then he must show that the easements he claims are necessary to give effect to it. Notwithstanding the submissions of Miss Baker, for the defendants, to the contrary, I think that the second hurdle is no great obstacle to the plaintiffs in this case ...".

26. The question in this case is whether the judge was right to say that the suggested easement could be implied or inferred from the common intention of the parties as to the building of a dwelling-house. The first point that is made is that no such implication or inference was pleaded or proved. That argument is not correct. As I have already indicated, the amended Defence pleaded an inferred and implied easement of necessity. The proof would arise from the terms of the Transfer and the relevant factual matrix, to some of which I have already referred. The Appellants next rely on the factors which they say militated against any inference of an easement, including the express restriction on further rights of access (which I have dealt with above), Mr Donovan's evidence that the Blue Land was retained as a ransom strip, and the absence of any evidence from Mr and Mrs Rana as to any other arrangements for access that he may or may not have made.

27. As to the evidence, the judge seems to have accepted in paragraphs 6 and 7 of his judgment that the Blue Land was retained in case there was a development of land to the West of the building plot. As it seems to me, however, that does not answer the question of whether the judge was justified on all the evidence before him in inferring that the parties to the Transfer must be taken to have intended that the proposed easement would be granted. The Blue Land was, as I have said, undoubtedly intended for access to both properties whatever else Mr or Mrs Donovan may have had in mind.

28. It must first be remembered that the parties that need to be considered for the purposes of implying an intention to include an easement to install and maintain services are Mrs Donovan as transferor and Mr Haynes as transferee. It is right to note to that there was, I think, no evidence before the judge as to Mr Haynes's specific intentions.

29. There was, however, considerable evidence as to the transaction that took place pursuant to the auction. It seems to have been abundantly clear from the auction particulars and conditions that the purpose of the transfer was to enable the transferee to build a dwelling-house on the building plot. The building plot was, as I have said, described in the auction advertisement as "*a super individual building plot situated in a pleasant*

residential area in the sought after area of Chalk, where building plots are extremely rare". There can be equally no doubt that the dwelling-house in question was intended to be erected "*to the satisfaction of the Local Authority*" (see the terms of the Transfer set out above). The surrounding circumstances included the fact that the building plot was in fact in the middle of a modern suburban residential area that was apparently much sought after (as was reflected in the price paid). The suggestion that a dwelling-house in such an environment might sensibly be expected by the parties to be constructed without connections to the mains utilities just a few metres away in Nickleby Road is, if I may say so, a somewhat optimistic submission.

30. Nonetheless, Mr Isaac has strenuously argued that, whilst connection to mains utilities might be reasonable, desirable or even normally to be expected, that is nothing to the point because, in the words of Lords Parker and Atkinson in Pwllbach Colliery supra , such connection must be "*necessary for the use and enjoyment, in the way contemplated by the parties*" or "*necessary to give effect to the common intention of the parties*" for the land to be used in a "*definite and particular manner*". The dwelling-house that the parties undoubtedly expected to be built could, Mr Isaac submitted, have used a septic tank and a bore-hole or a well, or could have obtained its service connections across other land. Thus, argued Mr Isaac, the requirement of necessity is here lacking as it was in Pwllbach Colliery supra.

31. Mr Isaac also reminded us that we are concerned here with real property rights, not just contract, and that a heavy burden of proof lies on those who claim that an easement was impliedly reserved as a matter of common intention (see In Re Webb's Lease [1951] Ch. 808 per Jenkins LJ at page 828, and Green v. Lord Somerleyton [2004] 1 P. & C.R. 520 per Jonathan Parker LJ at paragraph 113). We are, however, here concerned with an implied grant rather than an implied reservation. Finally, Mr Isaac draws attention to the fact that the building plot was sold at auction, where the full force of the maxim *caveat emptor* must be taken to apply.

32. Notwithstanding all these strictures, I have formed the clear view that the judge was right. Applying Lord Parker's second test, the parties must, as it seems to me, be taken to have intended that the building of a dwelling house on the building plot to the satisfaction of the Local Authority was to be undertaken in a definite and particular manner. That manner must be taken to have included the connection to mains utility services and the maintenance of those connections across the obvious route, namely the Blue Land.

33. Lord Atkinson's formulation must be read in its context, namely that the authorities cited to the House of Lords demonstrated only that an implied grant had to be based on more than merely reasonableness or usual practice (as the jury had found the colliery's mode of operation to be), but had to be necessary for the use and enjoyment of the right granted in the way contemplated by the parties. In the context of this case, I am satisfied that the connection of the building plot to the main utilities across the Blue Land was indeed necessary for the building of a dwelling house on that plot in that locality in the

manner obviously contemplated by the parties to the original Transfer. That was, as the judge found, the inferred common intention of the parties. In my judgment, the easement proposed is necessary to achieve the parties' expressly intended purpose. It is not seeking to manufacture a necessity out of what is merely reasonable or desirable. The implication of the proposed easement is, in the context of this transaction in the modern times in which it took place, relating to this building plot in this locality, entirely necessary to give effect to the inferred common intention of the parties to the Transfer.

Disposal

34. For these reasons, I would dismiss the appeal. Though the judge did not order it, I would favour declaring, so as to avoid further argument, that an easement was to be implied into the Transfer allowing the transferee and his successors in title to have access to the Blue Land to install and maintain connections to the public utility services in Nickleby Road.

Lord Justice Rimer:

35. I agree with Vos LJ that this appeal should be dismissed.

36. In giving the appellants permission to appeal, I was in particular impressed that it was arguable that the respondents' claim to an implied right to lay connections to the utility services in the retained land was expressly excluded by the provision of the transfer reading materially (as amended to read as it was obviously intended to read):

> 'Save for any rights of way or access expressly referred to in the Special Conditions of Sale, no rights of way or access for the benefit of the property over the transferor's retained land … shall be deemed to be expressly or impliedly granted …'.

37. The transfer included the grant of an express right of way over the retained land 'for all purposes connected with the use and enjoyment of the property but not for any other purpose'. Vos LJ has expressed the view, at [16], that one such purpose for which the right of way might be used would be for the laying of utilities. I would not question that anyone engaged in the provision of services to the property would be entitled to a right of passage over the retained land for such purpose. I would not, however, accept that anything in the express grant of the right of way can be said to confer a right on the dominant owner to dig the retained land up for the purpose of laying connections to the utility services through the retained land.

38. It is no part of the respondents' case that they were given such right expressly. Their case was that, applying the principle summarised by Nourse LJ in *Stafford v. Lee* (1992) 65 P

& CR 172, at 175, (referred to by Vos LJ at [25]), the circumstances were such that the court could and should find that the parties to the transfer had a common intention that the transferee should have a right to connect the property to the utility services across the retained land, and that a right to do so should therefore be implied into the transfer.

39. The judge so held and, subject only to the question of whether any such implied grant was excluded by the transfer, I would agree with Vos LJ, for the reasons he has given, that the judge was entitled to do so. If such right was excluded, it was in my view excluded only by the provision in the transfer that I have quoted above. There was, it seems to me, an argument that in drawing, as that provision does, an apparent distinction between 'rights of way' and 'rights of … access', the parties were, by the use of the latter phrase, intending to refer to wider rights over and in respect of the retained land than mere rights of way; and that such 'rights of … access' could, for example, include access over the retained land for utility connection purposes. If so, the provision was making it clear that unless any such right was expressly granted, which it was not, it could not be regarded as impliedly granted.

40. This point has troubled me but in the event Mr Isaac did not press or develop an argument founded upon any suggested distinction between 'rights of way' and 'rights of … access'; and I have anyway come to the conclusion that the better construction to attach to the use of latter phrase in the context is that it is simply being used as synonymous with 'rights of way'. If it had been intended to range wider, I consider it likely that the extent of its intended reach would have been spelt out expressly. It does not therefore exclude the implied right that the judge held to have been granted.

Lord Justice Moore-Bick:

41. I agree that the appeal should be dismissed for the reasons given by Vos LJ.