Case No: B2/2007/2157

**Neutral Citation Number: [2008] EWCA Civ 1382**
**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM GUILDFORD COUNTY COURT**
**(HIS HONOUR JUDGE REID QC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 19th November 2008

**Before:**

**LORD JUSTICE TUCKEY,**
**LORD JUSTICE JACOB**
and
**SIR WILLIAM ALDOUS**

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**Between:**

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| | **MELHUISH** | **Appellant** |
| | **- and -** | |
| | **FISHBURN** | **Respondent** |

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(DAR Transcript of
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Tel No: 020 7404 1400 Fax No: 020 7831 8838
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**Mr J Critchley** (instructed by AWB Partnership) appeared on behalf of the **Appellant**.
**Mr C Auld** (instructed by Messrs Draper & Co) appeared on behalf of the **Respondent**.

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# Judgment **Lord Justice Tuckey:**

1. This is an appeal by the claimant, Gordon Melhuish, from a judgment of HHJ Reed QC given in the Guildford County Court in which he declared where the boundary was between the defendant's garden and the claimant's adjoining land by a reference to an agreed plan.

2. This plan had compared the Land Registry filed plan with the boundary as it had been

erected by the defendant on the ground. It showed that the defendant had given up a strip of land in exchange for three small additional pieces of land. Overall, the defendant had increased the size of his garden by 6.53 square metres or 1.8 %.

3. At the beginning of his judgment the judge defined the issue he had to decide as whether:

> "…as the claimant says, there has never been any agreement for the alteration or clarification of boundaries as between what is shown on the Land Registry plans and what now stands on the ground, or whether, as the defendant says, there was agreement that subject to any necessary equalisation payment (because he, the defendant, was obtaining a small additional amount of land) that the boundaries should be as they presently stand."

4. After a two-day trial the judge resolved this issue in favour of the defendant by accepting his evidence and rejecting that of the claimant. On this appeal the claimant, through counsel and solicitors, who did not appear for him at trial, says that this trial was unfair and that it was not open to the judge to find for the defendant in the way that he did because of the way the defendant's case had changed in the course of the trial and that the judge's reasons for making the finding he did were inadequate. It is further contended that the informal oral agreement relied on by the defendant fell foul of Section 2 of the Law Reform Miscellaneous Provisions Act 1989.

5. The claimant is a property developer. In March 2001 he agreed to sell to the claimant what is now 4 Leas Farm Barn, which is a barn conversion. The property was transferred to the defendant in November 2001, by which time the conversion was said to be complete, although disputes between the parties about snagging and payment for extras persisted until the trial.

6. The Land Registry plan showed the boundary of the garden as straight lines, but it was not laid or marked out on the ground at the time of the transfer. This did not happen until April 2002. It was the defendant's case that towards the end of 2001 he had orally agreed with the claimant where the boundary should be. The claimant had been concerned that the straight line boundary marked A to B on the agreed plan would restrict access to his other land between that boundary and the corner of an existing barn, so they had agreed that the boundary would be curved so as to create a wider access and that, in exchange for the loss of land which this involved, the defendant would be given an extra small nib of land to allow him access from the end of his garden to a nearby public footpath.

7. This agreement was reflected in plans for the layout of his garden which the defendant had prepared by a garden architect in November 2001. The garden was laid out in accordance with these plans in April and May 2002 when the defendant was on honeymoon by a garden contractor, Mr Porter. Mr Porter's evidence, which the judge accepted, was that he had marked out and agreed the layout of the garden with the claimant before carrying out any work. This included the precise line of the curved boundary to which I have referred. Mr Porter said that he had carried out the work, which included the construction of brick walls, in accordance with this agreed layout.

8. The claimant's case, on the other hand, was that he had agreed nothing with the

defendant. The defendant had simply, as he said, stolen his land. He had not even met Mr Porter, let alone agreed the layout of the garden with him. The agreed plan to which I have referred was prepared in June 2002 by a local surveyor, Mr Marvin, and paid for jointly by the parties. It was the defendant's case that it had been prepared to show how the garden, as laid out, differed from the Land Registry plan so as to enable the latter to be amended. It was the claimant's case that it had been prepared to show the defendant how much land he had misappropriated.

9. It is apparent from what I have said so far that there was an acute conflict of evidence between the parties as to what had or had not been agreed by or on their behalf about the garden boundary. The defendant's case was that the boundaries had been agreed; the claimants that nothing had been agreed. This issue was clearly drawn in the pleadings, in the skeleton arguments prepared by counsel for the purposes of the trial, and in the evidence given by the parties at trial, which was properly and fairly tested in cross-examination.

10. What was not clear before trial was the defendant's position about whether it had been agreed that he should make what the judge described as "any necessary equalisation payment" for any additional land which he gained by the exchange and the right of way over the claimant's land from his garden gate to the footpath. In correspondence he had maintained that no such payment was due, but had offered £200 to settle the matter amicably. This offer had been rejected by the claimant, who was saying that what the defendant had gained was worth £10,000 to £15,000.

11. At the outset of the trial, counsel for the defendant, then as now Mr Auld, made what he described as an open offer to the claimant. In doing so he said:

> "The defendant's case is that it was agreed that he would give up certain pieces of land in exchange for other pieces of land given to him by the claimant. The claimant denies this. The defendant's position is that he does not resile from that but for the sake of settling the case the value of that land is such that he would pay whatever is a proper price for it because the cost of arguing in court over it is probably more than the value of the land."

So the defendant was making an open offer to pay whatever was the proper price for the additional land which the Marvin plan showed he had acquired by the agreement.

12. The trial then proceeded. The defendant was cross-examined at some length about the agreement he alleged. Fourteen pages into the transcript counsel for the claimant, Ms Perkins, had her Perry Mason moment, which can be seen from the following exchanges:

> "Q. …I just do not understand your case. Is it that there was an agreement to transfer like for like, or is that there was an agreement to acquire the land for a price? I just do not see evidence of either, I am sorry.
>
> A. There was an agreement to do a swap of parts of the land and if need be to pay for the extra 5 square metres. That is not documented anywhere, I am afraid.

…

JUDGE REID: Just going back, the agreement was to exchange land and for an equalisation payment.

Q. Yes, that was why the Marvin plan was raised.

JUDGE REID: If that was why the Marvin plan was raised, why was it raised at that late stage and not immediately after the agreement?

A. I think the various events of Mr Melhuish's stroke and my marriage and other events, we just didn't get round to it, I'm afraid.

MS PERKINS: I suggest to you that it was because the Marvin plan was commissioned directly after you constructed your garden using incorrect boundary positions, which immediately became apparent to Mr Melhuish.

A. The Marvin plan was commissioned to show the difference to agree. If the Marvin plan was going to be constructed to actually say, "you're wrong", would I have paid half?.

Q. I believe that was one of my questions to you at the outset

JUDGE REID: As far as you were concerned, the purpose of the Marvin plan was to identify (a) where the current boundary was, (b) where the Land Registry boundary was, and (c) how much land it was you were going to have to pay for.

A. Yes."

13. These exchanges took place during the afternoon of the first day of the trial. The following day, in his closing speech, Mr Auld put forward the defendant's case on the basis of what he had admitted in cross-examination. He did so without objection from Ms Perkins or the judge, although both made the point that the defendant had not admitted any actual or potential obligation to pay before his cross-examination. The judge gave an extempore judgment at the end of the second day of the trial. In paragraph 3 he said:

> "The point that has been made forcibly on behalf of the claimant is that it is only at a very late stage that it has been made abundantly clear that what the defendant says is that there was a boundary agreement with an agreement for an equalisation payment. I take the view that, forcible though that argument is, the defendant's account is to be preferred.

> Firstly I took the view that in general terms he was a more reliable witness than the claimant. The claimant had a glib answer for everything. On occasion, for example, in relation to the land adjoining the nib and the land attached to the adjoining barn where he said that "yes, he transferred that additional piece of land with the adjoining barn because it upped the price", I got the firm impression that he was making things up as he went along. So far as other matters are concerned, he has of course had the misfortune to have had a number of strokes and it may well be that with the passage of time and his medical difficulties his memory has played him false in a number of respects, and that he is simply doing his best to reconstruct what must have happened. By contrast, the defendant seemed to me to be someone who was prepared to accept that there were matters that he could not remember and indeed to concede points where he felt in retrospect he had been in error."

14. In the following seven paragraphs the judge set out a number of points which he said supported his conclusion. He asked why should the defendant have instructed his garden architect to prepare plans based on boundaries which had not been agreed? Why should Mr Porter have laid out a garden on boundaries of which he was uncertain? Why should the claimant have agreed to pay for half the Marvin plan to show the extent to which he was trespassing? In support of his case, the claimant had relied heavily on some of the correspondence between the parties and their solicitors but the judge concluded that the totality of this correspondence was equally consistent with there having been an agreement, as the defendant alleged, as it was with there being a misappropriation of land, as the claimant alleged.

15. Mr Critchley, who now appears for the claimant, says that the judge's finding was reached in a way which was procedurally unfair to the defendant and indefensible, given that the agreement found by the judge was never put to the claimant in cross-examination and he was never given an opportunity to deal with it. It is, as he reminds us, a fundamental principle that a witness should not be disbelieved unless he has had the opportunity to deal with the allegations made against him. This serious unfairness, Mr Critchley submits, was aggravated by the judge playing down the defendant's late change of case and his reference, by way of an afterthought, to the claimant's medical history, in paragraph 3 of his judgment which I have quoted.

16. I do not accept these submissions. As I have already pointed out, the real issue between the parties was, and always had been, whether or not the claimant had agreed the boundary as it stood. The defendant's case about this was repeatedly put to the claimant in cross-examination. He vehemently denied it. The judge did not accept his denials. There was nothing unfair about this. It was never the claimant's case that he had agreed the boundary subject to any necessary equalisation payment. Had this been put to him in cross-examination, he would obviously have denied it. Had his experienced counsel or this experienced judge felt that it ought in fairness to have been put to him, they would have said so. If counsel had felt that she had been put into a difficult position by the defendant's change of case, she could have applied for an adjournment. She made no such application, and indeed the Notice of Appeal which she settled before the change of legal representation made no complaint about the fairness of this trial.

17. The obligation to pay, if necessary, was elicited from the defendant in cross-examination by Ms Perkins acting on behalf of the claimant and resulted in a finding which was more favourable to the claimant than the defendant's pleaded position. Carried to their logical conclusions, Mr Critchley's arguments would mean that he could not have objected if the judge had found that the agreement did not contain any obligation at all to make payment. The judge's finding was obviously open to him on the evidence. In his general assessment of credibility, he took into account the defendant's very late change of case. This was significant, but not as significant as Mr Critchley argued. The impression which the two witnesses made upon the judge obviously played an important part in his decision. Having read the transcripts of their evidence, the judge's comments seem to me to be entirely justified. Both witnesses were suffering from the fact that the events which they were trying to recall had occurred many years earlier. The claimant cannot complain about this because he did not start these proceedings until November 2006. The judge's reference to the claimant's ill health was obviously intended to ameliorate the terms in which he made the finding of fact which he had to make in order to resolve the issue he had to decide.

18. So this assessment does not take account of Mr Porter's evidence. The evidence which he gave was clear and, if it was to be believed, put the matter of what had been agreed about the boundary beyond doubt. The judge was in the best position to decide whether he could accept this evidence. Mr Critchley has suggested that the judge should have discounted it because Mr Porter was employed by the defendant to do this work, but it does not follow that this made him partial. The judge gave good reasons for accepting his evidence based upon the fact that a professional man in Mr Porter's position would not have set about laying out a garden on a site of this kind unless he was certain where the boundaries were.

19. I do not accept the submission that the judgment is inadequately reasoned. Paragraphs 3 to 10 explain the decision perfectly well.

20. The judge dealt with the point under the 1989 Act in paragraph 11 of his judgment. What he said was:

> "…the boundaries as now drawn in accordance with the Marvin plan reflecting the agreement was reached, are such that the agreement was truly an agreement regulating the boundary and that in so far as land is transferred one way or another, and indeed upon the Marvin [plan] it is clear that the land goes each way, it can indeed properly be said that the differences are trivial and therefore it cannot be suggested that the agreement falls foul of s.2 of the Law of Property (Miscellaneous Provisions) Act."

21. The judge's reference to triviality is to the decision in Joyce v Rigolli [2004] EWCA Civ 79. In that case, building on the decision of Megarry J in Neilson v Poole [1969] 20 P & CR 909, this court held that, where an agreement is made merely to demarcate a boundary, it is not a contract for the sale or other disposition of an interest in land for the purposes of Section 2 of the 1989 Act, simply because a trivial transfer or transfers of land were consciously involved (see Arden LJ at paragraphs 32 to 34 and Nourse LJ at paragraphs 43 to 45, with whom Thorpe LJ agreed).

22. Mr Critchley argues that the present case does not fall within this principle at all because there was never any boundary dispute as such. The Marvin plan showed precisely where the boundary was originally intended to be and how it was to be altered. The agreed alteration involved transfers both ways at a price to be agreed or determined and therefore fell fairly and squarely within Section 2. I cannot accept this argument, because it looks at the matter with the benefit of hindsight. Rule 278 of the Land Registry Rules applied to the boundaries shown on the file plan so that it was "deemed to indicate the general boundaries only" and "the exact line was left undetermined". This was the position at the time when the agreement relied on by the defendant was made. The Marvin plan came later. This was therefore a boundary agreement to which the principles in Joyce v Rigolli applied and the judge was right to find as a fact, which he did, that it was such an agreement. The conclusion is not affected by the fact that the agreement contemplated that the defendant would have to pay if he benefited from it.

23. Mr Critchley also argues that there was no meaningful evidence that the land in question was trivial. The judge made an assumption that it was but should not have done so, because there was no evidence from a valuer to indicate that the land had merely a trivial value. I do not accept those submissions; the judge was entitled to conclude from the Marvin plan, which dealt with the amounts of land involved rather than the value that could be placed on them, that the amounts of lands involved in this exchange were trivial. An overall increase in the garden area of 1.8% was all that was involved; it cannot possibly be said that the judge was not entitled to say that this was trivial.

24. The claimant's other grounds of appeal relate to the judge's order, which limited the amount to be paid by the defendant to £16,473 and his order that the claimant should pay the defendant 75% of his costs.

25. The claimant had chosen to limit his claim, which included claims for damages for trespass, for extras and for a contribution to the cost of repairing a shared courtyard, to £20,000. The judge awarded the claimant £3,527 on the latter two claims and limited his order for payment for the extra land and pedestrian right of way to the balance. This is said to be unfair because the claimant's claim had not included any claim for such payment, merely damages for trespass. This is a small point, but I do not think the judge can be criticised for limiting his order in this way. He did so without objection from Ms Perkins. The highest at which the claimant had put the value of what he had lost was £15,000 and it was clear that the parties were very apart about this.

26. As to costs, Mr Critchley submits that the judge's order was perverse; it did not properly reflect the late emergence of the case upon which the defendant succeeded, or the fact that the claimant had succeeded on two out of three of his claims. The short answer to this is that this was an order which was well within the wide discretion which the judge had as to costs, with which this court will not interfere. The defendant had succeeded on the main issue as to whether or not there had been a boundary agreement. He had lost on the other two claims, but the claimant had recovered only about 50% of those claims which, as the judge said, if they had stood alone would have been small claims on which he would not have been entitled to assessed costs.

27. I have dealt, I hope, now with each of the claimant's amended grounds of appeal. For the reasons I have given I would dismiss the appeal.

**Lord Justice Jacob:**

28. I agree

**Sir William Aldous:**

29. I also agree.

**Order:** Appeal dismissed