Neutral Citation Number: [2015] EWCA Civ 795

Case No: B2/2014/3131

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE
HIS HONOUR JUDGE WORSTER
2BM02319

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 22nd July 2015

Before :

LADY JUSTICE ARDEN
LORD JUSTICE RYDER
and
LORD JUSTICE BRIGGS

- -

Between :

	PARMAR & others	**Appellant**
	- and -	
	UPTON	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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GEORGE LAURENCE QC and DAVID WARNER (instructed by **HADGKISS HUGHES & BEALE**) for the **APPELLANT**
JONATHAN GAUNT QC and MATTHEW HAYNES (instructed by **SYDNEY MITCHELL**) for the **RESPONDENT**

Hearing dates : 7th and 8th July 2015

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Judgment

Lord Justice Briggs :

Introduction

1. This appeal is mainly about the application to a particular set of facts of the pair of rebuttable presumptions which conveyancers call the "hedge and ditch rule". While, to many modern (and in particular urban) lawyers, this rule might at first sight appear to be something of a quaint chancery conceit, it continues to serve a valuable purpose, not least as a means of enabling neighbouring owners of rural land to avoid what is almost always the wholly disproportionate cost and stress of having to litigate a boundary

dispute. The blood, toil and sweat which has been devoted to this litigation would even have horrified Prince Hamlet who, watching Fortinbras march away with his army, observed:

> "…while, to my shame, I see
> The imminent death of twenty thousand men
> That, for a fantasy and trick of fame
> Go to their graves like beds, fight for a plot
> Whereon the numbers cannot try the cause,
> Which is not tomb enough and continent
> To hide the slain? O, from this time forth
> My thoughts be bloody, or be nothing worth!"

In *Alan Wibberley Building Limited v Insley* [1998] 1WLR 881, at 891, giving a dissenting judgment later approved by the House of Lords [1999] 1WLR 894, Judge LJ said this, of the hedge and ditch rule:

> "I can see no basis for trivialising this principle. In large areas of the countryside it is well understood and has indeed ensured that those with a boundary formed by a hedge and ditch know exactly where they stand without recourse to legal advice or litigation."

2. In the House of Lords in the *Wibberley* case, at page 897, Lord Hoffmann explained the hedge and ditch rule as follows:

> "There are certain presumptions which assist the inferences which may be drawn from the topographical features. Perhaps the best known is the one which is drawn from the existence along the boundary of a hedge and a ditch. In such a case, it is presumed that the boundary likes along the edge of the ditch on the far side from the hedge. The basis of this presumption was explained by Laurence J. in *Vowles v. Miller* (1810) 3 Taunt. 137, 138:
>
> > "The rule about ditching is this. No man, making a ditch, can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on top of it."
>
> It should be noticed that this rule involves two successive presumptions. First, it is presumed that the ditch was dug after the boundary was drawn. Secondly, it is the presumed that the ditch was dug and the hedge grown in the manner described by Laurence J. If the first presumption is displaced by evidence which shows that the ditch was in existence before the boundary was drawn, for example, as an internal drainage ditch which was later used as a boundary when part of the land was sold, then there is obviously no room for the reasoning of Laurence J. to operate."

3. In the present case the Judge, HHJ Worster, concluded after a meticulous examination of the evidence deployed during a four-day trial in the Birmingham County Court that there was nothing sufficient to displace those presumptions, so that the hedge and ditch rule provided the simple answer to the main issue raised by the proceedings. The Judge did not, unfortunately, have the benefit of evidence discovered only after the conclusion of the trial, which was admitted as fresh evidence on this appeal by Vos LJ on the without notice application of the Appellant, the admission of which has not been challenged by the Respondent. The result is that the analysis of the critical question whether the presumption underlying the hedge and ditch rule can be rebutted in the present case has needed to be conducted afresh in this court. It is only a small mercy that this (together with other issues) has taken two, rather than four days. The result is that the challenge to the applicability of this simple rule has occupied two courts and four judges for no less than six days of painstaking analysis, not to mention time for pre-reading and judgment writing, and the involvement of four counsel, including senior leading counsel in this Court, all in relation to a dispute which, however riveting for the parties, can only sensibly be described as modest, in terms of value at risk other than costs.

The facts

4. This is an action in trespass. The claimant Mr. Upton is, and has been since 1997, the owner of a house and agricultural land constituting the bulk (but not the whole) of what had for many years previously been known as Birchy Farm, Tidbury Green near Solihull. Birchy Farm lies on the north-east side of Birchy Leasowes Lane ("the Lane"). I have appended as Annex 1 to this Judgment a photocopied extract from the 1937/38 Ordnance Survey 1.2500 County Series map, upon which the Lane appears running northwest to southeast across its bottom-left hand corner. I will refer to this plan as "the Annex Plan".

5. In November 1991, Mr. Parmar acquired the house and land adjacent to the Lane immediately southeast of Birchy Farm, known as 77 Birchy Leasowes Lane. At that time, Number 77 consisted of a plot bounded by my letters D, E, F, G, H of the Annex Plan, but in and after 2008 Mr. Parmar carried out a residential development of the northeast part of his land, bordering the line D, E on the Annex Plan, thereby creating two properties now known as Numbers 79 and 79A Birchy Leasowes Lane, which he sold to the Hunters and the Gardners, the second to fifth defendants. It was during the carrying out of this development that the alleged trespass began upon Mr. Upton's south-east boundary, between points D and E. This led to the dispute about the whole of the boundary between points D and F, although Mr. Upton has since settled with all the defendants other than Mr. Parmar.

6. Prior to substantial residential development after 1920, the whole of the land to the south-east of the line A to F consisted of a coppice, known as Birchy Leasows Coppice ("the Coppice"). It was sold at auction as a single lot in 1920 (probably for development) and Number 77 was carved out of it and sold to a predecessor of Mr. Parmar by a conveyance dated 24th July 1925 ("the 1925 Conveyance").

7. The Coppice has since then been almost entirely covered by residential development.

The hedge and the ditch

8. It is common ground that there has at all times since at least 1925 been a ditch carrying drainage water from point D to point F on the Annex Plan. The ditch now discharges into a culvert under the Lane but, at least until 1925, it used to turn south-east at point F and run along the south-western boundary of the Coppice into a pond at the south-eastern corner of the Coppice lying beyond the bottom right hand corner of the Annex Plan.

9. Although the ditch therefore ran along the whole of the now-disputed boundary, it is most unlikely that it began at point D. The photographic and other evidence now available shows that it began at least as far north-east as point A, so that it ran along the whole of the north-west and south-west physical boundaries of the Coppice. The lie of the land is such that the ditch was capable of draining both the Coppice itself and the agricultural land lying to the north-west of it between points A and F, including both Birchy Farm betweens points B and F, and what is now a rugby pitch lying to the north-west of the line A to B.

10. The judge found (and this is not challenged on appeal) that there used to be a hedge along the line D to F immediately to the north-west of the ditch, which continued north-east from point D, and vestiges of which, including some mature oak trees, are still to be seen. He accepted expert opinion that the hard line between points D and F on the 1882-84 Ordnance Survey map (replicated in the Annex Plan) depicted the line of that hedge and that, as indeed appears from the 1882-84 OS map and from aerial photographs, it is common in that vicinity to find mature deciduous trees along such hedges. The Judge was assisted in making these findings by his own site visit.

11. The Judge had no evidence at all with which to enable him to decide (if it mattered) whether the land either side of the line A to B on the Annex Plan was in separate or common ownership. Prior to its current use as a rugby pitch, the land to the north-west was a field, and the Coppice extended along the south-east side of that line. Perfectly properly, he declined to speculate about that question.

12. By contrast, the fresh evidence admitted on this appeal demonstrates beyond dispute that, until 1920, the land on either side of the line A to B on the Annex Plan was indeed in common ownership. The field was part of what used to be known as Betteridge Farm. It is unnecessary to describe that new evidence in any detail, save to note that it extends back to 1801. Not only does it show that Betteridge Farm and the Coppice were in common ownership, but also that Betteridge Farm was separately owned from Birchy Farm, along a boundary running west-north-west from point B on the Annex Plan. The evidence shows with reasonable clarity that no ownership boundary (i.e. boundary between land in separate ownership) ran along the line A to B before 1920. By contrast, the same fresh evidence confirms, as the Judge presumed at trial (applying the first of the hedge and ditch presumptions in the absence of any evidence to the contrary) that the land on either side of the line B to F had at all material times (if not forever) been in separate ownership.

The conveyancing history

13. I must now describe the conveyancing history, so far as relevant to the disputed boundary. Although it formed an important part of the Judge's analysis, and an even more important part of the Appellant's case on this appeal, I must preface my description by a note of caution. Where a disputed boundary is created by a conveyance or (now) Transfer, where the land was formerly in common ownership, then that conveyance is of primary and frequently decisive effect in resolving any dispute as to the position of the boundary thereby created. The same may be said of a boundary agreement between owners on either side of a disputed boundary. By contrast, where as here it is clear that the relevant ownership boundary was created prior to the earliest surviving conveyance, so that those which survive deal merely with the land on one or the other side of that boundary, then the conveyancing history is *prima facie* unlikely to be decisive, and frequently of little assistance. This is for two simple reasons. First, if the conveyance of land on one side purports to convey land beyond the pre-existing boundary, then it is to that extent a *brutum fulmen*. The seller cannot convey that to which he has no title. Conversely, if the conveyance appears at first sight to stop short of the pre-existing boundary then a common sense construction of it must ask the question whether the parties really intended to reserve to the seller an apparently useless strip along the edge of the land being transferred.

14. In the *Wibberley* case, where there was a hedge and a ditch along the disputed boundary, it had been conceded in the Court of Appeal that a conveyance of land on the hedge side of the ditch transferred land only up to the middle of the hedge, whereas the application of the hedge and ditch rule suggested that the seller owned the strip between the hedge and the other side of the ditch. In expressing grave doubt about the correctness of that concession, at [1999] 1WLR 894, 899 E to G, Lord Hoffmann said:

> "If, therefore, the 1975 conveyance drew the boundary along the middle line of the hedge, Mr. Beard (*the vendor*) would have been retaining a useless strip between that line and the far side of the ditch. This was most unlikely to have been the intention. The more likely inference, which the words "for the purposes of identification" support, is that the parties were using the Ordnance Survey plan in the same way as it is used in registered conveyancing, that is, to indicate the general boundaries. This would leave the hedge and ditch presumption undisturbed, with the result that the 1975 conveyance included all the land up to the boundary… on the far side of the ditch."

15. I shall have to return in due course to this passage, which Mr. George Laurence QC for Mr. Parmar described as both obiter and "a howler". To my mind, whether obiter or not, it represents plain and simple common sense. Landowners do not, in general, reserve narrow and inaccessible strips of land along the edge of property conveyed which abuts an established boundary with land in separate ownership, unless for some very good reason, such as the preservation of a ransom strip, designed to enable the seller to share in any subsequent development value which necessitates an access road or other services

being constructed across the strip.

16. I therefore approach the conveyancing history which I am about to describe with a disposition to doubt whether it had any relevant effect upon the disputed boundary which, as is common ground, separated land which had been in different legal ownership for many years, if not centuries, previously. The only relevance of such transactions, involving as they do, parties on one side of the boundary only, is that, as the Judge said, they may if carefully drawn offer some assistance towards an understanding of what was then believed to constitute the boundary. Of course, the conveyancing history on the claimant's side of a disputed boundary in a trespass case necessarily forms part of his title to sue, unless he relies merely upon possession.

17. It is convenient to trace the conveyancing history separately, on each side of the disputed boundary. On Mr. Upton's side, it begins in July 1957 with a conveyance of Birchy Farm to Mrs. Buttler (or possibly to her and her husband). Despite research, this conveyance has not been found. Mr. Buttler died in the 1990s and Mrs. Buttler died in January 1997. Her executors sold the bulk of Birchy Farm to Mr. Upton, less a small section at the north-eastern corner of it abutting the A to F line between points B and C, by a conveyance dated 7th July 1997 ("the 1997 Conveyance"). Since great emphasis is placed upon its terms by Mr. Laurence, I must describe its contents in some detail. The land conveyed is defined as "the Property" and that phrase is explained in clause 4 as follows:

> "The Property is the piece or parcel of freehold land comprising an area of 6.88 acres or thereabouts situate at and fronting to Birchy Leasowes Lane… For the purpose of identification only edged brown on the plan annexed hereto ("the Plan") and the dwelling house and outbuildings erected on some part thereof."

18. That plan ("the 1997 Plan") is based upon a copy of a later Ordnance Survey map, and carries the prominent warning "for identification purposes only", together, in smaller print, with a warning that the plan had been published for convenience for identification purposes only and, though believed to be correct, did not form part of a contract. This suggested, as counsel agreed, that the 1997 Plan had been lifted lock, stock and barrel from the contract, so that on neither occasion was there a plan which purported to do more than identify the boundaries in general terms.

19. Turning to Mr. Parmar's title, the earliest surviving document is the conveyance on 29th April 1920 of the whole of the Coppice by Messrs Nicholls and Ellis to a Mr Shipway. Nothing turns upon its written terms, but its plan was found by the Judge to have been hand-traced from the 1918 edition of the Ordnance Survey County Series map which, like its 1882 predecessor, the Judge found depicted the A to F line (on the Annex Plan) as the line of a hedge. In so doing, he accepted the opinion to that effect of Mr. Parmar's expert Mr. Atkinson. I will call it "the 1920 Plan". Neither that plan, nor any of the Ordnance Survey maps which preceded or followed it depict the ditch, but Mr. Jonathan Gaunt QC was content for the court to assume that it was by then in existence.

20. Mr. Parmar's land at Number 77 was, as I have said, carved out of the Coppice by the 1925 Conveyance by Mr. Shipway to a Mr. Muddeman. The parcels clause describes the

land conveyed as:

> "More particularly delineated and described as to the boundaries, abutments and dimensions thereof upon the plan annexed to these presents and thereon edged pink…"

That plan ("the 1925 Plan") is drawn to a scale of 1/2500, states that the land conveyed has "CONTENTS 5560 SQ.YDS or Thereabouts" and a dimension of 32 yards and 2 feet along its boundary with the Lane. More to the point, it depicted the north-western side of the land conveyed (ie points D to F on the Annexed plan) as a continuous line with a dotted line very slightly to the south-east of it. The dotted line turned sharply south-east at point F and ran along the edge of the Lane, stopping at the border with what was then Number 79, described as "land belonging to Mr. Evans".

21. Contrary to the parcels clause, the 1925 Plan did not depict the land conveyed as edged pink. On the contrary, all the boundary lines and the dotted line are in simple black. Rather, it shaded the land conveyed pink, and the Judge found that, on close inspection, the pink shading stopped at the dotted line between points D and F, rather than the hard line. It was just possible during the appeal, with the aid of a magnifying glass, to confirm the Judge's conclusion when the original 1925 Conveyance was made available to the court.

22. It became common ground during the trial that the dotted line on the 1925 Plan depicted the ditch, both along the line D to F, and along the edge of the Lane. The Judge concluded that, since the 1925 Plan had been traced from the then current Ordnance Survey map, the hard line between D and F represented the hedge, and this was not challenged on appeal.

23. The Judge readily acknowledged that the 1925 Conveyance could not (for reasons which I have set out at greater length than he did) be determinative of the disputed boundary. He accepted however that it was valuable evidence, having been professionally prepared from a reliable source, about what was then understood about the boundary. He acknowledged that his mind had changed on the question whether the 1925 Plan depicted the hard line or the dotted line between points D and F as the boundary, but decided, as a matter of construction, that it depicted the dotted line, ie the ditch rather than the hedge.

24. I have already described how, in due course, Number 77 was then conveyed to Mr. Parmar in November 1991 and, after his re-development of the rear of Number 77, then sub-divided. Nothing turns on the contents of those documents of title.

Application of the hedge and ditch rule

25. The Judge was alert to the fact that the hedge and ditch rule depended upon rebuttable presumptions. He addressed and rejected submissions both that the topography was such that the presumptions never arose at all, and that they were in any event rebutted on the facts. But he was as I have said deprived of an important fact, namely whether there was not, along the line A to B, any ownership boundary which could have or (in

accordance with the first presumption) did come into existence before the ditch was dug along that line. He said this, at paragraph 68 of his judgment:

> "As this land is presently divided up, the ditch does continue up beyond the Claimant's land (*ie beyond point B*). But what we do not know is whether that has always been the case. It may be that at one stage the boundary was between the 3 fields of farmland and the Coppice, rather than the 2. I do not know, one way or the other, which is so. From the way the land is laid out it is perfectly possible. It is not as if the third field is part of the other nearby farm – it is a Rugby pitch."

26. The fresh evidence to which I have referred enables this Court to know that about which the judge could only speculate. The rugby pitch was never part of Birchy Farm, it was part of Betteridge Farm (to which the Judge referred to as "the other nearby farm"). There was not before 1920 an ownership boundary between the Rugby pitch and the Coppice. The two were in common ownership. Although the earliest evidence pointing to the existence of the ditch is in the 1925 Plan, Mr. Gaunt readily accepted that the ditch from B to F probably pre-dated 1920. There being no evidence that the A to B part of the ditch was dug later than the B to F part of the ditch, it is a fair inference that the creation of the A to B boundary between the Coppice and the rugby pitch did not pre-date the digging of that part of the ditch.

27. It is I think therefore necessary to reconsider by reference to the whole of the relevant evidence whether the hedge and ditch rule can properly be applied, as the Judge did, as the primary basis for his resolution of this boundary dispute in favour of Mr. Upton. Since the submissions made to the Judge were broadly replicated on this appeal in relation to that question, nothing will be lost by not first addressing the Judge's own reasoning. I shall therefore take his findings of primary fact, together with the fresh evidence, as the basis for my re-appraisal of the question. I shall do so, notwithstanding what became Mr. Laurence's main submission on this appeal, namely that the logical first step is to ask whether Mr. Upton ever obtained title to anything beyond the hedge, and to answer it in the negative by reference to the 1997 Conveyance. For reasons which I will later explain, I reject both Mr. Laurence's premise and his conclusion. In my judgment the correct order of analysis is first to ask whether the hedge and ditch rule had settled the boundary by 1997, and then to construe the 1997 Conveyance in the light of that analysis. In any event, since the 1997 Conveyance warned the reader no less than three times (once in the parcels clause and twice on the Plan) that the delineated boundaries were for identification purposes only, it is of no significance as evidence for the purpose of rebutting the presumptions underlying the hedge and ditch rule. This was the ratio of the House of Lords' decision in the *Wibberley* case.

28. The first question is whether, along the boundary between B and F, there is enough in the topography to permit the hedge and ditch rule to apply at all. In my judgment there plainly is. It is beyond question that there was both a ditch and an adjacent hedge to the north-west of it, even though the hedge has now largely disappeared. Mr. Laurence's only challenge to that conclusion was that the Judge was wrong to have identified a mound, representing the earth presumed to be thrown back upon his own land by the owner when digging the ditch, before planting his hedge. Regardless whether, as Mr. Laurence submitted, such a mound is an essential topographical feature for the triggering of the twin presumptions, a point on which I prefer to express no opinion, the Judge

found that there was sufficient evidence of such a mound, see paragraph 62. Unlike this court, he had the advantage of a site visit, and I regard that factual finding as unassailable.

29. The next question is whether the first presumption, namely that the digging of the ditch followed the creation of the ownership boundary, is rebutted. Plainly it is not in relation to the ditch between points B and F, and the contrary has not been suggested. It is rebutted in relation to the ditch between points A and B, but that is not the disputed part of the boundary. The fact that the north-eastern part of the ditch was not dug alongside any ownership boundary seems to me to go rather to the second presumption, namely that the ditch along the disputed part of the boundary was dug by Mr. Upton's predecessors as owners of Birchy Farm, at the very extremity of their own land, throwing back the soil and planting a hedge on it.

30. Mr. Laurence's submission by way of rebuttal of this second presumption may be summarised as follows:

i) Looking at the ditch as a whole it started (at point A) and ended (at the pond in the Coppice) on land owned by the then owner of the Coppice.

ii) The inference is that it was dug by that owner either to drain the Coppice, or the Coppice and what is now the rugby field, or both.

iii) The presence of mature oaks along the hedge line suggests that it was dug within the Coppice, rather than along the edge of the fields to the north-west of points A to F.

iv) Thus the boundary remained, regardless of the digging of the ditch, where it had always been, namely along the edge of the Coppice, marked by the hard line on the OS map, the hard line on the 1920 and 1925 Plans, and, for good measure, the hard line on the 1997 Conveyance.

v) Finally, on no basis could it be said, looking at the ditch as a whole, that it was dug for the purpose of marking out a boundary. It was a drainage ditch rather than a boundary ditch.

31. I have not been persuaded that the evidence is sufficient to rebut the presumptions which underlie the hedge and ditch rule. Even if it is sufficient, the evidence seems to me to lead to the same conclusion about the position of the boundary between points B and F as that which would flow from the application of the rule. My reasons follow.

32. It is convenient to deal with Mr. Laurence's last point first. Nothing in the authorities about the hedge and ditch rule show that it is a necessary part of the underlying presumptions that the ditch was dug as a boundary ditch, ie to demarcate a boundary, rather than as a drainage ditch. On the contrary, farmers generally dig and then maintain ditches at not inconsiderable expense for the economic purpose of draining farmland so as to improve its yield, whether as arable or pasture, rather than for the anxious purpose

of the precise defining of their boundaries with their neighbours. Nothing in the classic description of the second presumption by Laurence J in *Vowles v Miller* (1810) 3 Taunt 137, at 138, suggests otherwise. The farmer is digging the ditch at the extremity of his own land because he must not cut into his neighbour's soil. Indeed, the first presumption suggests that the farmer already knows where the boundary is, and has no need to mark it out.

33. The second main flaw in Mr. Laurence's submissions is his assumption that the mature oaks still visible along the A to F line marked the edge of the Coppice, before it was cut down for residential development. That assumption is flatly contrary to the Judge's finding that the OS line marked a hedge, typically dotted with mature oaks, as was visible in other hedges in the vicinity: see paragraphs 64 and 65 of the Judgment.

34. Similarly, the submission that the ditch was dug for the purpose of draining the Coppice is also contrary to the Judge's assessment of the probabilities, see paragraph 66 of the Judgment. Although the lie of the land means that it does in fact drain the Coppice, it is hard to see why a woodsman would wish to spend money draining a coppice, rather than a farmer spend money to drain his fields.

35. There is however real force in Mr. Laurence's submission that since, viewed as a whole, this ditch cannot be regarded as an exercise carried out purely by the owner of Birchy Farm within the confines of his own land, there is some basis for undermining the second presumption. It is possible that the ditch was dug entirely by the owner of Betteridge Farm and the Coppice, within his own land, since it undoubtedly started and finished within his land and, on any view, served to drain that part of his farm which is now the rugby pitch.

36. But as Mr. Gaunt pointed out, there are at least two other possibilities, and it can be little more than a matter of speculation which of the three is correct. The first is that the ditch from points B to F was indeed dug by the owner of Birchy Farm, leaving the water to drain away along the edge of the Lane until gravity took it to the pond in the Coppice. The ditch from points A to B could then have been added later, by the owner of Betteridge Farm and the Coppice.

37. The second possibility suggested by Mr. Gaunt is that the ditch, viewed as a whole, was the product of sensible co-operation by the owners of Betteridge and Birchy Farms, each digging their part of the ditch at the edge of their respective fields from A to B and B to F, with the owner of Betteridge Farm and the Coppice then arranging for, or allowing, the water to drain away into the pond. On that analysis, there would be nothing to displace the presumption that the owner of Birchy Farm carried out his part of the drainage enterprise in the usual way, namely as near to the edge of his field as he could, throwing back the earth and then planting a hedge on it. In my judgment, presumptions must be rebutted by evidence, rather than by mere speculation. The evidence must demonstrate at least a probability that the events inherent in the presumption did not occur.

38. Even if I had to approach the matter purely as one of fact, other than presumption, I would still have concluded that the ditch between points B and F had been dug by the owner of Birchy Farm at the edge of his field, rather than by the owner of Betteridge

Farm and the Coppice, within the Coppice. I would reason thus.

39. First, it is clear that the ditch, viewed as a whole, served to drain both Betteridge and Birchy Farms, and was dug for that purpose rather than to drain the Coppice. Secondly, it follows that (assuming in Mr. Laurence's favour that the ditch was dug as a single enterprise) it probably was a co-operative enterprise between the two farmers, each contributing to the joint product by work at the edge of his own fields. Thirdly, faced with the alternative of digging a ditch at the edge of a field, and digging it within a coppice, the field option would appear to be the obvious favourite. Why dig and maintain a ditch among tree roots and undergrowth if it can as easily be dug at the edge of a cleared field? Why dig it where the fall of leaves will make it harder and more costly to keep clear, if it can be dug clear of the trees, in the adjacent field? The advantages to the owner of Birchy Farm of taking the latter course seem to me to be plain.

40. This analysis lies easily with the assumption which Mr. Laurence repeatedly pressed upon us, namely that prior to the digging of the ditch, the boundary between Birchy Farm and the Coppice lay along the then edge of the Coppice. But, as I have said, the flaw in his analysis is to assume that the Coppice extended to the line marked by the mature oak trees, contrary to the Judge's finding that they marked a hedge rather than formed part of the Coppice.

41. For these reasons, I am not persuaded by the admission of the undoubtedly relevant evidence about the common ownership of the land either side of the A to B line to depart from the Judge's conclusion that there was nothing to rebut the hedge and ditch presumptions. His analysis, necessarily in ignorance of that fresh evidence, was otherwise unimpeachable, both in law and in his appraisal of the evidence. But I would only add that, leaving the hedge and ditch rule aside, the evidence still pointed to the same result. Thus the outcome is fortified, rather than nullified, by the evidence.

42. I have not in that analysis lost sight of the conveyancing history, and in particular the evidence constituted by the 1925 Conveyance and Plan. It formed a major plank in Mr. Parmar's case at trial that there was sufficient evidence to rebut the hedge and ditch presumptions. Initially, the Judge thought that it did indeed do so, being disposed until a late change of mind to think that, on its true construction, it purported to convey land up to the hedge, and including the ditch, between points D and F: see paragraphs 49 and 51 of the Judgment. In the end however, he concluded that, upon its true construction, the 1925 Conveyance identified a north-western boundary which ended at the ditch.

43. I have travelled down the same road as the Judge. On my initial pre-reading, it seemed to me that the 1925 Plan, described in the parcels clause as more particularly delineating the boundaries (rather than for identification purposes only), ought to be read as identifying the hard line rather than the dotted line between points D and F, both because the other three boundaries were identified by hard lines, and because conveyancers do not usually identify boundaries with dotted lines.

44. But conveyances of land are no exception to the principle set out in the *ICS* case, namely that the meaning of words and phrases may be illuminated by setting them against the relevant factual matrix. The meaning of a plan is no less susceptible to that process of

illumination than the words or phrases of a parcels clause. In short, the plan must be interpreted by reference to the features on the ground visible at the time of the conveyance of which the plan forms part. In the present case, anyone seeking to interpret the 1925 Conveyance at the time would have seen, along the north-west border of the land conveyed (between points D and F), a hedge and a ditch. A little more research would have revealed that the land conveyed lay alongside an ownership boundary which had existed for many years prior to 1925, and which was not being created for the first time by the 1925 Conveyance. Indeed, of the four sides of the land being conveyed, three of them lay along existing boundaries, namely the D to F boundary with Birchy Farm, the F to G boundary with the Lane, and the G to H boundary with land which the 1925 Plan described as already owned by Mr. Evans. The only new ownership boundary being created was that between points D and H, on the north-east edge of the land conveyed.

45. The intelligent interpreter of the 1925 Conveyance would, like Lord Hoffmann in the *Wibberley* case, think that the edge of the land being conveyed along the D to F line was, *prima facie*, likely to correspond with the existing ownership boundary along that line, rather than convey more land than the vendor owned or, for that matter, less land, leaving a useless narrow strip. Since the pre-existing ownership boundary with Birchy Farm was visibly demarcated by a hedge and a ditch, the starting assumption would have been, without need for the advice of a lawyer, that the boundary lay along the side of the ditch opposite from the hedge, in accordance with the hedge and ditch rule. The intelligent observer would then have looked again at the 1925 Plan and noted the care with which its draftsman had depicted both the hedge and the ditch. He would need no magnifying glass to ascertain that the D to F edge of the land being conveyed was indeed depicted on the Plan by the hedge and ditch. As the Judge said, why otherwise would the careful draftsman include the dotted line at all? Armed with that understanding of the factual matrix, the intelligent observer would then have concluded, like the Judge, that the boundary intended to be identified along the D to F line by the 1925 Plan was that which would be identified by the application of the hedge and ditch rule, so that it lay along the south-east side of the ditch. Recourse to a magnifying glass (which I accept is a counter-intuitive method of construing a plan) would then simply have confirmed that interpretation.

46. The result of that analysis is that the 1925 Conveyance and Plan provides evidence which confirms rather than rebuts the presumptions underlying the hedge and ditch rule, along the D to F line. But even if it did not, a chronological approach to the question would lead to the conclusion that, long before 1925, the boundary had already been established by reference to the hedge and ditch rule along the south-eastern side of the ditch, so that a Conveyance which purported to convey anything more to Mr. Parmar's predecessor was, to that extent, of no effect.

The 1997 Conveyance

47. Mr. Laurence made no apology for making his submissions based on the 1997 Conveyance the centrepiece of Mr. Parmar's appeal. His argument may be summarised thus:

i) Leaving aside adverse possession, Mr. Upton's claim in trespass depended upon him proving good title to that part of the D to F line on Mr. Parmar's side of the line of the old hedge.

ii) Mr. Upton's title derived entirely from the 1997 Conveyance, which unambiguously conveyed to him the residue of Birchy Farm up to the hedge line, but no further, whatever may have been the property of his vendors, Mrs. Buttler's executors.

iii) Therefore, regardless what conclusions might be reached as to the boundary along the D to F line prior to 1997 by the application of the hedge and ditch rule, it availed Mr. Upton nothing.

48. Mr. Laurence faced two difficulties in pursuing this submission, one procedural and one substantive. His procedural difficulty was that, as he frankly acknowledged, this argument had not been advanced at all at trial, or even in Mr. Parmar's Grounds of Appeal. He needed therefore to obtain this Court's permission to advance the argument at all.

49. The 1997 Conveyance was among the documents available at trial and, for my part, I would readily have been disposed to permit new arguments based upon it, provided that they only raised matters of law, and called for no examination by experts, or other evidence. At first sight, Mr. Laurence's main argument based on the 1997 Conveyance (which was simply that it conveyed only up to the hedge line, by reference to the use of a photocopy of the Ordnance Survey map) fell within that essentially legal rather than factual category. But Mr. Laurence sought to bolster his submissions by detailed analysis of the acreages referred to in the 1997 Plan, producing a manuscript table of his own detailed calculations to back up his submission. To that, Mr. Gaunt objected that conclusions based upon the detailed analysis of acreages were matters for experts, and that no such analysis had been put to the expert witnesses at trial. There is much force in that objection by Mr. Gaunt but, for reasons which I now explain, I have found it more satisfactory to deal with Mr. Laurence's new argument as a matter of substance rather than procedure.

50. Mr. Laurence is obviously right to say that, leaving aside adverse possession, Mr. Upton's title to sue Mr. Parmar in trespass depended upon the 1997 Conveyance.

51. But Mr. Laurence's second proposition is, in my judgment, manifestly wrong. It is hornbook law (at least to conveyancers) that, where a conveyance refers to an attached plan for identification purposes only, it cannot be relied upon as delineating the precise boundaries. It does no more in that regard than the filed plan or General Map in

registered conveyancing, namely indicate the general boundaries only. That well-known principle is set out in ummistakable terms by Lord Hoffmann in the *Wibberley* case, between page 895h and 897c, a passage which is unquestionably part of the ratio. Where, therefore, a conveyance or Land Registry transfer only indicates general boundaries, and the dispute is as to the precise boundary, recourse must be had to the drawing of inferences from existing topographical features, or other evidence, including inferences which may be derived from the hedge and ditch rule. As Lord Hoffmann put it at page 896:

> "The parcels may refer to a plan attached to the conveyance, but this is usually said to be for the purposes of identification only. It cannot therefore be relied upon as delineating the precise boundaries and in any case the scale is often so small and the lines marking the boundaries so thick as to be useless for any purpose except general identification. It follows that if it becomes necessary to establish the exact boundary, the deeds will almost invariably have to be supplemented by such inferences as may be drawn from topographical features which existed, or may be supposed to have existed, when the conveyances were executed."

In that case, as in the present, the relevant topographical features consisted of a hedge and a ditch, and the inference which their Lordships drew from those features was derived from the application of the hedge and ditch rule.

52. In the present case, the 1997 Conveyance and Plan warned the reader no less than three times that the plan was for identification purposes only. Even the acreage was stated at a figure "or thereabouts". True it is that the use of the Ordnance Survey as a basis for the 1997 Plan meant that the boundary of the property being conveyed along the C to F line corresponded in general terms with the former hedge, although by that time it had largely disappeared, apart from the mature oaks which the Judge found had formed part of it.

53. The intelligent observer taking the 1997 Plan to the site of the boundary would know that Birchy Farm was being conveyed, so far as concerned the C to F line, along an ownership boundary created long previously, and apparently demarcated by the vestiges of an old hedge and by a ditch on the far side of it. Just as in 1925, the intelligent observer would think in 1997 that, in all probability, the vendors were selling all that they had, rather than purporting either to sell more or to retain a useless strip, completely isolated from any other land in their continuing ownership. The observer would not for one moment be dissuaded from that assumption by the terms of the 1997 Conveyance and Plan, precisely because of their repeated warnings that the Plan was for identification purposes only.

54. It is in that context nothing to the point that, as Mr. Laurence submitted after the most careful examination of the *Wibberley* case, both in the Court of Appeal and in the House of Lords, Lord Hoffmann's observations about the unlikelihood of a vendor retaining a useless strip, at page 899F-H were obiter. I think Mr. Laurence was correct about that, because Lord Hoffmann's purpose was to cast doubt upon the sense and reliability of a concession that the relevant conveyance had conveyed land only to the middle of the hedge, rather than to the opposite side of the ditch. But the observation is plainly not a

howler, as Mr. Laurence sought to categorise it. It is simply plain common sense. There could be no ransom-strip explanation for the reservation by Mrs. Buttler's executors of a narrow strip along the south-eastern boundary of the remaining part of Birchy Farm which had not already been disposed of by Mrs. Buttler's will. If the consequences of the application of the hedge and ditch rule, long before 1997, are as the Judge found them to be, then nothing in the general depiction of boundaries in the 1997 Conveyance leads to the conclusion that Mr. Upton thereby obtained anything less along that boundary than the vendor executors by then owned.

55. The result is that this new argument, based on the 1997 Conveyance, wholly fails as a matter of substance, regardless whether it ought also to be refused on procedural grounds.

Adverse possession

56. My conclusion that the Judge was, notwithstanding the fresh evidence, still correct in his application of the hedge and ditch rule as decisive of the boundary dispute before him makes it unnecessary for me to address the appeal against his alternative conclusion that Mr. Upton had in any event acquired title to the ditch by adverse possession, due to a sufficient period of maintenance, both by him and by the Buttlers. His claim in trespass was sufficiently supported by his paper title to need no bolstering by possession, whether adverse or otherwise. I would only say that, had his case depended upon adverse possession, there were difficulties in the Judge's understandably brief analysis of it which would have given me real pause for thought. But, in the circumstances, I will not overburden this already long and perhaps disproportionate judgment by pursuing that unnecessary further analysis.

Conclusion

57. I would, for the reasons set above, therefore dismiss this appeal.

Lord Justice Ryder

58. I agree.

Lady Justice Arden

59. I also agree.