

Neutral Citation Number: [2010] EWCA Civ 873

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE NEWCASTLE UPON TYNE COUNTY COURT
THE HON MR JUSTICE DAVID RICHARDS
VICE CHANCELLOR OF THE COUNTY PALATINE OF LANCASTER
8HZ00596

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2010

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE LONGMORE

and

LORD JUSTICE WILSON

Between :

	(1) IAN PENNOCK (2) DIANE PENNOCK	<u>Appellants</u>
	- and -	
	GILLIAN HODGSON	<u>Respondent</u>

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

Mr Tim Hirst (Instructed By Stachiw Bashir Green) For The Appellants
Mr Joseph Ollech (Instructed By Kj Wiper And Associates) For The Respondent

Hearing date: 22nd June 2010

Judgment Lord Justice Mummery :

How to construe a conveyance

1. In this boundary dispute the main ground of appeal is that David Richards J, in his judgment of 31 July 2009, construed an unambiguous conveyance by relying on inadmissible evidence of physical features of the land conveyed that are neither mentioned in it, nor

identified in an attached plan. The result was a declaration of the position and ownership of a boundary feature that contradicted the conveyance.

2. The parties' neighbouring properties were in common ownership before division occurred and the question of the boundary could arise. At the respective dates of purchase from the common vendor each of the purchasing parties reasonably believed that the relevant conveyancing documents gave them title to the bed of a narrow stream. A plan taken from the Ordnance Survey map and attached to the conveyance of the first area of land sold off showed a black wiggly line. It is agreed that the line represented the stream.
3. The claimants, who have brought this appeal, contend that the stream ran through land retained by the vendor, who later transferred the retained land, including the bed of the stream, to them.
4. The defendant, who is the respondent to the appeal, was a purchaser under the first conveyance. She contends that the boundary of the land conveyed to her and her husband was the line of a post and wire stock fence, which stood back from the southern side of the stream. The fence existed at the time of that conveyance, though it was neither mentioned nor (unlike the stream) was it shown on the attached plan.
5. The judge held that the bed of the stream had passed to the defendant along with a strip of its southern bank as far back as the fence. It followed that the later transfer of the retained land to the claimants could not, and did not, pass the bed of the stream to them. In reaching his decision the judge relied on evidence of the physical features of the land at the date of the first conveyance, including the fence. He held that the position of the fence would have been considered by a reasonable person to be the boundary line of the property conveyed to the defendant.
6. The claimants complain that the judge's method of construction was incorrect. If he had applied the proper principles, he would have had to find in their favour. Authorities, mainly from this court, were cited in support of the contention that the judge ought not to have looked outside the conveyance in order to ascertain the boundary and whether the bed of the stream was retained or conveyed.
7. The opinion of Lord Hoffmann in *Alan Wibberley Building Limited v. Insley* [1999] 1 WLR 894 is now regarded as the leading modern authority on the construction of the parcels in a conveyance. The rest of the Appellate Committee agreed with it. It discusses the status of an Ordnance Survey plan attached to a conveyance "for the purposes of identification" and the inferences that may properly be drawn from physical features of the land existing and known at the date of the conveyance. They are all familiar themes in boundary disputes.
8. Ought the judge to have ignored evidence of the presence and position of the fence, when

construing the parcels clause and the attached plan? The judge should, according to the claimants, have excluded the fact of the fence from the process of construction, because there was no ambiguity in the presence and position of the stream shown as a boundary feature on the attached plan.

9. *Alan Wibberley* supplies the solution. From it the following points can be distilled as pronouncements at the highest judicial level :-

- (1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land, in this case the conveyance to the defendant being first in time.
- (2) An attached plan stated to be “for the purposes of identification” does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise private boundaries nor will it always show every physical feature of the land.
- (3) Precise boundaries must be established by other evidence. That includes inferences from evidence of relevant physical features of the land existing and known at the time of the conveyance.
- (4) In principle there is no reason for preferring a line drawn on a plan based on the Ordnance Survey as evidence of the boundary to other relevant evidence that may lead the court to reject the plan as evidence of the boundary.

10. The long standing general principles of how to construe a conveyance underpin those points. In *Eastwood v. Ashton* [1915] AC 900 at 906 Earl Loreburn said in a dispute about title to a small strip of land:-

“We must look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties.”

11. Lord Parker said much the same thing in different words (see p913.) He also said:-

“There is nothing on the face of the indenture to show that any one of these descriptions in any way conflicts with any other. In order, however, to identify the parcels in a conveyance resort can always be had to extrinsic evidence...” (p. 909)

“It appears to me that of the three descriptions in question the only certain and unambiguous description is that by reference to the map. With this map in his hand any competent person could identify on the spot the various parcels of land therein coloured red. The other descriptions could only be rendered certain by extrinsic evidence...” (p. 912)

12. Looking at evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction. The rejection of extrinsic evidence which contradicts the clear terms of a conveyance is consistent with this approach: *Partridge v. Lawrence* [2003] EWCA Civ 1121; [2004] 1 P. & C.R. 176 at 187; cf *Beale v. Harvey* [2003] EWCA Civ 1883; [2004] 2 P. & C.R. 318 where the court related the conveyance plan to the features on the ground and concluded that, on the facts of that case, the dominant description of the boundary of the property conveyed was red edging in a single straight line on the plan; and *Horn v. Phillips* [2003] EWCA Civ 1877 at paragraphs 9 to 13 where extrinsic evidence was not admissible to contradict the transfer with an annexed plan, which clearly showed the boundary as a straight line and even contained a precise measurement of distance. *Neilson v. Poole* (1969) 20 P. & C.R. 909; *Wigginton & Milner v. Winstar Engineering Ltd* [1978] 1 WLR 1462; *Scarfe v. Adams* [1981] 1 All ER 843; *Woolfs v. Powling* [1999] All ER (D) 125; *Chadwick v. Abbotswood Properties* [2004] All ER (D) 213 and *Ali v. Lane* [2006] EWCA Civ 1532 were also cited on the construction points.

13. Before the judge and in this court it was agreed that the parties' subjective beliefs about the position of the disputed boundary in this case and about who owned the bed of the stream were extrinsic evidence that was inadmissible in the construction of the relevant conveyance: *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] 1 WLR 896 at 913. The effect of the conveyance is not determined by evidence of what the parties to it believed it means, but what, against the relevant objective factual background, they would reasonably have understood it to mean.

14. From that excursion into how to construe a conveyance I turn to the details of the proceedings, the judgment and the grounds of appeal on the surviving issues affecting the boundary. Much of the detail in the judgment relates to the claimants' plea of proprietary estoppel and the defendant's plea of adverse possession that are not pursued on the appeal and need not be repeated.

The proceedings

15. The order dated 10 August 2009 of David Richards J (Vice-Chancellor of the County Palatine of Lancaster) contains a declaration of the position of the boundary in terms of the title to the bed of the stream. It is in favour of Mrs Hodgson, the defendant. He also made an order against the claimants, Mr & Mrs Pennock, that they block up some steps leading down to the stream from a wall constructed by them along the southern bank of the stream and having its base set in the stream. The defendant sought no order for the demolition of the wall which has been built by the claimants on what the judge held to be her land. Without prejudice to her contention that the fence marked the boundary of what she purchased and that the wall was a trespass, she was willing for the wall to remain where it was built, provided that the steps are blocked up.
16. Rimer LJ refused permission to appeal and a stay. Arden LJ granted permission at the hearing of a renewed application on 8 December 2009. Mediation was suggested. It is a pity that, even at this late stage, this valuable service available through the court was not taken up. In many boundary disputes both sides ultimately lose something that might have been secured in a compromise.
17. The crucial Conveyance is dated 28 May 1993 (the 1993 Conveyance). The small stream only 1 metre wide runs from west to east. The defendant's property Kalmara (Title number DU 185688) consists of a detached bungalow and garden, which were conveyed by Mr & Mrs Thorn to the defendant and her husband, from whom she was later divorced. The claimants' neighbouring property Dalegarth (Title Number DU 243815) lies to the south of the stream. The transfer to them by Mrs Thorn dated 15 May 2005 (the 2005 Transfer) was of a building plot with the benefit of detailed planning permission for a 4 bedroom house. It was purchased at auction on 6 April 2005. The claimants built their house Dalegarth on it.
18. Both properties, Kalmara and Dalegarth, are in Moor Road, Cotherstone, Barnard Castle, County Durham. The title to both of them is ultimately derived from Mr Arthur Thorn, who acquired land in Moor Road in 1966 and later vested it in the joint names of himself and his wife, Shirley. They then dealt with it as described.
19. The claimants asserted that, as they had been led to believe at the auction, the boundary between Dalegarth and Kalmara is along the northern edge of the stream. So the bed of the stream belongs to them.
20. The property conveyed by the 1993 Conveyance was shown edged red on the attached plan, which was taken from an Ordnance Survey map and was "for the purpose of identification". The property retained by the Thorns was shown edged blue on the plan. The stream was represented on the plan by a black line. No measurements were given. Nothing was stated about who was in occupation of what areas. Clause 2 (c) of the 1993 conveyance provided that

"The boundary between the property hereby conveyed and the

retained property shall be and belong with the retained property.”

21. According to the claimants the bed of the stream was part of that retained property and was not conveyed by the 1993 Conveyance. It is the boundary referred to in clause 2(c) of that conveyance. The 2005 transfer of Dalegarth by Mrs Thorn therefore included the bed of the stream.
22. The judge did not accept that construction of the 1993 Conveyance. He found that the southern boundary of Kalmara is on the south side of the stream in the position of the fence that that was there in 1993 and that the bed of the stream belongs to the defendant.
23. At this point the physical features of the properties should be noted.
24. First, at the date of the 1993 Conveyance there was visible a wooden post and wire fence 2 feet to the south of the stream and in good condition. It was put up by Mr Thorn in 1985 replacing an earlier wire stock fence to stop sheep grazing there from getting into the stream and then into the garden of Kalmara. The judge found that the fence marked the boundary between Kalmara and the retained land.
25. Secondly, the southern bank of the stream was several feet high, while the northern bank was distinctly lower and had easier access. The land beyond the southern bank was pasture and beyond the northern bank was the cultivated garden of Kalmara.
26. Thirdly, there was a line of trees on the northern side of the stream. In 2006 the defendant agreed to their removal by the claimants at their expense, as the trees overhung and blocked out light to Dalegarth
27. Fourthly, since 2006 there has been a stone wall along the southern bank of the stream. It was built by the claimants and involved work in and excavation of the stream. There are steps leading from the wall down to the stream. The claimants appeal against the order to block up the steps. The defendant offered to allow the wall to remain as long as the access points to the stream were removed and it was declared that the true boundary was the southern edge of the stream. In this regard the defendant was therefore making a concession that, even though (as she contended) the boundary was the line of the former fence, a declaration to that extent more favourable to the claimants might be made.
28. The principal submission of the claimants at trial was that the terms of the 1993 Conveyance and the attached plan are clear on the position and ownership of the boundary and that no extrinsic evidence is admissible to determine the boundary.
29. In the alternative, they argued unsuccessfully that the defendant was estopped from asserting title to the bed of the stream by an oral agreement alleged to have been reached on 30

March 2006, but disputed by the defendant, and by expense subsequently incurred by them in removing trees and their stumps from the defendant's side of the stream. The judge rejected the plea of proprietary estoppel and the claimants have not appealed it, save in respect of the order to block up the steps. The judge found that there was no relevant representation by the defendant, and no reliance placed, or detriment suffered, by the claimants.

30. The defendant argued unsuccessfully an alternative contention that she had acquired title to the bed of the stream by adverse possession. She has not cross appealed.
31. The judge found as a fact that, at the date of the 1993 Conveyance, the defendant reasonably believed that the stream formed part of Kalmara and that the fence formed the physical and legal boundary. The judge also found that at the auction of Dalegarth the auctioneer stated that the stream was the boundary and that, when they bought Dalegarth, the claimants genuinely and reasonably believed that they were getting the whole of the bed of the stream
32. In sum the judge concluded that the 1993 Conveyance did not define the boundaries of the property conveyed; that it was necessary to take account of topographical features existing in 1993 as part of the surrounding circumstances; that they included the presence of the stream and of the fence; and that they would indicate to a reasonable person that the stream was being conveyed to the purchasers and that the boundary was along the line of the fence.

Claimants' submissions

33. Mr Hirst, who appears for the claimants, submits first that the judge erred in allowing his decision to be influenced by inadmissible evidence of the defendant's subjective belief at the time of the 1993 Conveyance as to the extent of the land conveyed and the position of the boundary along the stock fence south of the stream. That finding of belief was a crucial stepping stone reinforcing his decision that the fence was the boundary feature.
34. Secondly, the judge wrongly relied on extrinsic evidence of the existence of the stock post and wire fence as marking the boundary. He did not find that the 1993 Conveyance was ambiguous. The plan was in fact clear. The black wiggly line on the plan was the stream. That was the natural boundary feature. It was marked on the attached plan. It showed that the bed of the stream was excluded from the red edged land that was conveyed and was included in the blue edged land that was retained. The red edging and the blue edging both abutted the black line that was admitted to be the stream.
35. The judge had ignored the admissions that the black line represented the stream. Mr Hirst submits that read together clause 1 and the plan in the 1993 Conveyance were clear. The transient post and wire stock fence could have been marked on the plan, but it was not.

It had been moved. It had no precise position. The fence was erected to keep livestock out of the stream and the garden of Kalmara, not for the purposes of marking the boundary of that property. Further, the owner of Kalmara would have no use for a thin strip of land on the other side of the stream.

36. As the 1993 Conveyance was not ambiguous, extrinsic evidence was irrelevant and inadmissible. Under clause 2(c) the Thorns retained ownership of the stream as the boundary feature, which was transferred to the claimants by the 2005 transfer. There was no need or justification for looking at any other features on the ground to contradict the clear terms of the conveyance.

37. Thirdly, it was unjust to make an order requiring the claimants to block up the steps down to the stream and rebuild that part of the wall. The defendant, knowing that the claimants believed that the stream was theirs, had stood by and watched them incur expense by building the stone wall with the steps. There was no objection or protest from her. She had acquiesced in their construction of the wall with the steps and was estopped from insisting on any alteration to the wall as built. The order to block up the steps was also unduly onerous and unjust.

38. This estoppel point was the subject of an oral application by the claimants at the beginning of the trial. It was left over by the judge until the evidence had been given, but he did not invite the claimants to renew their application or hear argument on or consider the point before granting the mandatory injunction to stop up the steps.

39. Mr Hirst also made submissions that certain photographs had been admitted by the judge when they were not receivable, because no notice had been given of them by the defendant under CPR 33.6(3). As the photographs had already been put in evidence, the judge was not allowing new evidence in late. There is nothing in this point and I shall say no more about it.

Discussion and conclusion

40. In my judgment, the judge's findings as to the subjective belief of the defendant about her title to the bed of the stream at the time of the purchase of Kalmara did not form a part of the reasons for his decision on construction, any more than his findings as to the claimants' beliefs as to the title to the bed of the stream assisted them in their claim to title. The judge made and recorded findings on the evidence he had heard about the beliefs of the parties and of Mrs Thorn on the subject of the boundary. They formed part of the narrative of the case, but they were not part of the evidence on which he relied, or part of the reasoning for his conclusion on the construction of the 1993 Conveyance.

41. As for the physical features and their use in construing the 1993 Conveyance, an inconsistency noticed by the claimants in 2005 between the Sale Particulars and the

physical features of the building plot alerted them to the fallibility of paper delineations of property. Clarification was sought by the claimants because the Sale Particulars appeared to show that the building plot extended north of the stream into the garden of Kalmara. There was evidence from the claimants that it was stated at the public auction in 2005 that the building plot included the bed of the stream.

42. Those facts are not relevant to the construction of the 1993 Conveyance. They may have given rise to a claim by the claimants against Mrs Thorn, but they could not affect the question of the extent of the property which had been conveyed by the 1993 Conveyance.

43. We have been shown and, indeed, entrusted with the original 1993 Conveyance so that we can study the markings on the attached plan. It does not contain any relevant measurements. It does not fix the position of the boundaries. There are indications, by the use of the red edging for the land conveyed and by the use of blue edging for the land retained, of the location of those areas in relation to the position of the stream. But the indications are not with that degree of precision that makes clear the exact position of the boundary on the plan.

44. This was a general boundary shown by the quite thick red and blue coloured lines in the vicinity of the stream. As the plan is insufficiently clear about the position of the boundary, this was a case in which the judge was entitled to take the plan in hand and look at the physical features of the land on the ground as at the date of the 1993 Conveyance. That approach was in line with the principles summarised above based on the permissible use of the factual matrix of the 1993 Conveyance as well as with the common sense of the situation. The exclusionary rule regarding extrinsic evidence was not breached.

45. The estoppel point deployed against the defendant fails in respect of the steps in the wall, as it does not appear that the application to amend was pursued. Indeed, it even seems to have been accepted on behalf of the claimants that, even if made, the proposed amendment would not have given them any more than the defendant was prepared to give in relation to the wall.

Result

46. I would dismiss the appeal. It has not been shown either that the judge's construction of the 1993 Conveyance or that the orders made by him were wrong. The judgment of David Richards J is clear, careful and correct and I agree with it. The unfortunate consequences of a case like this are that, in the absence of any compromise, someone wins, someone loses, it always costs a lot of money and usually generates a lot of ill-feeling that does not end with the litigation. None of those things are good for neighbours.

Lord Justice Longmore:

47.I agree.

Lord Justice Wilson:

48.I also agree.