HOUSE OF LORDS

Lord Browne-Wilkinson Lord Lloyd of Berwick Lord Hoffmann
Lord Hope of Craighead Lord Clyde

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

ALAN WIBBERLEY BUILDING LIMITED
(RESPONDENTS)
v.
INSLEY
(APPELLANTS)

ON 29 APRIL 1999

LORD BROWNE-WILKINSON

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons which he gives I would allow the appeal and make the declaration which he proposes.

LORD LLOYD OF BERWICK

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hoffmann. For the reasons he gives I too would allow the appeal and make the declaration which he proposes.

LORD HOFFMANN

My Lords,

This appeal arises out of a dispute over the ownership of a tiny strip of garden in rural Staffordshire. But it raises a point of general importance about farm boundaries. That is why leave was given to bring an appeal to your Lordships' House.

Boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras's army. It is therefore important that the law on boundaries should be as clear as possible.

The first resort in the event of a boundary dispute is to look at the deeds. Under the old system of unregistered conveyancing, this means the chain of conveyances and other instruments, going back beyond the period of limitation, which demonstrates that the owner's title is in practical terms secure against adverse claims. These conveyances will each identify the subject matter in a

clause known as the parcels which contains the description of the land. Sometimes it is no more than a reference to the land conveyed by an earlier conveyance, which will then have to be consulted. Older conveyances of farm property often describe the property as being the house and land in the occupation of the vendor or his tenant. 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.

The same is true in the case of registered conveyancing. When registration was first introduced in 1862, Parliament thought it would be an improvement if the maps and plans used in the land registry showed the exact boundaries. But this turned out to be a mistake, for the reasons given by a Royal Commission which sat to consider land registration a few years later. The following passage from the Report (Land Transfer Commission on the Operation of the Land Registry Act (1870), p. xxix, para. 80) is cited in Ruoff and Roper, *Registered Conveyancing*, (1998), vol. 1, para. 4-18:

> "Everyone who has had experience in conveyancing knows that although the difficulties of identifying the parcels seem to be serious and numerous, yet in point of fact they hardly ever arise. The conveyancer sitting in his chambers is unable to identify things of which the description varies from time to time. But the attorney or land agent, seeing with his own eyes, and communicating directly with the person in possession, is in the vast majority of cases satisfied that his employer is getting the thing he contracted to have, and the history of which is narrated in the abstract of title. If there is any border land over which the precise boundary line is obscure, it is usually something of very trifling value and the purchaser is content to take the property as his vendor had it, and to let all questions of boundary lie dormant. But the Act of 1862 prevents a transfer on these terms. People who are quite content with an undefined boundary are compelled to have it defined. And this leads to two immediate consequences, both mischievous. First, notices have to be served on adjoining owners and occupiers which may and sometimes do amount to an enormous number and the service of which may involve great trouble and expense . . . . The second [mischief] is that people served with notices immediately begin to consider whether some injury is not about to be inflicted on them. In all cases of undefined boundary they find that such is the case, and a dispute is thus forced upon neighbours who only desire to remain at peace."

As a result of this report, the law was changed by the Land Transfer Act 1875 to introduce what is known as the "general boundaries' rule. This is now contained in Rule 278 of the Land Registration Rules 1925:

> "(1) Except in cases in which it is noted in the Property Register that the boundaries have been fixed, the filed plan or General Map shall be deemed to indicate the general boundaries only.
>
> "(2) In such cases the exact line of the boundary will be left undetermined - as, for instance, whether it includes a hedge or wall and ditch, or runs along the centre of a wall or fence, or its inner or outer face, or how far it runs within or beyond it; or whether or not the land registered includes the whole or any proportion of any adjoining road or stream."

The Land Registry uses maps based upon the Ordnance Survey which are, of course, usually very accurate. For example, if one field is divided from another by a natural feature such as a hedge, the line on the Ordnance Survey map will indicate the middle line of the hedge. But the effect of the general boundaries rule is that the owner of a field shown on the filed plan by reference to the Ordnance Survey map does not necessarily own it up to the middle line of the hedge. The precise boundary must, if the question arises, be established by topographical and other evidence.

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 lies along the edge of the ditch on the far side from the hedge. The basis of this presumption was explained by Lawrence 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 then presumed that the ditch was dug and the hedge grown in the manner described by Lawrence 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 Lawrence J. to operate.

It is the scope of these presumptions which is in issue in the present appeal. The appellant Mr. Insley lives at Saverley Cottage in the village of Saverley Green in Staffordshire. In 1985 he bought a strip of extra land for his garden from Mrs. Burton, the owner of the neighbouring Home Farm. It lay along part of the boundary which separated Home Farm from Saverley Green Farm. Between the two farms there was a hedge and a ditch which had been there as long as anyone could remember. The hedge was on Mr. Insley's side of the ditch. The field on the other side had been acquired by the respondent company ("Wibberley") from the owner of Saverley Green Farm in 1984.

In 1985 Mr. Insley, relying upon the hedge and ditch presumption, grubbed up the hedge along his section of the boundary and erected a post and wire fence along the far side of the ditch. Wibberley objected. It claimed that the true boundary ran along the middle of the hedge. It brought proceedings in the County Court to recover possession of the strip which Mr. Insley had enclosed. Wibberley was successful before the judge (Mr. Recorder Alan Pardoe Q.C.) and by a majority (Simon Brown and Ward L.JJ., Judge L.J. dissenting) his judgment was affirmed by the Court of Appeal.

The burden was upon Wibberley to show that it had a better title than Mr. Insley. He was in possession and therefore needed to show no title at all. Possession is in itself a good title against anyone who cannot show a prior and therefore better right to possession: *Asher v. Whitlock* (1865) L.R. 1 Q.B. 1. The question was therefore whether Wibberley had acquired a title to the strip. The land was unregistered and the question therefore depended upon an examination of Wibberley's deeds.

The title of Saverley Green Farm could be traced back to the seventeenth century. It has always been in separate ownership from Home Farm and there was nothing to show that the boundary had not always been in the same place. Wibberley had acquired its land by a conveyance dated 14 May 1984 from the executors of Joseph Bedson, who had owned Saverley Green Farm from 1921 until his death in 1954. The parcels in the conveyance to Wibberley described the land by reference to a plan "for the purpose of identification only" and by reference to the conveyance of 11 April 1921 by which Joseph Bedson acquired the land. In order to determine what land was conveyed to Wibberley, it is therefore necessary to discover what land was conveyed to Joseph Bedson.

The 1921 conveyance to Mr. Bedson identified the relevant part of the land by its extent in acres, roods and perches and the fact that it was occupied by a Mr. John Harvey. There was of course no direct evidence of whether Mr. Harvey had been in occupation of the strip in 1921. All that is possible is to draw inferences from the hedge and ditch, which the evidence suggested were probably in existence at the time. On the other hand, there was nothing to suggest that the ditch was there before the ancient boundary between the two farms had been drawn. So hedge and ditch gave rise to an inference, for the reasons stated in *Vowles v. Miller* (1810) 3 Taunt. 137, that Joseph Bedson's land was bounded by the near side of the ditch.

I therefore think it clear, my Lords, that if the question is confined to whether Wibberley had established a title to the strip on the basis of its own deeds, the claim should have failed. But the judge and the majority in the Court of Appeal held that Wibberley could succeed by praying in aid inferences drawn from Mr. Insley's deeds. Therefore, although as I have said Mr. Insley was under no obligation to prove any title at all, I must go on to examine his deeds.

Mr. Insley acquired his extra piece of garden from Mrs. Burton by a conveyance dated 23 July 1985. The parcels described the land as being 594 square yards in extent and shown on a plan for the purposes of identification only. This description was therefore neutral as to whether it included the strip or not. Mrs. Burton had in turn acquired the property (together with the rest of Home Farm) from Mr. Wilfred Beard by a conveyance dated 5 February 1975. This was a conveyance of "the property more particularly described in the schedule hereto." The schedule read as follows:

> ""ALL THAT messuage or farmhouse and outbuildings situate and known as Home Farm Saverley Green in the County of Stafford TOGETHER WITH the land forming the site thereof and used and occupied therewith which said property comprises in the whole ten decimal point three nine acres or thereabouts and is more particularly delineated for the purposes of identification only on the plan annexed hereto and thereon edged blue and is more particularly described as follows:

O.S. No.	*Description*	*Acreage*
5455	House and Buildings	0.82
6246	Pasture	3.38
6751	Ditto	3.08
7336	Ditto	3.11
		10.39

The field numbered 6751 included the land subsequently sold to Mr. Insley.

The argument principally turns upon this conveyance, but to complete the picture I must consider what land Mr. Beard owned at the time. He derived title from a conveyance to him dated 25 September 1956 in which the land was identified simply as being known as Home Farm and "as now in the occupation of the vendor." The earlier deeds are no more specific about the boundaries. So if one had asked before the sale to Mrs. Burton where the boundary between Home Farm and Saverley Green Farm lay, Mr. Beard's deeds would have told the same story as his neighbour's. In both cases exact boundary would have depended upon an inference from the hedge and ditch.

It is said, however, that upon its true construction, the parcels of the 1975 conveyance gave Mrs. Burton the land only up to the midline of the hedge. I very much doubt whether this is correct. The language is confusing. The land is said to be "more particularly" delineated on the plan but, almost in the same breath, the plan is said to be "for the purposes of identification only." It goes on to say that the land is "more particularly described" by reference to the Ordnance Survey

field numbers. I would regard this language as in itself fairly inconclusive as to whether the parties intended the boundary to be in the precise place which the Ordnance Survey map represented, namely, in the middle of the hedge. When one looks at the background, this construction becomes very unlikely. If one examined the title of the vendor Mr. Beard, as the parties must have done, it would show that by virtue of the hedge and ditch presumption he owned the land up to the far side of he ditch. If, therefore, the 1975 conveyance drew the boundary along the middle line of the hedge, Mr. Beard 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 only" 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 of Saverley Green Farm on the far side of the ditch. The same land was in due course conveyed to Mr. Insley.

In the Court of Appeal, however, counsel for Mr. Insley conceded that the 1975 conveyance only conveyed the land up to the middle of the hedge. Therefore the choices facing the court were either that Mr. Beard had (probably by a mistake) retained a useless strip or that it somehow belonged to Wibberley. The majority came to the latter conclusion by the following reasoning. The conveyances to Wibberley and its predecessors in title were intended to convey the field up to the boundary with Home Farm, wherever that boundary was. Until 1975, one would have had to assume, on the basis of the hedge and ditch presumption, that it lay along the near side of the ditch. But the 1975 conveyance cast a retrospective light on the matter. It must be assumed that Mr. Beard had also intended to convey to Mrs. Burton all the land up to the boundary with Saverley Green Farm. The 1975 conveyance shows that they thought it ran along the middle line of the hedge. Therefore they must have known something which displaced the hedge and ditch presumption in the conveyances of Saverley Green Farm.

My Lords, I am bound to say that this seems to me highly improbable. It means that Mr. Beard and Mrs. Burton intended not merely to convey whatever land Mr. Beard owned but that they had undertaken some inquiry, of a kind which the 1870 Royal Commission had said was burdensome and likely to cause trouble, to establish the precise boundary between Saverley Green Farm and Home Farm. Furthermore, they had ascertained that it lay in a place which no previous conveyance or topographical evidence would have suggested. But there is no evidence that they were privy to some piece of information which would have displaced the hedge and ditch presumption as applied to the earlier conveyances, or what that information might have been.

In my opinion therefore, if one has to start with the artificial assumption that the 1975 conveyance included the land only up to the middle of the hedge, the most likely explanation is that the draftsman simply made a mistake. The inartistic manner in which the parcels have been drafted supports such a conclusion. The matter has since been remedied by the execution of a confirmatory conveyance of the strip. But the 1975 conveyance, whatever its effect as between Mr. Beard and Mrs. Burton, cannot have affected the title of Wibberley, who took the land conveyed to Mr. Joseph Bedson sixty years earlier. And it is, as I have said, for Wibberley to establish its title to the strip.

The majority relied upon the case of *Fisher v. Winch* [1939] 1 K.B. 666. In that case, the trustees of a large estate sold it off in parcels. On 30 October 1922 they conveyed Dairy Farm to the defendant by reference to a plan, not said to be for

the purposes of identification only, which had been copied from the Ordnance Survey map. Prima facie, therefore, the defendant's land was bounded by the centre of the hedge represented by the line on that map. On the following day the trustees conveyed an adjoining field to the plaintiff's predecessor in title. There was a hedge and a ditch between Dairy Farm and the plaintiff's field, with the ditch on the defendant's side of the hedge. The plaintiff claimed that he owned the hedge and ditch according to the presumption. But the Court of Appeal held that the presumption could not affect the construction of the conveyance to the defendant. Before the date of that conveyance, the land on both sides of the hedge and ditch belonged to the trustees. The ditch was there before the boundary was drawn. So there was no room for the reasoning in *Vowles v. Miller* (1810) 3 Taunt. 137. Whoever dug the ditch could not have dug it along the boundary because there was no boundary at that point. There was nothing to displace the conclusion that, having chosen to describe the land by reference to an Ordnance Survey plan, the trustees intended the boundary to be where that plan indicated, namely, along the middle of the hedge.

In the present case, there is no doubt that there has been for many years a hedge and ditch on what has for centuries been the boundary between the two farms. There is no evidence to displace the presumption that the boundary between the farms was drawn before the ditch was dug. So for all this time the presumption has determined the boundary. And whereas in *Fisher v. Winch* [1939] 1 K.B. 666 the question turned upon the title of the person who took under the conveyance by reference to the ordinance survey plan, here it turns upon the title of the owner on the other side of the boundary. I therefore think that the reasoning in *Fisher v. Winch* [1939] 1 K.B. 666 can have no application. For these reasons I would allow the appeal and declare that the boundary ran along the Saverley Green Farm edge of the ditch.

LORD HOPE OF CRAIGHEAD

My Lords,

I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he has given I too would allow the appeal and declare that the boundary ran along the Saverley Green Farm edge of the ditch. But I should like to add these observations as we are differing from the Court of Appeal, where there was also a difference of opinion. The majority (Ward L.J. and Simon Brown L.J.) held that the recorder was right to find that the reference to the Ordnance Survey map had displaced the hedge and ditch presumption, with the result that the line of the boundary was in the middle of the hedge on the Saverley Cottage side of the ditch which the defendant has replaced by a fence. I find myself however, with respect, in full agreement with the reasons which Judge L.J. gave for rejecting the Ordnance Survey map and applying the presumption.

Any boundary dispute which leads to litigation as protracted as the dispute has been in this case is regrettable. But no workable system of conveyancing can be expected to eliminate entirely the opportunity for disputes to arise about boundaries. In most cases neighbours are content to accept that absolute precision is unattainable. They recognise that a certain amount of latitude must be given to whatever method has been used to fix the boundaries of their land. That also is the view which has been taken by the legislature. The original system of precise guaranteed boundaries under the Land Registry Act 1862 gave rise to considerable difficulty. It had to be abandoned in view of the expense which was involved in a survey of the precise boundaries and the many disputes which arose

between neighbours who had been content until then to accept a certain amount of vagueness as to the precise line of their common boundary. The result, as my noble and learned friend Lord Hoffmann has explained, was the introduction of the general boundaries rule now contained in Rule 278 of the Land Registration Rules 1925.

The use of maps or plans such as those published by the Ordnance Survey is now widespread and has obvious advantages. Ordnance Survey maps are prepared to a high standard of accuracy *and are frequently and appropriately used to fix boundaries by reference, for example, to Ordnance Survey field numbers. But* like all maps they are subject to limitations. The most obvious are those imposed by scale. No map can reproduce to anything like the same scale of detail every feature which is found on the ground. Furthermore, as Judge L.J. observed, [1998] 1 W.L.R. 881, 890B-C, the Ordnance Survey does not fix private boundaries. The purpose of the survey is topographical, not taxative. Even the most detailed Ordnance Survey map may not show every feature on the ground which can be used to identify the extent of the owner's land. In the present case the Ordnance Survey map shows the hedge, but it does not show the ditch. So there is no reason in principle *in this case* for preferring *the* line on the map to other evidence which may be relevant to identify the boundary.

The essential elements for a sound decision in the present case were, in my opinion, correctly identified by Judge L.J. when he said, first, that there was no evidence before the recorder that the disputed land had been in common ownership and, secondly, that a party cannot by mere assertion in the conveyance, however phrased, pass a title to land over which he himself has none: [1998] 1 W.L.R. 881, 889H and 890D. So even if the words used in the May 1984 conveyance had indicated that it was the intention of Joseph Bedson's executors to fix the line of the boundary by reference to the features shown on the Ordnance Survey map, it would still have been open to the objection that the disputed land was land to which the executors had no title.

In *Fisher v. Winch* [1939] 1 K.B. 666 the dispute concerned a boundary which had been created by the separation into two separate parcels of land previously in common ownership. The title of the common owner was not in question. What was in issue was simply the line of the boundary, bearing in mind the fact that the common owner could not convey the same piece of land on successive days to two different purchasers. In the present case there was no common owner, so the solution to the dispute must be found by analysing the titles of each party in order to identify the limits of each party's ownership. In neither case was the title identified by reference to Ordnance Survey maps until quite recently. This was done long after the ditch was dug and the hedge was planted. It was no doubt convenient to refer to the map in subsequent conveyances for identification purposes. But these references did not enable the owner to convey to another a title to land over which he himself had no title. They did not remove the need to examine the titles in the event of a dispute, as it was one between the owners of land not previously in common ownership.

In this situation it seems to me that the hedge and ditch presumption, far from being a touchstone of last resort, as Simon Brown L.J. put it [1998] 1 W.L.R. 881, 895B, is the best guide to the line of the boundary.

LORD CLYDE

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons which he gives I would allow the appeal and make the declaration which he proposes.