

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
NEWCASTLE UPON TYNE DISTRICT REGISTRY
(HIS HONOUR JUDGE LANGAN QC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

13th October 2010

B e f o r e :

**LORD JUSTICE MUMMERY
LORD JUSTICE LLOYD
and
LORD JUSTICE SULLIVAN**

Between:

Beazer Homes Ltd

Appellant

- and -

County Council Of Durham

Respondent

**Ms Amanda Tipples (instructed by Walker Morris) appeared on behalf of the Appellant.
Mr Michael Booth QC and Mr Eric Owen (instructed by Legal Services Division, Durham County
Council) appeared on behalf of the Respondent.**

Lord Justice Lloyd:

1. This appeal against an order of HHJ Langan QC dated 8 February 2010 is brought by the defendant, Beazer Homes Limited, for whom Ms Tipples has appeared before us as she had before the judge. The respondent, Durham County Council, is represented before us by Mr Michael Booth QC, who did not appear at the trial, leading Mr Owen, who did.
2. The issue is a short one arising on the construction of a transfer dated 23 March 1979 by which the defendant, under its then name, transferred 4.75 acres of land to the claimant, then intending to have a school built on it. The land sold adjoins a housing estate which had been constructed by the defendant. No school has been or now will be built on the land sold. Now the claimant is contemplating selling it for residential development, that being consistent with local planning considerations in the district of Chester-le-Street where it lies.
3. The defendant's housing estate, which had been developed by them, included a network of roads providing access to a highway. I daresay that by now the estate roads are themselves highways maintainable at the public expense. The network did not provide access all the way to the edge of

the property sold. Between the end of the nearest estate road and the boundary of the land sold there is an area which is shown on the plan annexed to the transfer hatched green. By the transfer various rights including private rights of way were granted to the claimant in relation to this hatched area and other areas and the various rights conferred were provided for in order to facilitate the development of the land sold as a school, but they were not limited to such a use of the land. It may be that if the land sold were still intended to be a school the problem that has arisen would not in practice have arisen, but perhaps the defendant as a residential developer sees a different economic and commercial interest in relation to the prospect of residential development of the land next to its housing estate.

4. The defendant does not and cannot resile from the rights expressly granted by the transfer. The defendant contends through Ms Tipples that those rights give the claimant all it needs even for a possible residential development. There is, however, an issue as to the scope of the claimant's rights and the defendant's obligations as regards the hatched area which the judge decided in favour of the claimant. If the defendant is right, its position in respect of the hatched area gives it the ability to treat that land in some circumstances and to some extent as a ransom strip, in the sense that it might be desirable for a future developer of the land to acquire further rights for which the defendant could insist that it should pay a commercial value. In using the phrase "ransom strip" I imply no value judgment as to the defendant's position. At its highest, the defendant's contention would not preclude the residential development of the claimant's land, but it could affect the liabilities to be incurred by the developer so that it would have an impact, and quite possibly a substantial impact, on the profitability of any development.
5. The operative part of the transfer is short and to the point. In consideration of the payment of the sum of £90,250, the defendant transferred the relevant land to the claimant together with the easements specified in the First Schedule, subject to the reservation of matters set out in the Second Schedule and with the benefit for the defendant of covenants on the part of the claimant as set out in Schedule 3, which is a restrictive covenant, and also as set out in Schedule 4, which are positive covenants. The Schedule 1 rights are, first of all, the right to connect to and use the drains and sewers on the adjoining land of the defendant and ancillary rights. The second paragraph sets out rights to use watercourses, sewers, drains, pipes and cables passing through the defendant's adjoining land. The third does not require any specific mention in the present context. The fourth gives rights of way over the estate roads for the claimants, its servants, contractors and all persons visiting the property or the school to be erected upon it. The critical right is that set out in the fifth paragraph of the Schedule, which I will read:

"The right within eighty years from the date hereof to enter and construct and thereafter have the same adopted as a highway maintainable at the public expense a road with associated drainage and street lighting on under and over the land (or part thereof) hatched green on the same plan to provide an access to the said property the person exercising such right causing no avoidable damage or disturbance and forthwith making good any damage thereby caused and the right (in common with the Transferor) to pass and repass over and along and to make connections to any road constructed by the Transferor within eighty years from the date hereof on the land hatched green or part thereof and provided that the Transferee shall construct a road and associated drainage and street lighting on under or over the land (or part thereof) hatched green on the said plan in accordance with this cause or if the Transferor shall do likewise the party so constructing the same shall construct the same according to the standard required by the Highway Authority for the construction of roads that are to be adopted at the public expense and will do all acts and things necessary to have the same adopted by the highway authority and will maintain the same until adoption and will fully indemnify the other in respect of any costs of construction maintenance or adoption"

6. Thus the claimant is granted the right to enter on the hatched area to construct a road and to have it adopted as a highway maintainable at public expense and also the right to make connections with the defendant's other roads. It is also provided that, whichever of the claimant or the

defendant constructs the road, it is to do so to the standards required by the Highway Authority for adoption and it is to do all such acts and things as are necessary to have it adopted.

7. So Ms Tipples argues there is an express obligation to do all acts and things necessary for adoption, but that is expressly provided for only in relation to the party constructing the road: that is to say it does not apply to the defendant unless it is the defendant that undertakes the work.
8. Before I turn to the implications of that, I must complete my brief review of the transfer. I need not refer to the matters excepted and reserved in Schedule 2. The restrictive covenant in Schedule 3 is designed to preserve and protect sewers which had already been constructed through or in the land sold for the benefit of the drainage of the defendant's housing estate. Those were to be preserved and protected, and an express reference is made to the fact that it was contemplated that they would be adopted under section 18 of the Public Health Act 1936 and the covenant included provision requiring that the covenantor do nothing to cause or allow anything to be done which would prejudice such adoption.
9. The positive covenants in the Fourth Schedule include at paragraph 1 an obligation on the claimant to join with the defendant, when it seeks to have the sewers adopted, in doing all acts and things required so that they shall be adopted under section 18 of the 1936 Act. The positive covenant also includes a covenant to maintain the hatched area in a neat and tidy condition until such time as a road is built on it.
10. The claimant contends that the transfer includes, albeit only by implication, in circumstances in which the defendant is not the party building the road, an obligation on the defendant to cooperate with the claimant by joining with the claimant if necessary if and when it seeks to have the road adopted, in doing all acts and things reasonably required so that the road and the associated drainage and street lighting over the hatched area shall be adopted as a highway maintainable at the public expense. The need, or at least the possible need, for such an obligation arises from the fact that some of the procedures by which land may become a highway maintainable at the public expense require the consent of the owner of the land, that is to say here the defendant, and moreover that another procedure which may lead to that is open to the possibility that the owner of the land may object. There are three relevant provisions which, because we are considering the transfer executed in March 1979, I will refer to by reference to the Highways Act 1959, although they are substantially in the same form now under the 1980 Act as they were in 1979.
11. Section 39(1) of the Highways Act 1959 is as follows:

“A person who proposes to dedicate a way as a highway and who desires that the proposed highway should become maintainable at the public expense by virtue of this section shall give notice of the proposal, not less than three months before the date of the proposed dedication to the council, who would, if the way were a highway, be the highway authority therefor, describing the location and width of the proposed highway and the nature of the proposed dedication.”
12. Under the remaining provisions of that section, if the council is satisfied that the highway would be of sufficient utility and has been made up in a satisfactory manner, they can provide that the highway shall be maintainable at the public expense.
13. More commonly used is section 40 as it then was. By subsection (2)(b) of this:

“Subject to the following provisions of this section, a local highway authority may agree with any person to undertake the maintenance of –

...

- (b) a way which is to be constructed by that person, or by a highway authority on his behalf, and which he proposes to dedicate as a highway;

and where an agreement is made under this subsection the road or way to which the agreement relates shall, on such date as may be specified in the agreement, become for the purposes of this Act a highway maintainable at the public expense.”

14. Both of those provisions require dedication as a highway as well as adoption by the highway authority. Dedication is something which only the owner of the land can do.
15. The third possible provision was then section 202, which is in the part of the Act which dealt with private street works and private streets. Subsection (1) is as follows :

“When any works have been executed in a private street, the street works authority may, by notice disclosed in a prominent position in the street, declare the street to be a highway which for the purposes of this Act is a highway maintainable at the public expense, and on the expiration of the period of one month from the day on which the notice was first so displayed the street shall become such a highway;

Provided that the street shall become such a highway by virtue of this subsection if, within the said period, the owner of the street, or, if more than one, the majority in number of the owners thereof, by notice to the authority object.”

16. Under the 1959 Act as originally enacted that gave the owner an absolute veto. At the time of the hearing before the judge that was thought to be the position in 1979 as well. In fact the Highways (Miscellaneous Provisions) Act 1961 qualified that position by section 11(1), which is as follows:

“Where by virtue of an objection made in pursuance of section two hundred and two of the principal Act (which provides that where street works have been executed in a private street or part of it, the street works authority may by notice make the street or part of a highway maintainable at the public expense unless the owner or a majority of the owners of the street or part object) a private street within the meaning of that section or a part of such a street is prevented from becoming such a highway, the street works authority may, within two months from the expiration of the period mentioned in subsection (1) of that section, apply to a magistrates’ court for an order overruling the objection.”

17. The remaining part of the section provides for the possibility of appeals either against the making or against the refusal of an order overruling the owner’s objection. If the objection is overruled whether by the magistrates court or on appeal, presumably, to the Crown Court, then subject to the elapse of a certain amount of time the street or part becomes a highway maintainable at the public expense on the overruling of the owner’s objection.
18. It was a significant part of Ms Tipples’ argument before us that the owner does not, as the judge thought it had, have an absolute veto over a proposal under section 202 but the fact remains that, even though there is the possibility of the objection being overruled either by the magistrates court or on appeal by the Crown Court, it would be a matter of uncertainty whether, if the owner objected, the procedure under section 202 leading to adoption as a highway maintainable at public expense could be followed successfully. There would be a good deal of uncertainty and the outcome would be very far from readily foreseeable.
19. I should say that the current provisions in the Highways Act 1980 corresponding to those that I have mentioned are section 37, section 38 and section 228. Sections 37 and 38 are reasonably clear and straightforward. As I understand it, section 38 is the provision which in practice is normally proposed when a developer proposes to a highway authority that a road that it is intended to construct to the relevant standard as an estate road or the like, should be adopted, so as to be maintainable at the public expense. The street works regime is a good deal less clear as

regards how it would work in practice especially in relation to the hatched area. So far as I know the only case in which that provision has had to be considered, albeit in a rather different context to the present, is the case of *Rusby v Harr* [2006] EWCA Civ 865 where, as it happens, it was I that had occasion to make some comments about what might have happened if an objection had been made and an application had been made with a view to overruling the objection in relation to a cul de sac in or near Harrogate. I made some observations about that in paragraph 14 of my judgment, which I do not need to quote.

20. If this procedure were invoked and if the defendant objected, as Ms Tipples submits it would be entitled to object, the outcome would be far from readily foreseeable. It cannot be said that co-operation, whether by active consent under section 37 or 38 or by refraining from objecting under what is now section 228, on the part of the defendant may not be needed if the hatched area is to be adopted as a highway maintainable at the public expense.
21. The judge held that the implication was appropriate and necessary. On behalf of the defendant, Ms Tipples contends that the judge was wrong for a number of reasons. She set them out under six headings but there is a good deal of overlap between her various points and I do not need to follow exactly her classification of the points. Her principal points were these.
22. The hatched area does not need to be adopted if the claimant is to be able to use the land for any relevant purpose, both because the transfer confers on the claimant its successors as owners of the land private rights of way which give all rights that are necessary over the estate roads and the hatched area and, secondly, because the defendant does not have an absolute veto under the street works regime. Furthermore, she submitted that the parties had addressed the question of the adoption of the hatched area and had made the express provision which I have read towards the end of paragraph 5 of the first Schedule in which, in a certain event but only in that event, the defendant would have to take all necessary steps with a view to adoption. She said that that being so, in all other circumstances the defendant is not under any such obligation. Further, she submitted that a positive obligation incumbent on the defendant in other circumstances would be inconsistent both with the limited express obligation and with the inclusion of the obligation on the claimant in paragraph 1 of the Fourth Schedule in relation to the sewers on the land sold.
23. She relied of course on Lord Hoffmann's exposition of the law's approach to implied terms, as part of his progressive restatement of the law of contract, in *Attorney General of Belize v Belize Telecom* [2009] UKPC 10 and she showed us in particular paragraph 17 and 18 of his judgment. She also relied on more conventional statements of the law in relation to implied terms such as the often cited though slightly obscurely reported *Philips Electronique Grand Public SA v British Sky Broadcasting Limited* [1995] EMLR 462 in a judgment of Sir Thomas Bingham MR, as he then was, particularly relying on passages at page 481 and 482 of the report.
24. She put forward the proposition which is not in dispute that for a term to be reasonable is necessary but is not sufficient for implication. The implication of an unreasonable term is of course impossible but a reasonable term cannot be implied unless it is found to be necessary. I do not need to reiterate any of the citation of the passages and propositions, none of which are in dispute between the parties in principle. The dispute is as to their application.
25. Ms Tipples recognised that the opening words of paragraph 5 of Schedule 1 contain a grant of a right to make a road and to have it adopted as a highway maintainable at the public expense, but she submitted that these words are not strong enough nor sufficiently specific to override the defendant's right to object to a proposal under the streets works provisions under what was then section 202 of the 1959 Act, now section 228 of the 1980 Act.
26. For my part, as the judge did at paragraph 23 in his judgment, I find the correct starting point to be the grant by the defendant to the claimant in paragraph 5 of Schedule 1 of the right in relation to the hatched area to enter on it to construct a road and to have that road adopted as a highway maintainable at the public expense. Of course the parties to the transaction could not provide that

the road, once built, even if to the necessary standard, would be adopted, because that would be a matter for the highway authority, but as between the parties the premise of the transaction was that in this relevant respect the claimant would exercise the right to enter on the land on the hatched area and construct a road on it. It was the claimant's right, as between the parties, to have it adopted as a highway maintainable at the public expense.

27. It strikes me that this grant in itself is the most clear and powerful factor which leads to the conclusion that it is not open to the defendant to withhold its consent or otherwise act in such a way as to prevent the land being adopted. To do so would be inconsistent with the defendant's own grant. Otherwise the defendant's grant would be found to have given the claimant the stated right but subject, without it being expressed, to the defendant's right to seek to frustrate the implementation of that right. It would also lead to a position in which if, as would be likely, it is the claimant who has the road built rather than the defendant, the claimant is under an express contractual obligation, as a proviso to the right granted by paragraph 5, to do all things necessary to have the road adopted by the highway authority but that the defendant would be entitled to seek to frustrate that and so the claimant, if it did, would be obliged to apply to the magistrates court to have the objection overruled and if necessary either to appeal to the Crown Court or to resist an appeal by the defendant under section 228 as it now stands at considerable cost and with an uncertain result, leading to the extraordinary position that the parties had agreed that the claimant should have this right but that the defendant had reserved the right to object and to do everything it wished or thought fit to do to prevent the implementation of the claimant's right, and in turn the claimant was contractually obliged to resist such efforts by the defendant tooth and nail..
28. The wording of the latter part of paragraph 5 is not altogether clear in every respect, but it is evident that it was contemplated as being possible that the defendant itself might construct the road. Why that should arise other than by agreement between the parties is not clear, but of course the hatched area is part of the defendant's land and it is, I suppose, not inconceivable that, depending on how the defendant's plans for the development of that part of its own adjoining land which had not then been fully developed were to turn out, it might be that the defendant would wish to have the hatched area made up as a highway maintainable at the public expense to lead not only into the claimant's land but also into other parts of the defendant's land. In that case one can see that the defendant might have an incentive to make the hatched area up itself because it would be part of its own plans for the development of its own land and it would in that case be in its own interests, but also necessary for the protection of the claimant, that the necessary work should be done to the adoptable standards required by the highway authority and that everything necessary should be done to have the road adopted and that it should be properly maintained in the meantime.
29. That is a possible situation in which one could envisage the possibility of the transferor constructing a road on the hatched area rather than the transferee.
30. What I cannot see is any logic in a position whereby if the transferor were to do that work it is obliged to do all acts and things necessary to have the road adopted by the highway authority, which of course would be entirely within its power as owners of the land, whereas if the transferee were to construct the road or have it constructed, which is the more likely case, and which is the case contemplated by the express grant in the first few lines of paragraph 5, the transferor should be entitled to take a diametrically opposed position and say: "Although of course you are entitled to have the land made up as a road with all proper street lighting and drainage and to the necessary standard, nevertheless we can do everything we wish to and can do to prevent your succeeding in having it adopted."
31. It seems to me further that the reading favoured by the judge is not in any way inconsistent with the covenant in paragraph 1 of Schedule 4 on the part of the claimant in relation to the sewers. Although the contemplation of adoption of the sewers is referred to in Schedule 3, as I have mentioned, there is nothing in the exceptions, reservations and re-grants in Schedule 2 to the

effect that the sewers will be adopted. Accordingly the covenant in Schedule 4 on the part of the transferee which, once the transfer has taken place, is the owner of the relevant land is needed and the inclusion of that covenant does not show that there is no equivalent obligation intended to be placed on the defendant in relation to the adoption of the hatched area as a highway.

32. As Mr Booth QC submitted, nothing else in the transfer would put the claimant under any obligation in respect of the adoption of the sewers, so the inclusion of an express covenant such as in paragraph 1 of Schedule 4 was necessary.
33. That seems to me to show the fallacy in Ms Tipples' argument to the effect that adoption as a highway maintainable at public expense is not necessary for the claimant to enjoy the full benefit of the transaction. The transfer makes it expressly clear that the hatched area is capable, if the claimant wishes (and it is the claimant's right), of being adopted for this purpose. This is manifest not only from the opening words of paragraph 5 of Schedule 1 but also in the latter part of the paragraph, to the effect that whoever builds the road it is to be done to adoption standard. As I say, that is there as being in the interests of both parties as part of the contract between them.
34. So far as the claimant is concerned, its interest is in having roads leading all the way to and within its own land maintainable at public expense. It is also explicable from the defendant's point of view because of the possibility that this particular area, the hatched area, might form part of a network of estate roads leading into an as yet undeveloped part of the defendant's own land.
35. I would therefore reject Ms Tipples' argument that the commercial purpose of the transfer would not be frustrated or thwarted if the claimant is unable to secure the adoption of the highway maintainable at public expense because of some act or omission on the part of the defendant, whether that be failure to agree under sections 37 or 38, active objection under section 228 or something else.
36. For the same reason I would reject the contention that the implication of the terms is unnecessary nor is it inconsistent, as I have said, with the express terms of Schedule 1, paragraph 5. I am satisfied that the obligation specified in the terms accepted by the judge is part of the agreement between the parties on the principles laid down as regards implied terms, whether in *Belize Telecom* or in other cases as I have already mentioned. It is a fair comment that the agreement is the result of legal drafting, no doubt carried out with some care. Nevertheless it seems to me that the correct reading is plain and that it does require the defendant to be subjected to the obligations identified by the judge.
37. Ms Tipples argued that the obligation proposed, requiring the defendant to do something positive, was not an easement in itself and would be inconsistent with the nature of the other rights in Schedule 1 which are easements. However, the obligation, even if appearing slightly oddly in its context, is incidental to the express grant at the outset of paragraph 5 of Schedule 1 and does not require positive action of the defendant, in the circumstances contemplated, of any onerous or complicated nature. There is no difficulty conceptually in a proviso or provision in relation to the grant of an easement that if the land is to be developed it will be developed in a particular way, here by the construction of roads to the proper standard and so on. So it seems to me there is nothing in that particular objection on Ms Tipples' part.
38. At most in practice what the defendant may have to do is either consent to a reasonable proposal as regards a section 38 agreement or do no more than refrain from objecting to a proposal under the street works provisions. The obligation is not an easement as such but it is a necessary concomitant of the rights expressly granted since otherwise the right would have been granted with one hand only to be taken away, or at least substantially obstructed, by the other.
39. That leads one to think of the principle of non-derogation from grant. Ms Tipples submitted that the cases on non-derogation from grant do not require a grantor to do something so as to cooperate, as distinct from refraining from doing something which would obstruct the purpose of

the transaction. She cited an old case, *Re Cadogan and Hans Place Estate Limited (Willis' Claim)*, summarily reported at (1895) 11 TLR 477 where the Court of Appeal held that an agreement for the making up of a road called Lennox Mews in Kensington did not oblige the owner of the soil of the road to buy in a small area, the backyard of the Australian Arms Public House, which was needed if the road was to be taken over and maintained at public expense and which was not in the ownership of either party.

40. From the very brief summary report one can understand the position, in particular since it was evidently open to either party to buy in the land just as well as the other. Here, however, it is inherent in the situation that only the defendant can do one of the things that is necessary, namely either consent as owner of the land to the dedication under section 37 or 38 or refrain from objecting under section 228. It may be that non-derogation from grant is not the correct label to adopt, at any rate if one is considering a positive consent under section 37 or 38. It seems to me that it might very well be an appropriate concept or label in relation to requiring the defendant to refrain from objecting under section 228. But the underlying principle is in my estimation very similar, as the judge said at paragraph 30 of his admirable and clear judgment :

“The startling fact in the background to the transfer is that the adoption of a road constructed by the claimant, which the parties expressly envisaged, could as a matter of law be achieved only with the co-operation of the defendant. The officious bystander may nowadays cut a rather more shadowy figure than he once did in this area of our jurisprudence. But if he were present when this transfer were executed, and he were asked “And is the defendant expected to promote an application for adoption?”, he would, in my judgment, have answered “Of course, that goes without saying, it is the only way the agreement will work.” That is, in my judgment, an adequate answer to the argument based on necessity in relation to implication, on which Ms Tipples understandably placed great emphasis.”

41. What the judge said there needs to be qualified only to the extent that an objection by the defendant under the street works code would not necessarily be fatal, but it clearly would be an obstacle. The defendant is not, by the obligation identified by the judge, required to do more than either join in the proposal for adoption under section 37 or 38 on reasonable terms or, as the case may be, if the claimant wishes to use the street works code, refrain from objecting to that proposal.
42. For those reasons, I consider the judge was entirely right and I would dismiss the appeal.

Lord Justice Sullivan:

43. I agree

Lord Justice Mummery:

44. I agree.

Order: Appeal dismissed