

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HALIFAX COUNTY COURT
HHJ IBBOTSON
5HX01423**

Royal Courts of Justice
Strand, London, WC2A 2LL

18/07/2008

B e f o r e :

**LORD JUSTICE MUMMERY
LORD JUSTICE JACOB
and
LORD JUSTICE WILSON**

Between:

**(1) ANDREW BRADFORD
(2) CHERYL BRADFORD**

Appellants

- and -

KEITH JAMES & Ors

Respondent

**Mr Stephen Howd (instructed by Wrigley Claydon) for the Appellants
Mr Matthew Hall (instructed by Lyons Wilson) for the Respondents
Hearing date: 26th June 2008**

Lord Justice Mummery :

Background

1. There are too many calamitous neighbour disputes in the courts. Greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution. An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive. By the time neighbours get to court it is often too late for court-based ADR and mediation schemes to have much impact. Litigation hardens attitudes. Costs become an additional aggravating issue. Almost by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both.
2. The extreme acrimony between these neighbours is nothing new. As far as this court is concerned the dispute is about title to a cobbled area of land 3.7m wide (the cobbled area) and its use for parking and access. The cobbled area is in the farmyard adjoining the wall of a converted barn (the Barn) at Great Jumps Farm (the Farm), Errington, up the hill from Hebden Bridge in West Yorkshire. The Barn overlooks the farmyard and has a front door giving access directly onto the cobbled area, which runs along the length of the southern elevation of the Barn. The cobbled area

is neither fenced off from the rest of the farmyard nor is it physically distinct from it, save for the fact that it is cobbled and the rest of the farmyard is not.

3. Before 1976 there was no room for disagreement because both the Barn and the Farm, with its farmyard, belonged to Mr & Mrs Wainwright. They had, however, applied for planning permission to convert the Barn before ultimately selling off the Farm minus the Barn and some surrounding land. Planning permission was obtained in February 1975 for change of use of the Barn to a dwelling. Plans for the proposed conversion were prepared. One plan showed the cobbled area adjacent to the Barn and, within that area, some steps going up by the side of the Barn. Evidence was given that they were original stone steps next to the cobbled area and that they led to a raised garden at the western end of the Barn. The position and use of the steps by the owners of the Barn was not an issue in the case. On another plan the yard elevation of the Barn has windows and a front door giving access to the cobbled area. There was evidence from the purchasers of the Farm of a belief that, when converted, the Barn would face away from the farmyard with no main doors or windows on that side. That did not turn out to be the case, however, either on the plans or when the conversion was carried out. As foreshadowed in the plans, the converted Barn has windows overlooking the farmyard and a front door leading out to the cobbled area in the farmyard.
4. By a conveyance dated 7 June 1976 (the 1976 Conveyance) the Farm, as “more particularly delineated” on an annexed plan and “thereon edged red”, was vested in Norma James and her daughter Dora. The farmyard was part of the Farm conveyed, but the Wainwrights retained the Barn along one side of it. The 1976 Conveyance did not contain any express reservation of the cobbled area along the side of the Barn or of any right of way over the cobbled area for the benefit of the retained Barn.
5. Much has been made of the fact that the annexed plan is small scale, OS 1:2500. It is, however, clear enough to show the Barn as a box shape building delineated by straight black lines. The straight red boundary line drawn on the plan follows the straight black line of the Barn facing the farmyard. On inspection the original plan shows a dog leg in the red boundary line past the eastern end of the Barn.
6. Norma and Dora James have since died. The Farm now belongs to Norma’s son, Mr Keith James, and the executors of Dora James. Mr Keith James is one of the executors. Mr Keith James and the executors are the defendants to the proceedings and the respondents to this appeal.
7. The Wainwrights sold the Barn in its unconverted condition about 10 months after the sale of the Farm. By a conveyance dated 21 April 1977 (the 1977 Conveyance) the Barn was vested in Mr & Mrs Fox. The plan referred to in the 1977 Conveyance and annexed to it “for the purpose of identification only” clearly shows the cobbled area as included in the land conveyed with the Barn. It is accepted, of course, that if the cobbled area was included in the 1976 Conveyance of the Farm, the Wainwrights could not convey it by the 1977 Conveyance of the Barn. The 1977 Conveyance is, however, relied on as evidence that the cobbled area was not intended to be conveyed by the 1976 Conveyance. In particular, the 1977 Conveyance contained a covenant by the purchasers to erect and maintain a stockproof post and rail fences between points on each side of the Barn along boundary lines marked B-C and D-E. The fence to be erected between D-E near the area of the dog leg is a continuation of the southern boundary line of the Barn, which is shown as the outside edge of the cobbled area. The fences have been erected.
8. In 1999 Mr & Mrs Bradford, who are the claimants in the action and the appellants in this court, bought the Barn from Mr & Mrs Fox. From about 2002 relations between the Bradfords and Mr James deteriorated badly. On 12 August 2005 the Bradfords started proceedings, which included a claim for a declaration that the defendants were not entitled to enter on or cross the cobbled area or any other part of their land. They alleged in their Particulars of Claim that

“3. As is more clearly set out on the plan marked “B” attached hereto, being a plan from a conveyance dated 21 April 1977 by which the Barn acquired its own title and induced first registration, comprised in the Claimants’ title is an area extending southwards from the Claimants’ house for a distance of 3.7 metres referred to and marked out as “the cobbled area “on plans “A” and “B” attached.”

9. In his order dated 28 November 2007 HHJ Ibbotson made a declaration, but not in favour of the Bradfords. He declared that the cobbled area referred to in that paragraph of the particulars of claim was within the defendants’ registered title (No WYK68410.) The Bradfords were ordered to pay 75% of the costs of the action and £20,500 on account of the defendants’ costs by 4pm on 18 January 2008. Litigation nowadays is extremely expensive, even in County Court proceedings about a little strip of farmyard worth much less than the legal costs of fighting over it.
10. On 15 March 2008 Arden LJ granted permission to appeal. On 10 June 2008 an application was issued by the Bradfords for permission to adduce fresh evidence on the appeal in the form of a further witness statement by Mrs Linda Fox and exhibited documents. I shall deal in the course of this judgment with that application and a related application for permission to amend the grounds of appeal.
11. The main issue on this appeal is whether the judge wrongly construed the 1976 Conveyance of the Farm as including the cobbled area. More particularly, is the plan annexed to the 1976 Conveyance sufficiently clear to render extrinsic evidence inadmissible as an aid to its construction? There is a dispute about the extent (if any) to which the court should admit, in aid of construction (a) evidence of surrounding circumstances at the date of the 1976 Conveyance and (b) evidence of subsequent acts and events relating to the cobbled area.

The judgment

12. The judge held that the 1976 Conveyance plan was clear. It was not made unclear by the small scale of the plan when all that was shown on the relevant part of it was the position of the Barn wall. He pointed out that on a plan to scale 1:2500 a strip of 3.7m would be shown by a line less than 1.5mm wide, which was not consistent with the width of the black and red lines drawn on the plan. He said

“I have concluded that the plan is clear because it depicts the only relevant feature it was intended to depict, that is the barn wall. The cobbles were, I find, included in the 1976 conveyance to Norma and Dora James. The defendant’s submission that the 1976 conveyance should be construed against the grantor is correct. The conveyance to Dora and Norma James did not reserve the cobbles to the vendors. That finding is determinative against the claimants and renders inadmissible extrinsic evidence to ascertain the vendors’ intention.”
13. The judge rejected an argument advanced on behalf of the Bradfords that the dog leg feature in the red boundary line in the plan showed that the boundary was not a straight continuation east from the Barn wall. The argument was that the continuation of the red boundary line was not straight because, when passing through the farmyard, it depicted the southern edge of the cobbled area, not the Barn wall itself. The judge said that there was no evidence that the continuation of the line of the Barn wall was intended to run alongside any particular fence, wall or other physical feature so that it was not possible to pinpoint the boundary by reference to some feature other than the Barn wall itself.
14. As the judge held that the plan was clear, that was determinative of the issue. Although the consequence of his conclusion was that extrinsic evidence was inadmissible to construe the 1976 Conveyance, he referred briefly to the evidence. Before 1976 the Wainwrights considered converting the Barn separately and in such a way as to make use of the cobbled area indicated on the building plans. Because of financial difficulties, they had offered the Barn to the Jameses, when they bought the Farm. The judge also referred to the evidence of Mrs Fox. She described

the use of the cobbled area by her and her family during their ownership and occupation of the Barn. Mr James disputed aspects of her evidence. Although the judge did not make specific findings of fact, he did not expressly reject Mrs Fox's evidence. Indeed, he appeared to have accepted it when he commented that it was not capable of the sole interpretation that the Bradfords owned the cobbles. The acts described by her were consistent with good neighbourliness on the part of the Jameses in not making an issue of the Foxes' use of the cobbled area.

Discussion and conclusion

15. It is entirely understandable that both parties have relied so heavily before the judge and in this court on their respective title deeds and the annexed plans. They record the intentions of the parties, as at the relevant date, regarding the boundaries of the property conveyed.
16. There is no doubt that the 1977 Conveyance showed that the Wainwrights purported to convey the cobbled area along with the Barn to the Foxes, who purported to convey it to the Bradfords in 1999. It must have come as a nasty shock to the Bradfords to learn that they might not own the cobbled area because years before, in 1976, it had been conveyed away with the Farm.
17. I can also understand why Mr James relied strongly on the plan annexed to the 1976 Conveyance, which delineated by a line edged red the Farm conveyed to his mother and sister. If it was intended to reserve a 3.7m wide area the red line should, he said, have been drawn away from the black line representing the wall of the Barn. The red line did not itself exclude the cobbled area from the rest of the farmyard adjoining the Barn. The elevations of the Barn are shown by black lines on the plan. The red edging follows the black lines. So Mr Hall argues on his behalf that the judge rightly held that the plan of the Farm was clear enough to cover the cobbled area and to exclude extrinsic evidence. He submitted forcefully that a reasonable person buying the Farm in 1976 would believe that he was buying the farmyard that went with the Farm and would not believe that the Wainwrights were retaining part of it in the shape of the cobbled area. The existence of the cobbled area, which was not mentioned in the conveyance or shown on the plan, did not in itself suggest retention of it by the Wainwrights.

Extrinsic evidence

18. It followed from the judge's conclusion that the 1976 Conveyance plan was clear that it should be construed in isolation from the surrounding circumstances existing at that date rather than in the light of them. I have no doubt that it was right to treat the plan as important contemporaneous evidence of the boundary between the Farm and the Barn. I would not disparage it, let alone throw doubt on the value of all contemporaneous conveyancing plans generally, even when small scale.
19. Mr Howd cited Lord Hoffmann's observations in *Alan Wibberley Building Limited v Insley* [1999] 1 WLR 894 at 895-6 that, although the deeds are the first resort in a boundary dispute, the plan attached to the conveyance "for the purposes of identification only" is often so small and the lines marking the boundaries so thick that it is useless for any thing except general identification. It is necessary in such cases to supplement the information on the plan by inferences from topographical features. That authority was not concerned with the boundaries of buildings adjoining land. The presence of a wall often means that the boundary is capable of being more precisely shown on a plan than boundaries between fields or between buildings. Further, the use of the expression "more particularly delineated" in this case (rather than "for identification only" mentioned by Lord Hoffmann) gives greater authority to the plan. It will, for example, prevail over a verbal description in the conveyance in the event of any uncertainty or conflict.
20. Nevertheless, I have been persuaded that there is a lack of clarity in the 1976 conveyance plan about the position of the boundary between the Barn and the Farm in relation to the cobbled area. Uncertainty as to whether the red line follows the wall of the Barn justifies the use of extrinsic

evidence to clarify, and therefore to construe, the 1976 Conveyance. I would therefore grant permission to amend the grounds of appeal in respect of the various items of extrinsic evidence relevant to the construction of the 1976 Conveyance.

21. The particular feature of the plan which indicates lack of clarity in the position of the southern boundary of the Barn is the presence of the dog leg feature in the red boundary line just to the east of the Barn. This feature cannot be explained by the plan itself or by the conveyance. Some external explanation is required for the fact that the straight red line apparently along the side of the Barn does not continue as a straight line to the east of the Barn. One possible explanation is that the straight red line is not along the Barn wall at all, but along the edge of the cobbled area 3.7m out from the wall of the Barn and that, at the dog leg, the red boundary line resumes its course as a straight line from the end of the eastern wall of the Barn.
22. Plans for the conversion of the Barn in existence at the date of the 1976 Conveyance are extrinsic evidence. They have probative value for ascertaining the intentions of the parties. As already explained the building plans show the farmyard side of the Barn as the front of the converted building. Windows overlook the farmyard. More important, the front door opens onto the cobbled part of the farmyard. The presence of the cobbled area is even noted on the plan. This is evidence that the red line delineating the boundary between the Barn and the farmyard was not intended to be along the Barn wall itself, but to be further out and to include with the Barn the cobbled area which affords access to the front door.
23. The evidence of later events, including the subsequent conduct of the parties, is more consistent with the exclusion of the cobbled area from the conveyance of the Farm than with its inclusion. The indisputable fact is that the front of the Barn, when converted by the Foxes, in 1977, faced the farmyard and had a front door opening onto the cobbled area. This fact was known to the owners of the Farm living across the farmyard. There was no evidence of any objection taken by them to the conversion and use of the Barn in that way or of any action taken by them claiming that the owners of the Barn had no right of access over the cobbled area to and from their front door.
24. The evidence of Mrs Fox as to the scale of user by members of the Fox family of the cobbled area was disputed by Mr Keith James and by Mrs Joy Kennedy. The judge neither rejected Mrs Fox's evidence nor did he make detailed findings of fact where there was a conflict of evidence. He decided the case on the basis that the plan was so clear that this extrinsic evidence was inadmissible.
25. Mrs Fox's evidence about the fencing on either side of the Barn in compliance with the covenant in the 1977 Conveyance was uncontested, as was her evidence about some use of the cobbled area to gain access to the front door of the Barn, for parking the car and horse box on it, for placing stone plant troughs and flower tubs. Even if the extent of the use was not as great as she said, it is significant that there was no history of objection to use of the cobbled area. The judge appears to have accepted that some use was made by the Foxes of the cobbled area, but discounted it on the ground that the absence of objection was explicable as good neighbourly conduct by the James family.
26. Evidence of subsequent acts and conduct to construe an earlier conveyance and to ascertain the earlier intentions of the parties about the position of boundaries of the property conveyed must always be handled cautiously. In this case the subsequent conversion of the Barn, the uses made of the cobbled area and lack of objection to those uses are of some probative value on the construction of the 1976 Conveyance and intentions of the parties at that time because, at the very least, they are more consistent with the exclusion of the cobbled area from the 1976 Conveyance than its inclusion. It may even be possible, though not necessary, to go further and describe the situation as one of acquiescence by the owners of the Farm in a state of affairs confirming the construction of the 1976 Conveyance asserted by the Bradfords.

27. Mr Howd sought permission to adduce in evidence a sketch drawn by Mr Keith James in about 1991 when the Jameses had a water rights dispute with the Foxes. Mrs Fox did not find the sketch until after judgment was given in this action. It was alleged that the sketch showed that in 1991 Mr James accepted that the boundary of the Barn extended into the farmyard to include the cobbled area as indicated by a line drawn by him on the sketch as a “property line.”
28. I would not grant permission for this evidence to be adduced on the appeal or grant permission to make consequential amendments to the grounds of appeal. I am not satisfied that it would be just to do so. The applications are made late. The document would not, on its own, have a significant effect on the outcome of the appeal. If admitted, it would be necessary to hear oral evidence from Mrs Fox and from Mr James as to the circumstances in which the dispute arose and the sketch was made. This would necessitate a re-trial and I am not satisfied that the fresh evidence would affect the outcome or justify imposing that burden on the parties.
29. To sum up, I have reached the conclusion that extrinsic evidence of surrounding circumstances and subsequent acts, though not admissible to contradict or vary the 1976 Conveyance plan, is admissible to clarify the aspects of it relating to the position of the boundary as to which the dog leg in the red line indicated a lack of clarity. The evidence of undisputed subsequent acts is admissible if it is of probative value in determining what the parties intended at the time of the 1976 Conveyance: *Ali v Lane* [2007] 1 EGLR 71 at paragraph 36; *Haycocks v Neville* [2007] 1 EGLR 78 at paragraphs 30 and 31. The combined effect of the pre-existing planning permission and the plans, the subsequent conversion of the Barn so that access to the front was over the cobbled area, the terms of the 1977 Conveyance, the various acts of user of the cobbled area by the Foxes during their ownership of the Barn and the lack of objection or action from the owners of the Farm is that, when the 1976 Conveyance and the annexed plan are read in this context, they are properly construed as excluding the cobbled area from the Farm. The cobbled area passed with the 1977 Conveyance of the Barn in accordance with its express terms. A declaration should be made to that effect.

Conclusion

30. For these reasons I would allow the appeal, set aside the judge’s order and make a declaration of title to the cobbled area in favour of the Bradfords.
31. I close, as I commenced, with a practical suggestion. More land is becoming available for residential development. More permissions are given to change the use of urban and rural buildings to dwellings. Partition into plots and units increases the potential for this kind of damaging and costly neighbour dispute. The risks can be minimised at much less cost than litigation by the use of surveyors’ larger scale, detailed plans showing what is sold and what is retained and recording vital measurements and physical features.

Lord Justice Jacob:

32. I agree.

Lord Justice Wilson:

33. I also agree.