

**IN THE HIGH COURTS OF JUSTICE
CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

7th October 2009

Before:

THE HONOURABLE MR JUSTICE LEWISON

FRAZER AND ANOTHER

Appellant

- and -

MARTIN AND ANOTHER

Respondent

MR JONATHAN SMALL QC and MR JOHN CLARGO (Instructed by Bates)
appeared on behalf of the Appellant
MR NICHOLAS DOWDING QC and MR STEVEN WOOLF (Instructed by Laytons)
appeared on behalf of the Respondent

Mr Justice Lewison:

1. Mr and Mrs Brown live at Bridge House, Crondall Road, Church Crookham in Hampshire. This dispute is between them and their neighbours, Mr and Mrs Frazer who live at Moles End. Bridge House lies between Moles End and the highway. Mr and Mrs Frazer's vehicular access to Moles End runs over a driveway, which itself runs across Bridge House. Both Mr and Mrs Brown and Mr and Mrs Frazer derive ultimate title from the common vendor. Both the title to Moles End and the title to Bridge House is registered. However, the boundaries shown on the filed plan of the Bridge House title, HB496568 is not contiguous with the highway. The western boundary, as shown on the filed plan, is separated from the highway by a small sliver of land. Mr and Mrs Frazer applied to be entitled to be registered as proprietors of that land even though it is immediately contiguous to Mr and Mrs Brown's land and is, in effect, the entire road frontage of Bridge House.
2. Mr and Mrs Frazer's application was referred to the adjudicator of Her Majesty's Land Registry. Mr Rees, sitting as a deputy adjudicator, dismissed the application. Mr and Mrs Frazer now appeal that decision with the permission of Henderson J. Mr Jonathan Small QC leading Mr John Clargo, argue the appeal for Mr and Mrs Frazer. Mr Nicholas Dowding QC leading Mr Steven Woolf, argue the case for Mr and Mrs Brown.
3. The deputy adjudicator came to his conclusion on the following grounds. It was common ground that as a result of a series of conveyances the Disputed Land was conveyed to Crown Hall Estates Limited, which was the first registered proprietor. However, owing to a mistake made by the

Land Registry the Disputed Land was not included within the red edging on the filed plan which resulted from that application for registration. A subsequent transfer dated 6th January 1995, from Crown Hall Estates Limited to Mr Robert Ash was effective to convey the Disputed Land to Mr Ash. Although the plan attached to the transfer was subsequently altered in the course of the application for Mr Ash's registration so that the plan excluded the Disputed Land, the alteration was of no effect. In any event the general boundaries rule contained in Rule 278 of the Land Registration Rules 1925 apply to the facts observable on the ground and that meant that at least part of the Disputed Land was included in Mr Ash's title. Mr Ash is Mr and Mrs Brown's predecessor in title to Bridge House. Consequently, once Crown Hall Estates had transferred the Disputed Land to Mr Ash they could not thereafter have conveyed it to Mr and Mrs Frazer.

4. Before conducting the hearing the deputy adjudicator had a site view, which he described as having been of inestimable benefit. He also had the benefit of evidence. The deputy adjudicator described the Disputed Land in meticulous detail in paragraphs 3 and 4 of his decision:

"3. I shall now describe in more detail the physical appearance of the Disputed Land, and the surrounding property. Bridge House, as I have said, lies on the eastern side of Crondall Road within the Respondent's land. It is set back from the road, and there is a lawn between the house and a very substantial hedge which appears to form the front of the western boundary of the Respondent's land adjacent to the road. According to the Applicants, however, the boundary is marked by a chain-linked fence on the eastern side of the hedge. At its northern point, the western side of this hedge is very close to the edge of the carriageway. However, the further south one goes, the wider the distance between the hedge and the carriageway. The area between the hedge and the carriageway has the appearance of a grass verge, and there are granite kerbstones separating the verge from the carriageway. Approximately half way southwards along the Disputed Land there is an area formed by granite sets or cobbles, which runs from the edge of the carriageway eastwards into the gated entrance to Bridge House. It forms the access to and from Bridge House, and indeed Moles End, onto Crondall Road. This area has been described as The Bridge and is situated entirely within the Disputed Land, forming its central section. It was constructed by the Respondents and at their expense in 2004.

4. Inside the gate there is a gravel driveway and turning area ("the drive"), which is subject to an easement in favour of Moles End. This area is within the Respondent's land, but is fenced off from Bridge House itself, there being a gate in the fence allowing access. At the eastern end of the drive there is an entrance which provides access to Moles End. The registered boundary of the Respondent's title runs along the back of the drive (along its eastern side) for about 25 metres and then turns westwards at a right angle, forming the southern boundary. The southern boundary does not – according to the filed plan – extend as far as Crondall Road. However, it runs immediately to the south of a small shed, which is built more or less on this boundary. To the north of the shed is a wooden barn ("the Barn"), now apparently used as a garage. The registered boundary of the Respondent's land, according to the filed plan, turns northwards at the end of the shed and runs along the western flank wall of the barn. At the north-western corner of the Barn, there is currently a new wooden fence, which runs northwards to terminate at the eastern edge of the Bridge. The fence follows the line of the registered boundary, which continues northward to run along the eastern edge of The Bridge and joins up with the hedge in front of Bridge House which I have previously described. The Barn is not built exactly parallel with Crondall Road, and there is a tapering distance between the western side of the barn (and registered boundary) and the edge of the carriageway – hence the fact that the Disputed Land is wider at its southern end than its northern end. The area between the Barn and the fence, and the edge of the carriageway, is grassed. There is an iron fence, somewhat elderly but of solid construction, which runs parallel with the edge of the carriageway for the entire distance from a point west of the Respondent's southern boundary as far as the southern end of the Bridge. The road is slightly higher in level than Bridge House and grounds, so that there is a slight dip between the edge of the carriageway and the fence and the Barn to the south of the Bridge and between the edge of the carriageway

and base of the hedge to the north of the Bridge. In days gone by there may well have been a ditch along here, but that is no longer the case to any great extent.”

5. He also made the following relevant findings of fact.

(1) The Disputed Land was physically part of the curtilage of Bridge House and, indeed, represented its sole means of vehicular access to Crondall Road.

(2) This was the case for many years before the conveyance to Crown Hall Estates.

(3) At all material times the Disputed Land has either been included within the physical boundaries of Bridge House – this applies to the triangle between the iron fence and the Barn – or has at least been used and enjoyed together with and as part of Bridge House.

(4) The Disputed Land, since it is an obvious part of Bridge House and its curtilage.

(5.) If an officious local bystander had been asked to say what Bridge House, Crondall Road had included within its apparent boundaries, he or she would identify the Disputed Land.

Mr and Mrs Frazer challenge the last of these factual findings on the ground that the finding is a moot point. However, the deputy adjudicator had “the inestimable benefit” of a site inspection on which he plainly placed weight. In my judgment it is not a finding with which I should interfere unless it is manifestly wrong. I do not consider that it is possible to say that it is manifestly wrong.

6. At the time of the transfer to Crown Hall Estates the land, including the Disputed Land, was unregistered. It follows therefore, that the conveyance was effective to convey the legal estate to Crown Hall Estates. Crown Hall Estates duly applied for first registration and was registered under title number HP486592. However, the red edging on the filed plan did not include the Disputed Land. The deputy adjudicator concluded as follows in paragraph 13 of his decision:

“It is the Applicant’s case that the filed plan for HP486592 contained an error, insofar as it excludes any part of the Disputed Land. I entirely agree. It is clear that there has been a mistake as regards the southern portion, where there is an obvious gap between the Barn and the iron fence. Crown Hall Estates had purchased the Disputed Land by virtue of the 1994 transfer which, as the parties accept, included the Disputed Land. Since this was first registration the Land Registry ought to have included within the registered title the entirety of the land conveyed. It failed to do so, no doubt because it failed to interpret the parcels clause and plan correctly. If a survey had been undertaken I have little doubt that the mistake would have been avoided. What is not so clear to me, however, is whether there was any mistake at the northern end of the Disputed Land. There is every possibility that the general boundaries rule is sufficiently flexible to include within the title all the land up to the edge of the carriageway. I shall return to this issue in due course.”

7. Thus far we are on common ground. The transfer to Mr Ash is dated 6th January 1995. It is headed HM Registration Land Registration Act 1925 to 1988 Transfer of Part and it refers to the title number HB486592. It contains a number of definitions and these include “The Plan,” which means, “The Plan bound up within” and “The Property,” which means, “The land with the dwelling house erected thereon shown edged red on the plan known as Bridge House, Crondall Road, Crookham, Hampshire, part of the land comprised in the title above mentioned.” There is also a definition of the building estate, which refers to other parts of land owned by Crown Hall Estates Limited, which were not intended to be conveyed. The consideration for the sale was stated at £300,000 and the transfer granted certain easements and reserved to the transferor for the benefit of the remainder of the building estate certain easements set out in the second schedule. Clause 7.4 of the transfer contained an agreement and declaration that:

“7.4 ...whether by implication or otherwise the Transferee shall not become entitled to any right of light or air which would restrict or interfere with the free use of the remainder of the Building Estate for building or other purposes nor to any rights of way except as maybe both specifically described and expressly granted hereby.”

The transfer did not contain the grant of any right of way over the Disputed Land.

8. The deputy adjudicator found that the plan bound up with the transfer at the time when it was executed showed the Disputed Land as included within the area edged red. However, at the request of the Land Registry, Crown Hall Estates and Mr Ash substituted a different plan upon which the red edging did not include the Disputed Land. This came about, because of a letter from the Land Registry quoted by the deputy adjudicator in paragraph 15 of his decision. The letter was dated 12th June 1995, and was written during the course of the application by Mr Ash for registration of the January transfer. The letter read as follows:

“Please find enclosed the transfer to your client dated 6th January 1995 and a copy extract of the ordinance survey map.

The further problem regarding the extent of the land edged red on the new plan for the transfer requires your consideration.

Please see the copy extract of the ordinance survey map. The land coloured blue thereon falls outside the vendor’s title HB486592 and is not registered. When the official search in form 94B was made this was limited to exclude the said land.

Would you please consider the point and have the red edging on the transfer plan amended to exclude the area of land coloured blue on the enclosed extract of the ordinance survey map. Any amendment should of course be signed by or on behalf of the parties to the deed.”

The land coloured blue on the enclosed extract from the ordinance survey map was the Disputed Land.

9. The Main issue is: what did the 1995 transfer actually transfer? The deputy adjudicator concluded that the 1995 transfer was affected to transfer the Disputed Land to Mr Ash. His reasoning was, first it was included in the original transfer plan; second, it was physically part of the curtilage of Bridge House; third, it was either included within the physical boundaries of Bridge House or had been used and enjoyed together with and as part of Bridge House; fourth, if one enquired what property was, “known as” Bridge House the answer would have been that it included the Disputed Land and; fifth, that although the Disputed Land was not “Part of the title above mentioned,” but subject to the application of the general boundaries rule, that was the result of the Land Registry’s error. Accordingly, the deputy adjudicator concluded that this part of the composite description of the parcels did not accurately describe the property intended to be conveyed and should be rejected by the application of the principle *falsa demonstratio non nocet*. Mr Small attacks this conclusion. He says that even on the basis of the transfer as executed the parties did not intend to transfer the Disputed Land. He relies on the description of the land as, “part of the title above mentioned.” From this he submits that if the Disputed Land was not part of the registered title the parties cannot have intended to transfer it.
10. The starting point for the enquiry, as it seems to me, is to ask whether the Disputed Land was indeed part of the registered title. The case was argued before the deputy adjudicator on the assumption that the Disputed Land was not part of the registered title. Mr and Mrs Brown challenge that assumption. Mr Small did not object to that challenge being made. There are, as it seems to me, two possible consequences of the Land Registry’s mistake when processing Crown Hall Estates application for first registration. One is that the Disputed Land remained unregistered land and that Crown Hall Estates remained the owner of the legal estate as unregistered land. The other is that as a result of rule 251 of the Land Registration Rules 1925

and the general boundaries rule containing Rule 278 of the Land Registration Rules the Disputed Land was included in the registered title, even though it fell outside the red edging on the filed plan.

11. Rule 278 provides, so far as relevant, as follows:

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 portion of an adjoining road or stream.”

Sub-rule 4 provides:

4. This rule shall apply notwithstanding that a part or the whole of a ditch, wall, fence, road, stream, or other boundary is expressly included in or excluded from the title or that it forms the whole of the land comprised in the title.

The general boundaries rule is a rule that applies to the filed plan. It is not a rule that at least in terms applies to a transfer or conveyance plan, as I explained in *Chadwick v Abbotts Group Properties Limited* [2005] 1 P&CR 10. But Rule 251 of the Land Registration Rules does spell out what vests by virtue of registration. It provides:

“The registration of a person as proprietor of land shall vest in him, together with the land, all rights, privileges, and appurtenances appertaining or reputed to appertain to the land or any part thereof, or, at the time of registration, demised, occupied, or enjoyed therewith, or reputed or known as part or parcel of or appurtenant to the land or any part thereof, including the appropriate rights and interests which, had there been a conveyance of the land or manor, would under section 62 of the Law of Property Act 1925 have passed therewith.”

The cases show that a piece of land can be an appurtenance of another piece of land depending on the context in which the word appurtenance is used. In *Methuen-Campbell v Walters* [1979] 1QB 525 Goff LJ said, that the original strict meaning of appurtenance had so far yielded to context as to be dead and that what it means is all that would pass on a demise without express mention. As Mr Dowding points out, rule 251 encompasses things which are occupied with the land and things which are known as part or parcel of it. Clearly the rule envisages that parcels of land may be included in the registered title even though not mentioned. For example, a Georgian or Victorian terraced house may have the use of vaults under the pavement, but the pavement is part of the highway and would never be included in the red edging on the filed plan. But no one could realistically doubt that the vaults are included in the registered title and as the general boundaries rule makes clear the general boundary does not exclude that possibility even if the boundary is expressly excluded from the title.

12. The appurtenances of a parcel of land include what is within its curtilage. This is established by *Trim v Sturminster Rural District Council* [1938] 2 KB 508 and *Methuen-Campbell v Walters* [1979] QB 525 referred to above. In the latter case helpful guidance was given by Buckley LJ as to the criteria to be applied in determining what falls within the curtilage of a property. At page 543 he said:

“In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter. There can be very few houses indeed that do not have associated with them at least some few square yards of land, constituting a yard or a basement area or passageway or something of the kind, owned and enjoyed with the house, which on a

reasonable view could only be regarded as part of the messuage and such small pieces of land would be held to fall within the curtilage of the messuage. This may extend to ancillary buildings, structures or areas such as outhouses, a garage, a driveway, a garden and so forth. How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending must depend on the character and the circumstances of the items under consideration. To the extent that it is reasonable to regard them as constituting one messuage or parcel of land, they will be properly regarded as all falling within one curtilage; they constitute an integral whole.”

There is no suggestion that the deputy adjudicator failed to apply that as the test by which he reached the findings of fact I have summarised. Thus, the deputy adjudicator found as a fact that the Disputed Land was within the curtilage of Bridge House at the time of the conveyance to Crown Hall Estates and indeed it still is. He has also found that it was occupied together with and as part of Bridge House.

13. In my judgment, therefore, Rule 251 of the Land Registration Rules would have operated to vest the Disputed Land in Crown Hall Estates as part of the registered title. The fact that the red edging on the filed plan did not include the Disputed Land does not matter, because of the operation of the general boundaries rule. Mr Small objected that this is really a question of rectification of the register under s.82 of the Land Registration Act rather than the application of Rule 251 or 278. He may well be right, that an application for rectification of the register could have been made, but I do not see why that possibility bars the application of Rule 251 and Rule 278 to the known facts.
14. On the basis of the deputy adjudicator’s findings of fact, the transfer as executed referred to a plan on which the Disputed Land was included within the red edging. Thus, the indications in favour of the conclusion that the parties intended to transfer the Disputed Land were the description of the property by reference to the plan and the description of the property as “known as” Bridge House, Crondall Road. The only pointer in the opposite direction is the reference to the registered title. That is readily explicable by the fact that, as is apparent from the colouring on the original plan, both parties assumed that the Disputed Land was part of the registered title. If their assumption is correct because of the operation of Rule 251 of the General Boundaries Rule on the original registration of Crown Hall Estates, then the description of the Disputed Land as part of the registered title was also correct. On this hypothesis, therefore, no part of the description was wrong. Suppose, however, that their assumption is incorrect? Suppose that the Disputed Land was not part of the registered title, but the Crown Hall Estates held the legal estate in the Disputed Land as unregistered land? In that event the description of the Disputed Land as being part of the registered title would have been wrong, but every other part of the verbal description and the original transfer plan would have been correct. The fact that there are pointers either way and there is, as the deputy adjudicator correctly held, exactly the situation in which the *falsa demonstratio* principle applies. In my judgment, the deputy adjudicator was right to conclude that that part of the description that was false should be rejected and he was also right to conclude that the part of the description that was false was, on this hypothesis, the assumption that the Disputed Land was part of the registered title.
15. Mr Small next relies on the alteration to the plan attached to the transfer. The deputy adjudicator held that the alteration to the plan did not affect the position. He held that once a deed had been executed it could only effectively be varied by re-execution by the parties and, that Rule 86 of the Land Registration Rules 1925 reiterated that requirement. Since the transfer was not re-executed the alteration to the plan could not have affected the position. There are two strands to this argument. First, it is argued that although the transfer was not re-executed, nevertheless, the alteration of the plan meant that the legal estate in the Disputed Land did not vest in Mr Ash. Second, it is argued that the subsequent conduct of the parties in altering the transfer plan shows that the deputy adjudicator’s construction of the 1995 transfer was wrong. Although evidence of subsequent conduct is not generally admissible to interpret a commercial contract, there is an exception to this principle in the case of conveyances where the issue is one of the precise boundaries of the property conveyed. In a number of recent decisions of the Court of Appeal the

application of this principle has been confirmed. See *Ali v Lane* [2007] 1 P&CR 26; *Haycocks v Neville* [2007] 1 EGLR 78, a case involving registered land and; *Piper v Wakeford* [2008] EWCA Civ. 1378. Mr Small also relies on *Berry v Berry* [1929] 2 KB 316 for the proposition that a deed can be varied by an agreement in writing or even orally. Mr Dowding does not challenge the principle, but he says it does not apply to the 1995 transfer, because on the hypothesis that the land remained unregistered it took effect as an immediate transfer to Mr Ash of the legal estate in the Disputed Land.

16. We come back, I think, to the question whether the Disputed Land was or was not part of Crown Hall Estates registered title. If, as I think it was, then under the Land Registration Act 1925 the legal estate did not pass as a result of the execution of a transfer. The legal estate only passed on completion of the transfer by registration. See s.20 of the Land Registration Act 1925. Thus, execution of the 1995 transfer in its un-amended form by Crown Hall Estates could not have taken effect as an immediate transfer of the legal estate in a Disputed Land to Mr Ash. It follows, therefore, that insofar as the transfer dealt with the legal estate it remained executory up to the moment of registration.
17. In my judgment, therefore, on the hypothesis that the Disputed Land is part of Crown Hall Estates' registered title, the deputy adjudicator's conclusion that once executed the 1995 transfer could not have been consensually varied except by re-execution was not correct. On the facts as found, transfer was varied by agreement before the registration took place. I see no reason to suppose that on this hypothesis the variation was invalid.
18. It follows, in my judgment that, on the hypothesis that the Disputed Land was registered land, the transfer must be interpreted as if the red edging of the plan did not include the Disputed Land. I might add that, since one of the purposes of the register is to record titles to land in a publicly available form, it may be that the court should be cautious about admitting extrinsic evidence to displace what actually appears on the register.
19. So, if the transfer is interpreted as if the red edging did not include the Disputed Land and the Disputed Land was already registered land, what is the result? The result must, in my judgment, be that the application of the general boundaries rule and rule 251 meant that the registration was effective to vest the Disputed Land in Mr Ash, just as the application of those two rules meant that it had become part of the registered title on the first registration of Crown Hall Estates. This conclusion is reinforced by the fact that Mr Ash was given no express right of way over the Disputed Land from the highway to Bridge House and, that clause 7.4 expressly excluded any implied rights of way. Thus, Crown Hall Estates ceased to be competent to convey the Disputed Land to Mr and Mrs Frazer.
20. If on the other hand the Disputed Land never was registered land, then the execution of the transfer would have conveyed legal estate in the Disputed Lands to Mr Ash. That conveyance would have taken immediate effect on the execution of the transfer. The case was argued before the deputy adjudicator solely on the basis that the Disputed Land was not part of the registered title and on that hypothesis the deputy adjudicator's reasoning about the effect of the transfer was, in my judgment, entirely correct.
21. Mr Small submitted that because the conveyance had to be perfected by registration it was open to the parties to undo its effect before registration actually took place. I do not agree. The conveyance does not have to be perfected by registration, it takes effect at once. There is a sanction for a failure to apply for registration, but conceptually, that is not the same at all. Section 52 of the Law of Property Act 1925 provides that the conveyance of a legal estate must be made by deed. If, therefore, the Disputed Land was conveyed to Mr Ash by the January 1995 transfer as executed, it could only have been re-conveyed to Crown Hall Estates by another deed. There was no other deed and consequently the legal estate remained with Mr Ash. Mr Ash would have had to apply for first registration within two months; otherwise under s.123 of the Land Registration Act 1925 the conveyance to him would have been void as regards any conveyance

of the legal estate. But Mr Ash did apply to registration of the legal estate in the Disputed Land based on the transfer containing the original transfer plan. Indeed, it was the very fact that he had applied for registration that gave rise to the Land Registry's requisition, which in turn caused the alteration to the transfer plan, so s.123 did not operate to divest Mr Ash of the legal estate. Mr Small submitted that Mr Ash's application to register the Disputed Land must be treated as having been withdrawn, but even if that is right s.123 says nothing about the effect of withdrawing an application for registration once it has been made. In my judgment it would not be right to read into an Act of Parliament, which has the effect of divesting a person's property, a trigger that is not there.

22. Accordingly, in my judgment, whatever the effect of the Land Registry's mistake on the first registration of Crown Hall Estates, one way or another the legal estate in the Disputed Land passed to Mr Ash. Of the two possible analyses I prefer the analysis that the Disputed Land has always formed part of the registered title as a result of Rules 251 and 278 of the Land Registration Rules 1925.
23. In my judgment, therefore, the deputy adjudicator came to the right conclusion, even though my reasoning differs in some respects than his. I will, therefore, dismiss the appeal.