



REF/ 2023/0159

**PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

PJ DAVIDSON HOLDINGS LIMITED

APPLICANT

and

STEWART SEYMOUR GIBBONS

RESPONDENT

Property Address: Land on the north side of Five Mill Hill, Whitestone, Exeter

Title Numbers: DN698961 and DN366997

Before: Judge Michael Michell

Sitting at: CVP remote hearing

On: 16th October 2024

Applicant Representation: Mr Simon Brilliant, counsel, instructed by

Respondent Representation: Mr Stephen Willmer, counsel, instructed by

DECISION

***ALTERATION OF THE REGISTER – CONSTRUCTION OF TRANSFER- ADMISSIBILITY
OF EVIDENCE - WHETHER LAND INCLUDED IN THE TRANSFER – WHETHER
REGISTER SHOULD BY ALTERED***

Cases referred to:

Baldwin's Case 2 Co Rep 23a

Neilson v. Poole 1969 20 P&CR 904

Investors Compensation Scheme v West Bromwich Building Society [1988] 1 WLR 896

Ali v Lane [2006] EWCA Civ 1532

Atlasnavios-Navegacao v. Navigators Insurance Co. [2018] UKSC 26

1. The Applicant, PJ Davidson Holdings Limited has applied to HM Land Registry to alter the title plan to title number DN698961 by removing a strip of land from the title and restoring it to title number DN366997. I shall refer to that strip as the “yellow land”. The Respondent, Mr Gibbons is the registered proprietor of the land in title number DN698961. He has objected to the application. HM Land Registry referred the matter to the Tribunal for determination.

2. Title number DN698961 was created following a transfer of part of the land formerly registered under title number DN366997. The Applicant was at the time of the transfer of part and is now, the registered proprietor of the land registered under title number DN366997.

3. The Applicant as transferor and the Respondent as transferee executed a transfer of part in form TP1 dated 23rd March 2018. Although the title out of which the land was transferred was title number DN366997, the TP1 provided for matters contained in the transfer to be registered or noted against title DN416678. The land in title DN416678 is land to the north of the land in title number DN366997.

4. The property transferred was described in box 3 of the TP1 as follows
“All that land being part of the above title which land is at the north side of Five Mile Hill, Whitestone, Exeter, Devon.
The property is identified
on the attached plan and shown
cross-hatched pink and labelled “C”.”

5. The plan shows three areas cross-hatched pink; areas marked “A” and “B” which comprise the land in title DN416678 and another area on which the letter “C” appears. The words “Field C” appear on this pink cross-hatched area with area measurements of 5.71 acres

and 2.31 hectares appearing below. Crossing the area labelled “C” is a strip of land coloured yellow, running north from the boundary with the adjacent highway to the south and turning at an obtuse angle to run towards the western edge of the area marked “C”. This is the yellow land, the land the subject of the Applicant’s application.

6. Drawn on the area coloured yellow are three arrows; one pointing north from the southern end of the yellow land; another pointing northwest where the yellow land runs at an obtuse angle and a third running north towards the northern end of the yellow land. Three pink hatching lines cross onto the yellow land but do not cross it completely. Two other pink hatching lines to the north of the yellow land stop at the northern edge of the yellow land. The four pink hatching lines to the south and west of the yellow land stop close to or at the southern/western edge of the yellow land and do not cross it. The words “Existing track” appear on the plan with an arrow running from those words to the yellow land. The words “Boundary Hedge” are printed to the left of the area marked “C” with arrows pointing to the pink line running north-south along the western edge of the land marked “C”. Two parallel black lines are drawn on the plan, running from the land to the west of the land marked “C” to the yellow land. The following words appear in a box with an arrow running from the box to the area between the two parallel lines,

“PJD Holding to retain a
right of way over existing
track to this point and also to
create a track/roadway
through the boundary hedge
if needed subject to planning
permissions”.

7. The Applicant owns or operates solar panels on the land to the west of the land marked “C”. The words “Solar Power Station” appear by thin boxes, which appear to be intended to show the rows of solar panels.

8. In box 8 of the TP1 under the words “The transferor has received from the transferee for the property the following sum (in words and figures):” the words

“Two hundred and fifty thousand pounds (£250,000.00) in respect of land comprised within this Transfer of land on form TR1 comprised within title number DN416678 made between the parties of even date”.

Neither counsel made submissions as to what this clause means or submitted that it helped in the determination of the dispute between the parties.

9. Box 12 includes the following provisions

- (1) “unless the contents otherwise provides the definitions and interpretations in the preceding clauses and in the First Schedule apply”
- (2) “the Property is transferred with the rights set out in the Second Schedule but excepting and reserving the rights set out in the Third Schedule”
- (3) “for the benefit and protection of the land comprised in the Retained Land” the transferee covenants in the terms set out in the Fourth Schedule
- (4) “for the benefit and protection of the land comprised in the property transferred by this Deed” the transferor covenants with the transferee in the terms set out in the Sixth Schedule.

10. The First Schedule to the TP1 includes the following definitions:

“ “**Retained Land**” the land and any structures thereon now or formerly comprised in the Title Numbers DN366997 and parts of which are shown hatched black on the plan”

“ “**Access Way**” the trackway on the property shown coloured yellow on the plan

“ “**Property**” the property referred to in clause 3 and the Exclusive Conduits installed or used solely from the purposes of the Property”

“ “**Plan**” the plan annexed”.

11. The Second Schedule is headed “Rights granted for the benefit of the property” and grants rights “for the Transferee in common with the Transferor and all others having the like rights and to whom like rights may be granted”. Paragraph 5 of the Second Schedule is in the following terms:

“Unrestricted access with or without vehicles over the Access Way subject to the Transferees and their successors in title being responsible for a reasonable proportion of the costs of repair and maintenance subject to user”.

12. The Third Schedule headed “(Rights excepted and reserved out of the Property) for the benefit of the Retained Land” includes at paragraph A6

“Unrestricted access with or without vehicles over the Access Way was (*sic*) subject to the Transferor and its Successor in title being responsible for a reasonable proportion of the costs of repair and maintenance subject to use”.

13. The Fourth Schedule includes at paragraph 3 a covenant by the transferee “Not to permit any vehicles of any description or any articles to obstruct any part of the Access Road (*sic*)”.

14. The Sixth Schedule includes a covenant by the transferor
“To repair and maintain to a minimum standard the Access Road to allow vehicular access to the property (the minimum standard being such that would allow access by a 2 wheel drive car or pick up truck”.

15. The transfer was registered on 6th June 2018. HM Land Registry drew the title plan so as to include the yellow land within the general boundaries of the land in the new title. The Applicant’s case is that the drawing of the title plan so as to include the yellow land was a mistake and that the registrar should correct the mistake using his power under paragraph 5 of Schedule 4 to the Land Registration Act 2002. If I were to find that the yellow land was not part of the land transferred by the transfer then I would need to consider whether the removal of the yellow land from the title plan amounted to “rectification” within paragraph 1 of Schedule 5 and if so, whether the register should be rectified having regard to the provisions of paragraph 6 of Schedule 5.

16. Construction and admission of evidence

The Respondents sought to refer me to pre-transfer correspondence between the solicitors who acted for the parties in the transaction. I do not take that correspondence into account in construing the transfer because it is inadmissible.

17. Lord Hoffmann said in Investors Compensation Scheme v West Bromwich Building Society [1988] 1 WLR 896:

“The principles may be summarised as follows:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would

reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945

18. Counsel for the Respondent referred me to *Ali v. Lane* [2006] EWCA Civ 1532, a case concerning a boundary dispute between the parties. The issue for the Court of Appeal to determine was whether it was permissible to assess the extent of land conveyed by one conveyance by reference to later conveyances and subsequent conduct. The Court of Appeal did not hear in depth submissions on the authorities, both counsel approaching the matter on the basis that it was a matter of the probative value of any material relied on. Carnwarth L.J. (as he then was) said that since there seemed to be some uncertainty it would be helpful if he made some comments on the state of the authorities as he understood them. His Lordship referred to *Watcham v. Attorney General of East Africa Protectorate* [1919] AC 533, a decision of the Privy Council on the construction of a conveyance by certificate under the East African Land Regulations. Carnwarth L.J. said that the ratio of the case could be taken from the headnote:

“The principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language

employed, applies to a modern as well as to an ancient document, and where the ambiguity is patent as well as where it is latent”.

Having considered a number of other authorities, Carnwath L.J. said [at paras. 36 and 37]

“The conclusion I would be inclined to draw from this review is that *Watcham* remains good law within the narrow limits of what it decided. In the context of a conveyance of land, where the information contained in the conveyance is unclear or unambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended”.

19. Though Carnwath LJ did not expressly exclude evidence of the previous negotiations of the parties and evidence of their subjective intent when stating that it was permissible to have regard to “extraneous evidence”, it is clear from the context that the question of evidence of previous negotiations and of subjective intent did not arise. I do not consider that His Lordship intended to depart from the well-established principle that on a matter of construction (as opposed to rectification), evidence of previous negotiations and of subjective intent is not admissible.

20. Counsel for the Respondent referred me in oral submissions to *Refined London Ltd and others v. Gordon and Others* [2021] EWHC 1915 (Ch). However, in subsequent written submissions, counsel for both parties concluded that the case does not assist in the determination of the matter before me.

21. The correspondence on which the Respondent sought to rely is evidence of previous negotiations between the parties and is inadmissible.

Construction

22. What is apparent is that the transfer is poorly drafted but the poor drafting does not entitle the tribunal to say that it cannot determine what is conveyed. As Megarry J. said in *Neilson v. Poole* 1969 20 P&CR 904 when considering the position of a boundary,

“...In the construction of the parcels clause of a conveyance and the ascertainment of a boundary the court is under strong pressure to produce a decisive result. The prime function of a conveyance is to convey. As to any particular parcel of land, either the conveyance conveys it, or it does not; the boundary between what is conveyed and

what is not conveyed must therefore be proclaimed. The court cannot simply say that the boundaries are uncertain and leave the plot conveyed fuzzy at the edges, as it were”.

Subject to a slight modification that may be required in the case of a transfer of registered land because of the general boundaries rule, I consider the same applies in the case of the construction of a transfer. Subject to the general boundaries rule, the tribunal must come to a decisive conclusion as a matter of construction of the transfer whether the yellow land is or is not part of the land transferred.

23. I consider first the parcels clause, being box 3. That provides that the land is “identified” on the plan. The words do not limit me to considering part only of the plan or only lines drawn on the plan. I should have regard to the whole of the plan, including what is written on the plan.

24. The cross-hatching is one important part of the plan. Some of the lines making the hatching are drawn across the yellow land. In my judgment the lines that cross the yellow land are more likely to have been drawn deliberately across the yellow land than to be the result of accident or clumsiness by the draftsman. The drawing of lines across the yellow land indicates that the yellow land is included in the land transferred. I take into account that some of the yellow lines do not cross but stop short of the yellow land but the lines drawn across the yellow land are more substantial.

25. I consider then what is written on the plan. The significant words written on the plan are “PJD Holding to retain a right of way over the existing track to this point”. The “existing track” is the yellow land. The use of the words “retain a right of way”, instead of words such as “retain the existing track” indicate that the Applicant was parting with ownership of the yellow land but retaining a right of way.

26. I then turn to consider the other parts of the transfer since the transfer falls to be construed as a whole. The transfer includes two mutually inconsistent provisions, namely paragraph 5 of the Second Schedule and paragraph A6 of the Third Schedule. The first is the grant to the Respondent of a right of way over the yellow land. The second is the reservation by the Applicant of a right of way over the yellow land. The first could only be effective if the Applicant retained the yellow land. The second could only be effective if the yellow land

was transferred to the Respondent. Neither counsel submitted that there was some construction which would give effect to both clauses.

27. There is an ancient rule of construction that the words of deeds are to be taken more strongly against the party who drafted the words. This requires that when the words of a deed are ambiguous, the court or tribunal construing those words should choose the meaning that is less favourable to the person who put forward the deed. Though the rule has been described as a rule of last resort and criticised particularly in the context of commercial contracts, its continued existence was affirmed in *Atlasnavios-Navegacao v. Navigators Insurance Co.* [2018] UKSC 26 [48]. The rule can also be used to determine which part of a contradictory deed is valid – *Baldwin’s Case* 2 Co Rep 23a, 24a. The effect of the application of this rule is in my judgment that the reservation of the right of way in paragraph A6 of the Third Schedule is the valid provision being the one less favourable to the Applicant as the party putting forward the transfer.

28. The covenant by the Respondent at paragraph 3 of the Fourth Schedule not to permit any vehicles or any articles to obstruct any part of the “Access Road” appears to be a restriction on the use by the Respondent of the Respondent’s land, intended to protect the exercise of a reserved right of way by the Applicant. The reference to the “Access Road” must be a reference to the “Access Way” as defined in the transfer i.e. the yellow land. There is no other road to which it could refer. The use of the word “obstruct” points to this being a covenant for the protection of a right to pass over the yellow land. If the Respondent were not the owner of the yellow land, the covenant would be a covenant by the Respondent not to do something he had no right to do under the general law (i.e. place articles on the yellow land) and which would amount to a trespass. He would simply be covenanting not to trespass in a specific way, that is by allowing articles to obstruct the yellow land. Such a covenant would not be necessary. The covenant makes practical business sense only if the yellow land was part of the land transferred to the Respondent. I consider this covenant to be a strong indication that the yellow land was part of the land transferred.

29. As in the covenant at paragraph 3 of the Fourth Schedule, so the reference in the covenant by the Applicant in the Sixth Schedule to maintain and repair the “Access road” must be intended to be a reference to the “Access Way”, i.e. the yellow land. It may be read as a covenant by the Applicant as owner of the yellow land to maintain it so as to facilitate the

use of it by the Respondent under a right of way. However, it is possible for a party to covenant to maintain and repair a road on land belonging to another. The party may so covenant in return for being given a right of way over the road. The covenant is not inconsistent with the yellow land being part of the land transferred.

30. I also consider the definition of “Retained Land” in the transfer. This is poorly drafted; read literally, it would include the land transferred as part of what is within the definition of “Retained Land”. The purpose of the definition of “Retained Land” in the transfer is to define the land for the benefit of which rights are excepted and reserved. For that reason, the definition must be read as excluding the land transferred. What can be said is that the definition of “Retained Land” does not expressly include the yellow land. It could easily have done so.

31. Doing as I must the best I can to construe a poorly drafted transfer so as to come to a decisive result, I conclude that the yellow land is part of the land transferred by the Applicant to the Respondent. My reasons can be summarised as follows:

- (1) The continuation of some of the pink cross-hatching lines on the transfer plan across the yellow land appears deliberate. It is more likely that the lines which stop short of the yellow land do so for reasons of clumsiness and lack of space than that the lines drawn across the yellow land were so drawn in error.
- (2) The conflict between the terms granting a right of way to the Respondent and reserving a right of way for the Applicant can be resolved by construing the transfer against the Applicant as the party who would in the normal course have prepared the transfer. The transfer is then construed as transferring the yellow land but reserving a right of way.
- (3) The covenant by the Respondent not to obstruct the yellow land indicates the yellow land was part of the land transferred to him.
- (4) The covenant by the Applicant to maintain the yellow land to a defined minimum standard can be read consistently with the transfer being a transfer of land including the yellow land.
- (5) The Retained Land is not defined so as to expressly include the yellow land. Construing the definition of “Retained Land” against the Applicant as the party putting forward the transfer, results in a conclusion that the yellow land is not part of the “Retained Land” and is therefore part of the lands transferred.

32. I shall direct the Chief Land Registrar to cancel the application of the Applicant to alter the title plan.

33. My preliminary view is that the Applicant should pay the Respondent's costs of the proceedings to be assessed on the standard basis, if not agreed. Practice Direction 9.1(b) of the Property Chamber, First-tier Tribunal, Land Registration Practice Directions provides that if the Tribunal decides to make an order about costs ordinarily the unsuccessful party will be ordered to pay the costs of the successful party but the Tribunal may make a different order. The Applicant is the unsuccessful party. I know of no reasons why it should not be ordered to pay the Respondent's costs. If any party wishes to submit that some different order should be made as to costs then that party should send written submissions to the Tribunal and copy them to the other party by 5pm on 24th November 2024.

BY ORDER OF THE TRIBUNAL

Judge Michael Mitchell

DATED THIS 11th November 2024

