Neutral Citation Number: [2008] IEHC 301

THE HIGH COURT

2007 No. 3511P

BETWEEN

PATRICK McCOY AND TERRI McCOY

PLAINTIFFS

AND

MICHAEL McGILL AND TIMOTHY ROE

DEFENDANTS

Judgment of Mr. Justice John Hedigan delivered the 6th day of October, 2008.

1. The plaintiffs are husband and wife and reside at 21 Dundela Park, Sandycove, County Dublin. They are the registered owners of the property known as Redan House, Ardbrugh Road, Dalkey, County Dublin. The defendants are both architects and are the owners of the property known as 5, Ardbrugh Villas which adjoins Redan House. Redan House is to the east of Ardbrugh Villas.

2. The plaintiffs claim that the two above properties are divided by a natural cliff face. They claim that on or about the 17th April, 2007, the defendants commenced building work in the course of which they removed a substantial quantity of rock from the natural cliff face bounding the two properties. This they claim was a trespass and constituted a nuisance. Furthermore, the plaintiffs alleged that the work of rock breaking had a weakening effect on the remaining cliff face and upon the structure of Redan House itself. The plaintiffs' claim for trespass is based upon their claim to own the land upon which the rock breaking and removal took place, (the disputed area). In the alternative they claim to have obtained a possessory title to the disputed area by occupation thereof since 1952.

The plaintiffs claim:-

(1) A declaration they are the legal and beneficial owners of the disputed area,

(2) Damages for trespass and nuisance,

(3) An injunction restraining the defendants from further trespassing in particular by carrying out works thereon,

(4) An order restoring the natural rock cliff face.

3. The defendants claim they own the disputed area. They deny the boundary is the cliff face and argue that the natural cliff face from the front to the rear of their property is within their property. They admit they did the works alleged but claim that it was loose rock that was removed. They did this pursuant to a planning permission which they had previously obtained. They therefore deny any trespass and further deny any damage to the structural integrity of either Redan House or the natural cliff face. They claim that the plaintiffs are in fact trying to claim a part of their property, firstly by claiming the disputed area under their title document and subsequently by claiming by way of adverse possession. The defendants claim the title documents clearly show they are the owners of the disputed area. As to adverse possession, the defendants deny the same and rely upon the uncertainty of Redan House's western boundaries which was notified to the plaintiffs by Special Condition 5 of the contract for sale whereby they purchased Redan House and the indenture of assignment dated 29th June, 1910, by which the disputed land was assigned to the then owners of the 5, Ardbrugh Villas by the then owners of Redan House.

The background

4. The two properties adjoin each other and neither are occupied by their respective owners. A number of applications have been made by the plaintiffs to demolish Redan House. The defendants received planning permission to remove part of the cliff face and do other works on their premises at 5, Ardbrugh Road. It was these works they were commencing when these proceedings were brought. The plaintiffs were of the view that the defendants were trespassing on their land whilst the defendants maintained the work they were doing was on property owned by them. The defendants admitted that there had been an inadvertent trespass of their rock breaker on the plaintiffs' property. It had been parked thereon overnight; they apologised and offered to remedy any damage caused by the machines heavy tread. This was before these proceedings were issued. The defendants suggested a meeting on site to clarify where the boundaries lay between the two properties. The plaintiffs did not take them up on this offer but applied to the High Court for injunctive relief. Ultimately the defendants gave an undertaking not to continue with the works.

5. The issue in this case resolves itself to the question of how to interpret the assignment of 1910. It was agreed by the plaintiffs herein at the hearing that this deed of assignment was the key to the case. The key issue is whether that deed assigned 7 feet from the then boundary of 5, Ardbrugh Villas to the eastern edge of a pier drawn thereon as a square and described therein as a pier and whether that pier was one and the same as the pier that was inspected by Denis Cogan, Architect, on 18th April, shortly after the works had commenced and whilst discussions were continuing between the parties.

The plaintiffs claim the existing pier is not the pier referred to on the 1910 map. They claim there must have been another pier since demolished and either the one existing in April, 2007 was a twin of that pier or else was constructed after the pier they alleged existed in 1910.

The defendants claim the pier existing in April, 2007 was one and the same as that shown on the map and described in the deed of 1910.

6. In this case I have had the benefit of reading the pleadings and affidavits sworn herein by the parties, by Eric Graham, Engineer of Fahy Fitzpatrick Consulting Engineers, Martin Hamm, Engineer of M.T. Hamm Limited, Consulting Engineers, Gerry Kestell, Managing Director of Lambe Surveys, Bernie Coleman, Solicitor of O'Rourke Reid, Solicitors, Frank O'Rourke of 3, Ardbrugh Villas, Thomas Mulreid, Chartered Land Surveyor of Apex Surveys Limited and David M. Turner, Solicitor for the plaintiffs. In evidence I heard Frank O'Rourke, Gerry Kestell, Eric Graham, Denis Cogan, Thomas Mulreid and Neil Vard.

7. I have been referred to a number of cases and have found the following the most apt and helpful;

Wibberley Building Limited v. Insley, [1999] 1 W.L.R. 894, Lord Hoffman at pp. 895 to 896:-

> *"Boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras's army. It is*

therefore important that the law on boundaries should be as clear as possible.

The first resort in the event of a boundary dispute is to look at the deeds. Under the old system of unregistered conveyancing, this means the chain of conveyances and other instruments, going back beyond the period of limitation, which demonstrates that the owner's title is in particular terms secure against adverse claims. These conveyances will each identify the subject matter in a clause known as the parcels which contains the description of the land. Sometimes it is no more than a reference to the land conveyed by an earlier conveyance, which will then have to be consulted. Older conveyances of farm property often describe the property as being the house and land in the occupation of the vendor or his tenant. The parcels may refer to a plan attached to the conveyance, but this is usually said to be for the purposes of identification only. It cannot therefore be relied upon as delineating the precise boundaries and in any case the scale is often so small and the lines marking the boundaries so thick as to be useless for any purpose except general identification. It follows that if it becomes necessary to establish the exact boundary, the deeds will almost invariably have to be supplemented by such inferences as may be drawn from topographical features which existed, or may be supposed to have existed, when the conveyances were executed".

O'Donnell v. Ryan, 4 I.C.L.R. 44, Ball J. at pp. 56 to 57:-

"… (T)he very plain and well established principle, that in construing legal instruments we are not at liberty either to transpose language or to reject words out of the instrument, or to import them into it, unless it becomes necessary to do so in order to carry out the manifest intention of the parties, appearing by the language they have used - I say the manifest intention apparent on the instrument; for it would be obviously a vicious construction to transpose or reject or supply words, in order to give effect to an intention not manifested by the parties, but only conjectured by the Court – that is, an intention which in the mind of the Court the parties may have entertained, but which the language of the instrument does not clearly import that they did. To reject words having a definite signification, and treat them as insensible, or to import into the instrument words which the parties themselves have not thought fit to use, or to transpose words, so as to alter the meaning of a legal instrument, would be manifestly to take such a liberty with it as neither law nor reason could justify, unless it be absolutely necessary to do so for the purpose of preventing the defeat of the object which the parties have shown clearly they had in view."

Topliss v. Green, [1992] EGCS 20, Butler Sloss L.J., as referred to in *Seeckts v. Derwent* EWCA CIV 393:-

"… One looks at the language used in the contract, the content of the plan and in the context of the facts relating to the locus in quo, if it is in issue as indeed it is in this appeal, including relevant photographs and the preliminary enquiries. The question therefore is: what would the reasonable layman think he was in fact buying."

Boyd Gibbins Ltd. v. Hockham, [1966] 199 EG 229, Buckley J.:-

"The parcel as set out in the agreement and conveyance was described by reference to the plan, and the plaintiffs would have it that the words 'coloured pink on the plan annexed hereto' gave a complete and certain description of the property intended to be conveyed, and that the dimensions which were then referred to were 'gilding the lily' and not an essential part of the property intended to be conveyed. That contention could not be accepted. The description in the body of the agreement and the conveyance must be read as a whole. In neither case did it include all the dimensions, but it did include certain dimensions which clearly formed part of the description of the property which was the subject matter of the transaction… There was no physical boundary which showed the dimensions of the plot when [the defendant] moved in, so the dimensions shown could not be treated merely as a misdescription which could be ignored in so far as necessary to make the document fit the physical facts."

Kenny v. La Barte, [1902] 2 I.R. 63, Walker L.J. at p. 71:-

"There are certain rules of law applicable to the construction of grants in deeds which were taken as admitted in the Court below. The difference in the judgments rests upon the application of them. It cannot be denied that if there be once "an adequate and sufficient definition with convenient certainty of what is intended to pass by a deed any subsequent erroneous addition will not vitiate it"; nor can it be disputed that a grant referring to a map may be so worded that the map is an essential part of the grant, and that there can be no certainty without it."

Cook v. J.D. Wetherspoon Plc., [2006] 2 326 P. & C.R. 18, Nourse L.J.:-

"…(w)here there is a conflict between (1) dimensions in figures on a plan by which the property conveyed or transferred is described, (2) dimensions arrived at by scaling off the plan, the conflict is to be resolved by reference to such inferences as may be drawn from topographical features which existed when the conveyance or transfer was executed."

8. From the above cases I deduce the following principles applicable herein.

In relation to determining boundaries:-

(a) The primary source for defining a boundary line is the deeds in the chain of title.

(b) The plan attached (if there is one), is usually for the purposes of identification only. It cannot normally be relied upon as delineating precise boundaries.

(c) If necessary the deeds will have to be supplemented by such inferences as may be drawn from topographical features which existed or probably did when the conveyance was executed.

In relation to rules of construction of a deed:-

(a) The court must give effect to the intention of the parties as expressed in the deed.

(b) To determine this, the court must determine what is meant by the words actually used rather than what the court might conjecture they actually meant. The court should only do so where absolutely necessary to avoid defeating the object which the parties clearly had intended.

In relation to the role of a map:-

(a) A map or plan may be the determining matter where the parcels provide that the map is to determine the nature and extent of the land in question.

(b) A map may be an essential part of the grant where it is worded such as to make it so and where there can be no certainty without it.

(c) Any conflict between dimensions set out in figures on a plan by which the property is conveyed or transferred and those calculated by scaling off the plan, may be resolved by reference to topographical features which existed when the conveyances or transfer was executed.

9. In this case the plaintiffs owned their leasehold property pursuant to the 1873 lease exhibited herein. This lease defines the boundary of the leasehold interest. The interest is described as "delineated" on a map which I consider means it is intended to be precisely defined thereby. The map shows a line with the description "top of the rocks". The lease further defines the western boundary as "a quarry field". The face of the cliff, it has been ascertained in evidence, has both a sheer face and coming toward Ardbrugh Road, a gradient moving westerly. If the leasehold interest was not intended to include a part of the quarry field, it should not have included the cliff face. This seems to me to be confirmed by the phrase "top of the rocks" on the map and I hold that the sensible interpretation of this phrase together with a reference to the map means that the interest given to the plaintiffs by the 1873 lease had a western boundary that was at the top of the rocks.

The original title of the defendants is the conveyance of 1899, also exhibited therein, from Kenny to Doyle which was then transferred to Rickaby. The memorial attached to this set out the road frontage conveyed as being 178 feet 6 inches. The deed of assignment and its map of 1910 between the Misses Pick and Rickaby also exhibited herein shows a frontage of 7 feet measured from the eastern edge of the pier (the square area) west to the boundary of 5, Ardbrugh Road.

It is highly probable that the pier that was inspected in April, 2007 is one and the same as the pier delineated as a square on the map attached to the 1910 deed. This pier is made of materials and in a manner that shows it is pre-first World War, i.e. 1914 at the latest. In any event, it seems highly improbable that the pier clearly referred to in the 1910 deed would have been demolished and replaced by another which formed a part of the wall on Ardbrugh Road. Furthermore the fact that the hoarding which was erected in place of the wall to the road frontage of Redan House ends at the Pier strongly suggests a belief or at least a suspicion on the part of the plaintiffs and their predecessors in title that the western boundary of their interest ended at the existing pier.

By reference therefore to the maps attached to the various deeds exhibited herein and to the topographical features appearing on the ground when these proceedings commenced, it is strongly probable that the map attached to the 1910 deed does reflect accurately the extent of the defendants' property which has an eastern boundary with Redan House at the point on Ardbrugh Road marked by the pier and stretching 60 feet back to a point at the top of the rocks. It has to be that point, at the top of the rocks, because if it were to the east, it would take more of the plaintiffs' land, which the defendants do not allege. If to the west, it would be taking in land already owned by No. 5, Ardbrugh Villas at the time the deed of 1910 was executed. I am fortified in this view by the evidence of Thomas Mulreid, whose expert analysis of the various deeds and maps, together with his measurements taken on the ground confirm that the existing pier is the one shown on the map of 1910. Mr. Mulreid's evidence also confirms that the correct point of intersection 60 feet south from the pier is the top of the cliff and that the line drawn between these two points constitutes the actual boundary between Redan House and No. 5, Ardbrugh Villas.

10. No evidence has been adduced to support any claim for possessory title. Indeed the ending of the temporary hoarding, short of the pier strongly suggests that the plaintiffs considered that their interest ended there. In any event it seems to me that Special Condition 5 which warned of the uncertainty of the western boundary of Redan House in itself precludes the plaintiffs from sustaining a claim in adverse possession.

11. Although fears were expressed of damage caused to Redan House and the cliff face by vibration from the rock breaker, no evidence supporting a claim of any damage caused thereby was produced and this case has not been established.

12. The plaintiffs' claim of trespass in respect of the overnight parking on their premises was never an issue in these proceedings. It was accepted by the defendants from even before proceedings were commenced. They apologised and offered to remedy any damage caused. I will make no finding as to trespass in this regard.

For the reasons outlined above I dismiss the plaintiffs' claim herein.