



Neutral Citation Number: [2011] EWCA Civ 1612

Case No: B2/2011/0482

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CARLISLE COUNTY COURT
RECORDER CLAYTON
6CA00017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2011

Before :

LORD JUSTICE LONGMORE
LADY JUSTICE BLACK
and
SIR D KEENE

Between :

DIXON & ANR
- and -
HODGSON & ORS

Appellants

Respondents

Mr Stephen Pritchett (instructed by Ward Hadaway) for the Appellants
Mr Edward Bartley Jones QC & Ms Sara O'Brien (instructed by Cartmell Shepard) for the Respondents

Hearing date : 21st November 2011

Approved Judgment

Black LJ :

1. This appeal arises out of a boundary dispute between Mr and Mrs Dixon (“the appellants”) who own a property referred to in the proceedings, for historical reasons, as the Bungalow Site and Mr and Mrs Hodgson (“the respondents”) who own a property known as The Arches.
2. The Arches is the more northerly property of the two and has an entrance leading north onto the highway. In the south, it adjoins the Bungalow Site. Green Farm lies to the east of both properties. Access to the Bungalow Site from the road runs south along a strip of land beside the eastern boundary of The Arches. It reaches the northern boundary of the Bungalow Site at around the position of an embankment/border which runs east/west. Within the embankment/border, also running east/west, is a low brick wall (“the low wall”) punctuated at intervals by brick pillars which have fencing panels between them. At the eastern end of this structure, there are two brick pillars (“the gate posts”) on which the appellants would like to affix gates opening northwards towards the respondents’ house. The land inclines uphill towards the south and for that reason it would not be possible to have gates opening southwards from the gate posts towards the appellants’ own bungalow. The dispute between the parties has these gates at its heart, each side laying claim to the land over which they would open if hung on the existing gate posts.
3. Proceedings originally began with a claim about drainage brought by the appellants against both the respondents and the owners of Green Farm. The details of that claim are immaterial to the instant appeal but it was in their defence and counterclaim to the drainage claim that the respondents raised the question of the boundary between their property and the Bungalow Site, claiming a declaration that the true boundary between The Arches and the Bungalow Site was at the centre of the low wall and seeking an injunction to prevent the appellants erecting gates swinging towards The Arches and rectification of the title plans.
4. The appellants in their Reply and Defence to Counterclaim asserted that the boundary lay further north. I will explain in more detail where they said it was when I come to describe more of the features of the site but, in contrast to the respondents’ line, it was a line visible only in the mind’s eye and, whilst the appellants identified reference points for its start and the direction of travel, they did not correlate the line itself with physical features of or on the land.
5. The dispute was determined by Mr Recorder Clayton who, on 26 August 2010, made an order that the boundary was along the northern face of the low wall as the respondents had contended. It is against that order that the appellants principally appeal. They also appeal against the order for costs that the Recorder made although they recognise that that appeal can only succeed if the substantive appeal succeeds.
6. The basis for the substantive appeal is that the Recorder applied the wrong legal test when determining the boundary or, if he applied the correct test, construed the documentary evidence incorrectly and drew the wrong factual inferences from the documents and the physical features on site.
7. In order to understand the issues in the appeal, it is necessary to know what physical features there are on the land. As one leaves the highway at the north, entering the

land belonging to The Arches, one comes first to the front of The Arches. The drive passes to the east of that property and leads down its eastern boundary where there is a hedge dividing The Arches from Green Farm. You come next to the double garage belonging to The Arches which is set crossways on the site with its rear very near the western boundary and its south wall not far from the Bungalow Site. To the south of the garage is the land with the low wall on it. The low wall has landscaped land on both sides of it. On the respondents' side, it has a simple border which you would have on your left as you drove into the respondents' garage. In older photographs dating from the time when the two properties, then in common ownership, were transferred to the Hodgsons and the Dixons, this appears as a grassy embankment with daffodils in it; in later photographs it appears that it might be rather less landscaped. It will be convenient to call this feature simply "the embankment". On the appellants' side, there is a lowish brick retaining wall which forms a raised border ("the raised bed") running in an apparently straight line parallel to the low wall for much of its length but ending in a half moon at nearly the point at which the west gatepost is situated. The raised bed on the south side of the low wall appears to be narrower than the embankment on the north side. The east gatepost is on the border with Green Farm. Immediately to the north of it there is a gate running north/south, hinged at its south end right next to the east gatepost, which leads into Green Farm ("the Green Farm gate").

8. The appellants argued that the boundary started at the northern end of the Green Farm gate and ran from there westwards in a straight line. This would put it at, or nearly at, the bottom of the embankment (its northerly edge) and would include in the Bungalow Site a strip of land stretching right across its northern border and, most importantly, of sufficient width to accommodate northward opening entrance gates hung on the existing brick gateposts.

History

9. Before December 1989, Green Farm and the Bungalow Site were owned by Margaret Edith Inglis and The Arches by Dr and Mrs Tiplady. In December 1989, Dr and Mrs Tiplady became owners of all three pieces of property. In due course, The Arches and the Bungalow Site were transferred to Mr and Mrs Brierley and Green Farm to its current owners, the Norgroves. In 2002, the Brierleys obtained planning permission for the construction of a dormer bungalow and double garage on the Bungalow Site. They began to build the bungalow. However, in 2003, they decided to sell both The Arches and the Bungalow Site with the partially finished bungalow on it.
10. The Arches was sold off first, to the Hodgsons, by a Transfer dated 16 October 2003. The Bungalow Site was sold a few days later to the Dixons by a Transfer dated 21 October 2003. The Dixons went on to complete the bungalow and associated external works, utilising the foundations which were already in place when they bought the property. It subsequently came to light that the foundations were not in fact in the position specified in the plan by which planning permission had been obtained but further south.
11. It was common ground that the disputed boundary was formed on the first sale by the Brierleys, that is the sale of The Arches. At this time, the low wall and the retaining wall of the raised bed were in place as was the Green Farm gate. The contemporary photographs also show the embankment meeting the gravel drive by The Arches'

garage. The gateposts were not yet built and the brick pillars and fencing had not been erected along the top of the low wall.

The Transfer of The Arches

12. The Transfer shows the property transferred as “The Arches” (together with its postal address) and says that “The Property is defined on the attached plan and shown edged red”. There are additional provisions which refer to the “Retained Land” which “means all the land (other than the Property) in respect of which the Transferor is or was the registered Proprietor under the Title Number [CU146642] and which is shown for identification edged blue on the Plan”; the retained land is therefore the Bungalow Site. There are obligations placed on both the Transferor and the Transferee. Each is subject to a covenant “To keep the garden or gardens forming part of the [Property/Retained Land] properly planted and in a good state of cultivation and order and in a clean condition and free from weeds”. Amongst the Transferees’ (the Hodgsons’) covenants is a covenant (clause 13.5 k) “To maintain in good repair and condition the fence on the boundary of the Property marked with an inward “T” on the Plan.”
13. The “attached plan” (“the Transfer plan”) which was meant to define the property transferred was problematic. For a start, all that could be produced to the Recorder was a copy of that plan or possibly even a copy of a copy (a copy of it is attached to this judgment marked “A”). But the main problem was that the scale of the plan and the extent and thickness of the colouring on the material boundary totally obliterated the boundary itself. This led the Recorder to find that he was “unable to clearly determine the position of the boundary from the Transfer” because the deficiencies of the plan made it “absolutely impossible to determine the precise position of the boundary” by reference to it.
14. Other plans were produced which the Recorder listed in his judgment. Most were not included in the appeal bundle. The one to which our attention was invited was a plan which has been referred to by the appellants as a “cleaner version” of the Transfer plan (page 71 of our bundle, a copy of which is attached to this judgment marked “B”). There was some doubt about whether the cleaner version that we have is the precise one that was produced to the Recorder and to which he referred as “the clearest available colour copy of the contract plan on the sale of the Bungalow Site” but it does not matter for our purposes as there can be little doubt that it comes from the same stable. It has as its foundation the same printed plan as the Transfer plan albeit that it was used for a different purpose and different handwritten markings were therefore added which, as it happened, obliterated less of the printed plan. It was only to that clearer printed plan (hereafter “the clearer plan”) that the appellants sought to make reference and not to any of the superimposed markings.
15. On the Transfer plan one can see (starting from the north and working south):
 - i) The Arches’ double garage
 - ii) a line drawn at a slight angle from the south east front corner of the garage towards the eastern boundary with “gravel drive” labelled to the north of the line

- iii) red/black/blue colouring running east/west; I can see the word “Planter” under the blue colouring but it was not visible on all copies
- iv) a double dashed line running east/west south of the colouring (“the south tramlines”)
- v) another east/west line ending in a curve at the easterly end.

At the west end of the boundary is a small piece of land, rectangular in shape which is plainly in the ownership of the Bungalow Site but extends back to somewhere around the rear south corner of The Arches’ garage. This piece of land has been called “the peninsula”. The line described at iv) above extends across it and when using the term “peninsula” in this judgment, I will treat that as representing the south edge of the feature. There is a similar double dashed line running parallel to the south tramlines further north, about half way up the peninsula (“the north tramlines”). The Green Farm gate is indicated by the word “gate” on the eastern boundary. At that point, the otherwise straight boundary line is indented which the appellants argued was intended to indicate an open gate, thus showing that the hinge is at the southern end. If that is right, it would indicate that the gate has its southern end at a point some way south of the south tramlines and roughly opposite the point where the half moon of the raised bed begins.

- 16. On the clearer plan (page 71), one can also see that the double dashed line that crosses the peninsula extends a long way towards the eastern boundary of the plot. The word Planter can also be seen clearly. There are T markings on the disputed boundary and the eastern and western boundaries of the Bungalow Site, all on the Bungalow Site side of the line in question and all irrelevant for our purposes.
- 17. A site survey had been carried out for the purpose of the proceedings and the site features were matched up with the Transfer plan by overlaying one on the other. The Recorder was provided with a scale plan showing the result.

The Recorder’s approach

- 18. The Recorder directed himself (§24):

“(1) My task is to determine, objectively, from the admissible evidence available, what the parties intended to transfer. I disregard evidence of their subjective intentions, including negotiations, which may only assist on the question of rectification.

(2) The earlier authorities suggest that if the terms of the transfer clearly define the land, extrinsic evidence is not admissible to contradict the transfer (*Scarfe v Adams* [1981] 1 All ER 843 per Griffiths LJ at p 851).

(3) The modern tendency is to use all admissible material in order to arrive at the correct answer (*Strachey v Ramage* [2008] EWCA Civ 384 per Rimer LJ at para 33).”

19. Having found himself unable clearly to determine the position of the boundary from the Transfer of 16 October 2003 given the problems with the plan, the Recorder considered the other plans, the terms of the transfer of the Bungalow Site (which did not help at all), and the physical features on the ground at the time of the transfers. He also made a site visit. What he found there is set out in his decision which was as follows:

“27. In my judgment, the weight of the evidence clearly suggests that the common boundary was intended to be along the line of a wall, and that this would lead to an entrance onto the Bungalow Site marked by two pillars, with the eastern most pillar adjacent to the north of the gateway to Green Farm. This can be seen on the Brierleys’ architect’s plan....which formed the basis on which the respective properties were marketed by Hayward Tod. See in particular the plan attached to the sales particulars for the Bungalow Site.....On this basis, the strip of land immediately to the north of the wall and marked ‘Planter’ on the plans and which may have formed an embankment, would have been retained within the Bungalow Site.

28. However, significantly, one can see a clear discrepancy between the way in which those plans were marked up and the way in which the wall was actually constructed on the ground. The wall was actually constructed further south, along the southern most line of the land marked ‘Planter’, and with the wall and pillars extending, albeit by a kinked line, to a point immediately to the south of the gateway to Green Farm. This can be seen on site and in the photographs. It is also helpfully shown on the site plan and overlay....The result is that the area of land marked ‘Planter’ actually forms the embankment on The Arches side of the wall and which again can be seen on site and in the photographs.

29. Regrettably, the selling agents, architects and conveyancers seem to have been blissfully unaware of the discrepancy and so do the parties when they came to purchase the respective plots. In my judgment, the very fact that the parties were unaware of the discrepancy and had not for example spotted that the plans showed the wall extending to the pillars adjacent to the northern gatepost to Green Farm with the raised planting area on the Bungalow Site side of the wall, suggests to me that they had not attached much significance to the plans, and were guided by the physical feature which was then on the ground and demarcated an obvious boundary between the two properties, being the wall on the southern side of the embankment, connecting the two brick pillars which formed an obvious entrance to the Bungalow Site.

30. In my judgment therefore, as a matter of construction, the true boundary between the Bungalow Site owned by the Dixons

and The Arches owned by the Hodgsons is along the northern face of the wall shown on the site survey plan ...and extending across the northern faces of the two brick pillars forming the entrance to the Bungalow Site, also shown on the plan.”

20. The Recorder returned to the issue in a second judgment on costs and other ancillary matters, which deals also with the appellants’ application for permission to appeal. Counsel for the appellants told the Recorder that the basis for the proposed appeal would be that the Recorder applied the wrong test in law to his determination about the boundary. Rejecting the application for permission, the Recorder said that he had not taken into account evidence of the subjective intentions of the parties. He said:

“29. ...I sought to construe, objectively, the Transfer dated 16th October 2003 having regard to all admissible evidence including the physical features on the ground at the time, and I specifically listed the matters that I had considered at paragraph 24(6). That task leads to the determination of what, objectively, was intended to be transferred. I acknowledge with hindsight that my reference in paragraph 24(1) of my judgment to “*what the parties intended to transfer*” was perhaps inappropriate, but the task I plainly set myself was to determine the correct boundary having regard to objective evidence.

30. Further, having assessed the evidence, I considered that the weight of the evidence clearly suggested that the common boundary was (objectively) intended to be along the line of the existing wall which was a significant and obvious boundary feature in existence at the time (paragraph 27), but I pointed out also that there was an obvious discrepancy between the position of the wall on the plans and position of the wall on the ground (paragraph 28). The significance of this point only emerged at trial when raised it and I felt constrained to point out that the parties themselves, as well as the selling agents, architects and conveyancers seemed to have been unaware of this at the time. I concluded that the position of the wall on the ground should prevail.

31.....The plans identified the southernmost double tramlines being the intended position of the boundary wall (and connecting to intended gateposts), as the common boundary. However, as I have pointed out, the boundary wall was actually construed [*presumably intended to read ‘constructed’*] further north towards the bungalow. Objectively construed, I considered the line of the boundary wall to be the intended boundary, and it seemed to me that the reasonable man, attending on site at the time of the transfer, with the plan in his hand, but having regard also to the position of the substantial boundary wall on the ground, would inevitably conclude that the line of the physical boundary would prevail. Indeed, I regard the result contended for by [the appellants], that the

reasonable man, attending on site would regard the lower edge of the embankment as the boundary to be wholly unrealistic.”

21. The Recorder said that he had set himself the task described in *Eastwood v Ashton* [1915] AC 900 and approved by Mummery LJ in *Pennock v Hodson* [2010] EWCA Civ 877 of looking at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties.

The law

22. In approaching the relevant law, it is essential to keep in mind the distinction between a plan which is said to be for identification and a plan, such as we have here, which defines a property.
23. Important amongst the authorities to which we were taken was *Pennock v Hodgson* [2010] EWCA Civ 873 because it provides a recent explanation by this court as to how to construe a conveyance, albeit given in the context of a plan which was for the purpose of identification.
24. The argument was between neighbouring landowners over the ownership of a stream. Set back from the south side of the stream was a post and wire stock fence which was in existence at the time of the relevant transactions. The trial judge found, and the Court of Appeal confirmed, that the fence was the physical and legal boundary and the stream therefore belonged to the defendant. In the crucial conveyance, the property conveyed was shown edged red on the attached plan which was taken from an Ordnance Survey map and was “for the purpose of identification”. The plan indicated, by the use of coloured edging, the location of the two plots in relation to the stream but the indications were not of such a degree of precision as to make clear the exact position of the boundary. Mummery LJ (with whom the other members of the court agreed) said:

“44.....As the plan is insufficiently clear about the position of the boundary, this was a case in which the judge was entitled to take the plan in hand and look at the physical features of the land on the ground as at the date of the 1993 Conveyance....”

25. He distilled the relevant principles in such cases from what he described as “the leading modern authority on the construction of the parcels in a conveyance”, namely *Alan Wibberley Building Limited v Insley* [1999] 1 WLR 894. The points to be drawn from it were (§9):

“(1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land....

(2) An attached plan stated to be ‘for the purposes of identification’ does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise boundaries nor will it always show every physical feature of the land.

(3) Precise boundaries must be established by other evidence. That includes inferences from evidence of relevant physical features of the land existing and known at the time of the conveyance.

(4) In principle there is no reason for preferring a line drawn on a plan based on the Ordnance Survey as evidence of the boundary to other relevant evidence that may lead the court to reject the plan as evidence of the boundary.”

26. A little further on he said:

“12. Looking at the evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction. The rejection of extrinsic evidence which contradicts the clear terms of a conveyance is consistent with this approach: *Partridge v. Lawrence* [2003] EWCA Civ 1121; [2004] 1 P. & C.R. 176 at 187; cf *Beale v. Harvey* [2003] EWCA Civ 1883; [2004] 2 P. & C.R. 318 where the court related the conveyance plan to the features on the ground and concluded that, on the facts of that case, the dominant description of the boundary of the property conveyed was red edging in a single straight line on the plan; and *Horn v. Phillips* [2003] EWCA Civ 1877 at paragraphs 9 to 13 where extrinsic evidence was not admissible to contradict the transfer with an annexed plan, which clearly showed the boundary as a straight line and even contained a precise measurement of distance. *Neilson v. Poole* (1969) 20 P. & C.R. 909; *Wigginton & Milner v. Winstar Engineering Ltd* [1978] 1 WLR 1462; *Scarfe v. Adams* [1981] 1 All ER 843; *Woolls v. Powling* [1999] All ER (D) 125; *Chadwick v. Abbotswood Properties* [2004] All ER (D) 213 and *Ali v. Lane* [2006] EWCA Civ 1532 were also cited on the construction points.

13. Before the judge and in this court it was agreed that the parties' subjective beliefs about the position of the disputed boundary in this case and about who owned the bed of the stream were extrinsic evidence that was inadmissible in the construction of the relevant conveyance: *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] 1 WLR 896 at 913. The effect of the conveyance is not determined by evidence of what the parties to it believed it means, but what, against the relevant objective factual background, they would reasonably have understood it to mean.”

27. Although other authorities were cited to us, it was not suggested that they revealed any different propositions of law.
28. In *Drake v Fripp* [2011] EWCA Civ 1279 the boundary was either a Cornish hedge or a post and wire fence 4 or 5 metres from it. Lewison LJ., with whom the other members of the court agreed, said:

“4. The answer to the question where the true boundary lies depends on the interpretation of the transfer by which the land was transferred. A land transfer is a sub-species of written instrument; and the principles that apply to the interpretation of written instruments apply equally to land transfers. In *Strachey v Ramage* [2008] EWCA Civ 384 [2008] 2 P & CR 8 Rimer LJ said (§ 29):

“That required a consideration of the February conveyance in the context of the surrounding circumstances in which it was granted, and having regard also to any evidence properly admissible for the purposes of its interpretation. It is a statement of the obvious that the crucial provision in the conveyance was the parcels clause, since it was there that the parties identified the land being conveyed. It is, however, fundamental that the parcels clause in a conveyance should not be considered in isolation from the remainder of the document. It is a general, and basic, principle of the construction of documents that questions of interpretation should be answered by considering the document as a whole, since only then can the provision giving rise to the question be seen in its proper context. There can be no reason for this principle not to be equally applicable in relation to the interpretation of a conveyance for the purpose of identifying the limits of the land conveyed by it.”

5. In addition to the written instrument considered as a whole, the court must also take into account the physical features on the ground at the date of the transfer.”

He then went on to quote the passage from paragraph 12 of Mummery LJ’s judgment in *Pennock* which I have reproduced above.

29. He approved the way in which the adjudicator and the judge had arrived at provisional conclusions from the parcels clause, the plan (which was for identification only and deficient in being a reduced version and not to scale) and the rest of the instrument and then checked them against the position on the ground. Although the parcels clause and the plan had not produced any answers, the position seemed clear from rest of the instrument for reasons which are peculiar to that case and which it would not be helpful for me to set out here. Checking the provisional conclusions on site confirmed that they made better sense of the position on the ground than the alternative interpretation of the transfer.

30. The respondents argued that it is important to see construction of a transfer as a unitary process rather than a staged process and that in *Drake v Fripp*, Lewison LJ was merely going through a checklist of issues as part of that process. On any view, however, the case is a useful practical demonstration of how to go about the interpretation of a transfer.
31. The significance of *Beale v Harvey* [2003] EWCA Civ 1883 was said to be its similarity with the facts of the present appeal. Importantly, the property in that case was defined by the plan rather than the plan being for identification.
32. Two adjoining barns were converted by a developer into three properties. There was a site plan of the development showing what was to be put where and the plan used for the transfer of the properties was a reduced copy of this. On both plans, the intended boundaries were marked in red. The defendant bought one of the properties and the claimant later bought the adjoining property. There was no dividing structure on the ground when the plans came into being but the intention was that there would be a fence and wall along the boundary line. Between exchange and completion, the defendant visited the site and noted that the developer had put up a fence and wall. She asked for and got permission from the developer to landscape the garden of her plot up to the fence and to make the fence stock-proof prior to completion. The transfer was duly completed, the property transferred being defined as that edged red on the plan. The fence/wall was not in fact in the position marked on the plan and when the claimants purchased their plot, a dispute arose as to whether the boundary followed the fence/wall or the line on the plan.
33. The Court of Appeal concluded that the line on the plan determined the boundary. Peter Gibson LJ first looked at the parcels clause. The description of the property was confined to that which was shown edged red on the plan. That took him to the plan and he set out the defining points of the boundary line that could be ascertained from it. He then said:

“25. One then has to try to relate what the plan shows to the features on the ground. Although Mr Ball did not accept that it would be apparent on the ground that the retaining wall and fence did not accord with the plan, it is to my mind quite plain, as demonstrated by the photographs in evidence, that the line of the retaining wall and fence did not accord with the straight line shown on the plan.....”

26. It is that discrepancy that gives rise to the problem. There are two possible arguments as to what was intended.”

Those were, of course, that the boundary was intended to follow the line on the plan or that the retaining wall/fence which had been placed by the developer with the intention of marking the boundary did in fact mark the true boundary and the plan was inaccurate. Amongst the arguments advanced by the defendant’s counsel in favour of the wall/fence was the argument that the line of the wall and fence would be apparent to any reasonable purchaser who came to the site who would automatically assume that that was the boundary.

34. Peter Gibson LJ had no hesitation in saying that the line on the plan was the boundary. The property transferred was defined by reference only to what was edged red on the plan and the colouring on the plan was therefore the dominant description and must be given its full weight. He said (§28):

“The fact that the retaining wall and the fence, although intended to be on the boundary line as the directions on the plan show, were built on a different line cannot be determinative of the true boundary. The erection of the retaining wall and fence on that different line seems to me to have been plainly an error, because it was inconsistent with what is shown as the straight red line on the plan. Further it would flout common sense to hold that, wherever [the developer] happened to build a retaining wall and fence, that must be the boundary regardless of the features of the plan to which I have drawn attention, even though at the time the plan was drawn the retaining wall and fence had not been erected and so the line of the red edging west of the buildings was not following existing features on the ground. Those accustomed to deal with conveyancing problems know only too well how frequently instructions on a plan are incorrectly carried out and building or fences or walls are put up in the wrong place. The difficulties for workmen trying to carry out instructions on a site plan are greater where, as here, a wall or fence is to be erected on a featureless agricultural field. It would be absurd to attribute to the parties the intention that what was erected, however erroneously, subsequently to the preparation of the plan, should define the boundary, when the immutable feature at all material times of the line of the sides of Phoenix Barn and The Shippen where they joined was shown on the plan as part of the straight boundary line from the estate road to the millstream.”

35. Both sides cited *Chadwick and others v Abbotswood Properties Ltd and others* [2004] EWHC 1058 (Ch) to us. In that case, Lewison J as he then was said:

“43. The principles applicable to the interpretation of a transfer of real property are not open to serious doubt. A transfer, like any other contractual document, must be interpreted in the light of the background facts reasonably available to the parties. Although it has been said that extrinsic evidence is not admissible to contradict the words of a transfer where the language of the transfer is clear, this may need reconsideration in the light of the modern approach to the interpretation of contracts: *Partridge v Lawrence* [2003] EWCA Civ 1121, [2004] 1 P & CR 176 per Peter Gibson LJ. But in any event, the transfer in the present case is far from clear. Where the definition of the parcels in a conveyance or transfer is not clear, then the court must have recourse to extrinsic evidence, and in particular to the physical features on the ground. As Bridge LJ put it in *Jackson v Bishop* (1979) 48 P & CR 57:

“It seems to me that the question is one which must depend on the application of the plan to the physical features on the ground, to see which out of two possible constructions seems to give the more sensible result.”

44. The question is one to be answered objectively: what would the reasonable layman think he was buying? Since the question must be answered objectively, it follows that evidence of the parties' subjective intentions, beliefs and assumptions are irrelevant; as are their negotiations.

36. In *Partridge v Lawrence* [2003] EWCA Civ 1121 the dispute was as to the width of a right of way. It was described in the deed as “such piece or parcel of land of a width no greater and no less than the land shown cross hatched black on the Plan annexed hereto...”.
37. The appellants particularly invited attention to paragraph 28 of the Court of Appeal's decision which they said encapsulated the modern approach to construction:

“28. There is little or no dispute between the parties as to the approach to the construction of the 1995 deed as a contractual document. As Sir John Pennycuik, giving the judgment of himself, Russell and Orr L.JJ. in *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No.2)* [1975] 1 WLR 468 at 476, said:

‘...one must construe the document according to the natural meaning of the words contained in the document as a whole, read in the light of surrounding circumstances.’”

However, *Partridge v Lawrence* is also of interest for one aspect of the facts. The plan annexed to the deed had no recognisable scale so it was not possible to determine the width of the right of way solely from it. It was, in fact, a reduced, distorted copy of an architect's scale plan and it was permissible to have regard to the architect's plan, as one of the surrounding circumstances of the transaction, in ascertaining the width of the right of way.

The arguments: The appellants

38. The appellants submitted that what the Recorder in fact did was to determine what the parties intended to transfer rather than, as he should have done, determining what the transfer deed objectively transferred. They submitted that he “should have limited himself to determining against the physical features on the ground what the result of the outward manifestation of their agreement was”.
39. They relied on the Recorder's language to support their submission that his approach had been subjective rather than objective, inviting attention to his statement at §27 that the weight of the evidence clearly suggested that the boundary “was intended to be along the line of a wall.....”, and argued that there is a further indicator of this at §29 where he said that “the parties....had not attached much significance to the plans and were guided by the physical feature which was then on the ground”.

40. They argued that the Recorder had failed to give proper weight to the assistance that he could get from the plan, taking an overly simplistic view that because the lines drawn on it obliterated the boundary line, the plan did not help him at all. The plan had been prepared, they said, for the purpose of the transfer and it had physical features marked on it which should have been taken into account in establishing the line of the boundary. The Recorder could have established some positive and some negative indicators from it. It showed him, the appellants submitted, that the boundary was not the low wall. The line with the curve (see paragraph 15 (v) above) could only be the retaining wall of the raised border. The south tramlines must therefore have marked the low wall. The conveyancer's colouring had not been applied to them at all showing that the boundary was not at this point but further north. This was also clear, they said, from the start and finish points of the coloured line. Furthermore, however imprecise that line was, it was clear that in the east it began at the north end of the Green Farm gate and in the west bisected the peninsula. The low wall did not follow this line but began at the south end of the Green Farm gate and ended at the south end of the peninsula. The boundary was marked, they submitted, by the northern tramlines on the plan. On the ground it correlated, they said, with the "short dwarf wall at the foot of the embankment" or roughly where the grass meets the gravel of The Arches drive. The "short dwarf wall" did not feature in the Recorder's judgment and the respondents cannot recollect that it was made the subject of any submission at trial or shown on any material plans. I was unable to see anything answering that description on the photographs either. In contrast the foot of the embankment where the grass meets the gravel can be seen clearly.
41. The appellants submitted that their interpretation made sense in that it permitted the installation of gates to the bungalow which would not have to open over The Arches' land. Furthermore, it made sense of the covenant by the Dixons to keep up the garden at the Bungalow Site which, they submitted, would only be of interest to The Arches if it related to the embankment which was the only part of the Bungalow Site garden which was visible from The Arches.

The arguments: the respondents

42. The respondents argued that the Recorder had done exactly what he was required to do in accordance with the authorities. If §27 did give the initial impression that he was addressing subjective intention, that was not in fact what he was doing. The paragraph was, they submitted, part of the historical narrative dealing with matters before the transfer of The Arches and leading up to his point, set out at §28, that (unappreciated by everyone, §29) the wall had not been built in the position marked for it on the earlier plans but further south. They said that the judgements (which should be taken together) made clear that the Recorder had construed the Transfer objectively.
43. They submitted that the plan was wholly unclear and the Recorder correctly had reference to the physical features on site at the date of the transfer. The only boundary feature at that time was the low wall. There was no significant physical feature where the appellants contended the boundary was which must be somewhere on the embankment between the low wall and The Arches' drive, making it almost impossible to translate their contention into a line on the ground. Objectively, the obvious boundary was the low wall. Effectively, the Recorder had asked himself the very question that Lewison J had posed in *Chadwick v Abbotswood Properties Ltd* i.e. "what would the reasonable layman think he was buying?" and given the obvious

answer to it, namely the land up to the existing boundary structure. In contrast, the appellants were seeking to make an unclear plan override the actual position on the ground which is a complete negation of *Pennock* in that it leads to the boundary being fixed without reference to the physical features on the site. The respondents submitted that this case was materially different from *Beale v Harvey* in that the misplaced boundary structure was only erected after the contract of sale in *Beale* whereas in this case it was in place before the sale.

44. The respondents took exception to the use of the clearer version of the plan which they submitted was not permissible. The transfer plan is the plan that must be construed, not anterior plans which differ from that plan (for example, in showing a T marking which is absent from the transfer plan). Furthermore, they said it was uncertain whether the clearer plan made available to us was the one actually seen by the Recorder.
45. As to the appellants' reliance on their covenant to maintain the Bungalow Site garden, they submitted that it took the matter nowhere. The covenant relates to "the garden or gardens forming part of the Retained Land" and not just a portion of the garden, and it is in any event mirrored by precisely the same covenant given by the respondents in relation to garden or gardens of The Arches.

Discussion

46. I will deal first with the argument over whether the Recorder was entitled to have recourse to the clearer plan. I see no reason why it was not permissible, as part of the exercise of interpreting the Transfer, to do this and *Partridge v Lawrence* (where the architect's plan was used in a much more pivotal way) lends support for such a course. It was common ground that the answer for which the Recorder was searching could not be discovered solely from the Transfer and its attached plan and he was inevitably going to have to look elsewhere. The same printed plan was the starting point for both the clearer plan and the Transfer plan but the clearer plan, albeit that it had been marked, had been marked more discreetly. It was therefore a sensible resource from which could be gained some illumination as to what the printed plan that had been used for the Transfer looked like before it was marked and therefore what lay under the coloured markings on the Transfer plan. Used in this way, the clearer plan would not be likely to mislead by virtue of additions to it such as the T markings on some of the boundaries.
47. In fact, very little extra light is shed by the clearer plan but it does confirm some of the obvious assumptions that one would have been inclined to make anyway about the lines on the Transfer plan around the area of the disputed boundary.
48. Following the approach that found favour in *Drake v Fripp* and in *Beale v Harvey* (above), I begin the exercise of interpretation of the Transfer by looking at the parcels clause. It gives the name and address of the property transferred (but does not say that the transfer is of the property "known as The Arches") and tells us that the property is defined on the attached plan edged red.
49. There being nothing more to be extracted from the parcels clause, the plan is the next stop.

50. It is important to note that the plan is not merely for identification; it defines the property transferred. Being the dominant description, it has to be accorded full weight in the same way as the plan was in *Beale v Harvey*. Finding that the plan did not enable him to determine the precise position of the boundary, and that the low wall had been put in a different place from that intended, the Recorder appears largely to have abandoned the plan. I am not persuaded that that was the proper approach. Even if the plan cannot give the whole answer, it must surely be right to look at it to see what information it does reveal about the boundary, notably its fixed points, its relationship to other features marked on the plan, and its direction of travel. Whilst it perhaps seems a little odd to look upon it as part of the surrounding circumstances when it was intended to be definitive, if it has failed in that primary aim I would see it as a very significant part of the objective facts available to the parties at the relevant date.
51. In my view the Transfer plan (illuminated by the clearer version) yields the following information:
- i) The boundary starts in the east in the vicinity of the Green Farm gate and, specifically, at the place where the north/south line on the plan is indented for a relatively short distance.
 - ii) It runs east/west across the site in roughly a straight line from that point.
 - iii) At the western end, it meets the peninsula at a point roughly half way down it.
52. There is no means of telling from the document which of the lines on the printed plan, if any, refer to the low wall.
53. The rest of the Transfer tells one little that can assist. I do not set any store by the covenant to maintain the garden of the Bungalow Site which, for the reasons advanced by the respondents, does not have the significance that the appellants seek to give it. The one clause in the Transfer that might have been thought to be worthy of note is clause 13.5 k), that is the covenant by the Hodgsons to maintain the fence on the boundary of The Arches marked with an inward T on the plan. Neither side even mentioned this covenant let alone relied on it. The fact is that there is no T anywhere on the plan (although the only common boundary is the disputed one so the boundary in question may be obvious even without it) and there was no fence in place when the transfer occurred. Perhaps it was for these reasons that clause 13.5 k) was not thought to be of assistance.
54. It is next necessary to have reference to the photographs and the site survey material from which one can start to construe the Transfer against the background of its surrounding circumstances. It becomes clear at this stage that the plan and the actuality do not match up in a number of ways. In identifying them, I will proceed on the basis that the low wall has been constructed on the south tramlines as the Recorder found, but I will say more about this later. A number of differences between the plan and the reality are immediately apparent such as the half moon of the planter being appreciably further from the east boundary than the plan shows, the low wall kinking south in a way that is not represented at all on the plan, and the bungalow having been built too far south. It is therefore clear by this point that marrying the plan to the features on the ground in practice may not be entirely straightforward.

55. Before going any further, it is important to recall the Recorder's factual findings about the low wall which he concluded had also not been constructed where intended.
56. At §27, he found that the original intention was that the boundary would take the form of a wall which would lead to an entrance to the Bungalow Site marked by two pillars, the eastern pillar being adjacent to the north end of the Green Farm gate. The appellants asked where he had got this starting point from except from an analysis of the Transfer plan in comparison with the features on the ground? This was not the foundation for it as is clear from §27. The Recorder said there that this was what could be seen on the Brierleys' architect's plan which formed the basis on which the properties were marketed by Hayward Tod, as confirmed by Mr Hayward in his witness statement. We have not been provided with the Brierleys' architect's plan or Mr Hayward's statement so that we could see for ourselves what the Recorder saw but it was not submitted that he was mistaken in what he said about what could be derived from the architect's plan.
57. From §31 of the second judgment (set out at paragraph 20 above), we can see that the Recorder considered that the intended position for the low wall was along the north tramlines on the Transfer plan. What he actually *said* in §31 was that the "plans identified the *southernmost* double tramlines being the intended position of the boundary wall (and connecting to intended gateposts), as the common boundary". However he must have mistaken south and north on the Transfer plan in this paragraph, no doubt not assisted by the fact that the plans in the bundle do not have south and north marked on them and have been labelled (when originally drawn) and inserted into the bundle with north at the bottom and south at the top. What the Recorder went on to say immediately afterwards about the wall actually being constructed "further *north* towards the bungalow" only makes sense if for "north" one reads "south". His finding about the actual position of the wall at §28 of the first judgment confirms this in that it says: "The wall was actually constructed further south along the southern most line of the land marked 'Planter' and with the wall and pillars extending, albeit by a kinked line, to a point immediately to the south of the gateway to Green Farm."
58. These findings about where the wall was intended to be and where it is are not challenged.
59. How does the plan, illuminated in these various ways, relate to the features on the ground? I revert to the features on the plan that I identified at paragraph 51 above in order to see whether they can be found in reality.
60. I have no doubt that the Recorder was right in thinking, as he said in §30 of his second judgment, that the low wall was "a significant and obvious boundary feature in existence at the time". Anyone looking at the site without the benefit of the plan would inevitably suppose that it was the boundary. But that would be to ignore the plan which gives a different picture. Once one began to match the plan to the site, it would be clear, as one can see from the photographs, that with the Green Farm gate closed, the north/south boundary is straight, not indented. Looking at that with plan in hand, the obvious conclusion would be that the indentation on the plan represents the open gate with the hinge at the south end. The reasonable layman would therefore have found the starting point of the boundary in the east because the plan can now be interpreted to show that it begins at the north end of the gate.

61. He would also see, as the Recorder did, that the boundary on the plan does not run along the low wall. The retaining wall of the raised bed is clearly identifiable on the plan and he would see that the low wall must be represented on it by the south tramlines or at least that it could not be in the position of the north tramlines.
62. Looking to the west side of the site, he would note the peninsula with the low wall approaching its southern end, as the south tramlines do on the plan. But he would see on the plan that the boundary meets the peninsula further north. He would also see that the boundary leaves the north end of the Green Farm gate at roughly a right angle to the gate and the eastern perimeter.
63. Doing the best he could with these pieces of information, he would surely conclude that the boundary squared off the south end of The Arches' site at the level of the north end of the Green Farm gate. Making use of the site survey material, we can see that this would take the boundary approximately along the line of the north tramlines to meet the peninsula half way down.
64. Accordingly, that is where the parties, against the relevant objective factual background, would reasonably have understood the boundary to be. They could only have understood otherwise, in my view, by abandoning the plan completely in favour of what they saw on the ground and thereby failing to give the plan, which was the dominant description, any weight at all.
65. The Recorder's finding that the boundary ran along the low wall was therefore in error, in my judgment. I am not at all sure that he was led into error because he was looking for the subjective intentions of the parties. He set himself the correct test and I do not see the passages in §27 and §29 as necessarily demonstrating that he abandoned it, although he may have allowed himself to be unduly influenced by the original intention that the boundary should be along a wall. The prevailing problem, as I see it, was discarding the Transfer plan completely because of its lack of clarity and construing the Transfer by looking at the physical features on the ground as at the date of the Transfer without the plan in his hand. A reasonable layman without the plan no doubt would have concluded as the Recorder did that the low wall was the boundary but he would have been engaged in the exercise of construction without one of the most important pieces of evidence.
66. I differ from the Recorder reluctantly as he went about his task with conspicuous care and he had the great advantage of being able to visit the site itself. I have not found the issues here at all easy to determine as the sight of an obvious boundary structure, such as the low wall, in place at the time of the Transfer, naturally gives rise to the assumption that that is indeed the boundary. However, as *Beale v Harvey* shows, that natural assumption is not the end of the matter and I would allow the appeal for the reasons I have given, substituting a determination that the boundary follows a line as set out in paragraphs 62 and 63 above.

Sir D Keene:

67. I agree

Longmore LJ:

68. I also agree



