Neutral Citation Number: [2022] EWCA Civ 1001

Case No: CA-2021-000171
CA-2021-000172

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
IAN KARET (SITTING AS A DEPUTY HIGH COURT JUDGE)
[2021] EWHC 764 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE MACUR
and
LORD JUSTICE DINGEMANS

- -

Between :

PETER DEMETRIOU **(also known as Panayiotis Demetriou)**	**Defendant/** **Appellant**
- and -	
(1) MEHMOOD MAPARA **(2) SALEEM SHAIKH** **(3) ABDUL RASHID TELADIA** **(4) ISMAIL ISA AMAAN**	**Claimants/** **Respondents**

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Justin Kitson and **Lara Kuehl** (instructed by **Moreland & Co**) for the **Appellant**
Daniel Gatty (instructed by **Shoosmiths**) for the **Respondents**

Hearing date : 13 July 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 11.00 on 19 July 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Lewison:

Introduction

1. This appeal concerns burial rights in Tottenham Park Cemetery; and more particularly, the form of declarations made by Mr Ian Karet, sitting as a Deputy High Court Judge in the Chancery Division. The cemetery is a private cemetery currently owned by Mr Demetriou.

The facts and the judgment below

2. Under a series of deeds Badgehurst Ltd ("Badgehurst"), one of Mr Demetriou's predecessors in title, granted burial rights to the then trustees of the Tottenham Park Islamic Cemetery Association ("the Association"), an unincorporated association formed in 1981 to acquire and manage burial plots and cemeteries for its members, who are all Sunni Muslims.

3. Each of the deeds was in similar form with some variations. The grantor under each deed was Badgehurst, which then owned the cemetery. In each case the right granted was described as "the right of burying" a specified number of bodies in various defined parts of the cemetery. A premium was paid for each grant. The right was to endure for 999 years; and apart from the premium only an annual peppercorn was payable. In most (but not all) of the deeds the areas concerned were described as "plots" within a portion of the cemetery shown on a plan. A typical deed also contained the following relevant provisions (that of 7 September 1987 being an example):

> "THIS DEED dated as above made between:-
>
> (1) BADGEHURST LIMITED of Fen Lane Orsett Essex (hereinafter called "the Grantors") and
>
> (2) [Certain individuals] the present Trustees of TOTTENHAM PARK ISLAMIC CEMETERY (hereinafter called "the Grantees")
>
> Clauses 1 and 2 contained the grant of the right "of burying" a stated number of bodies.
>
> "3. The Grantees for themselves and successors in title hereby covenant with the Grantor [sic] and its successor in title as follows:-
>
> (1) At all times to comply with and observe the rules and regulations for the time being of [the Cemetery]
>
> (2) That only members of [the Association] shall be buried in the plots within either of the said areas of land

> (3) To keep both areas of land in a clean and neat condition at all times provided that if the Grantor is not satisfied that this condition has been complied with within a period of six months from the date hereof then the Grantor shall have the right to enter upon the land and carry out and necessary works thereto at the cost of the Grantees
>
> (4) To supply the Grantor or his successors in title names and addresses of the Deceased persons to be buried in both areas of land and carry out any necessary works thereto at the cost of the Grantees…
>
> …
>
> 5. IT IS HEREBY AGREED AND DECLARED THAT the Grantor shall have the exclusive right to dig graves in the said plots of land at the following costs:-
>
> (1) During the period of Two years from the date hereof at the rate of £20-00 per grave dug from Mondays to Fridays (inclusive) of each week and at a cost of £50- 00 per grave dug on Saturday or Sunday of each week
>
> (2) After a period of Two years from the date hereof at the rates of the Grantor from time to time
>
> PROVIDED ALWAYS that if the Grantor shall fail to dig graves within a reasonable period of request by the Grantees so as to allow burial in accordance with the religion of the Grantees then the Grantees shall have the rights to dig the graves themselves. … ”

4. Following Mr Demetriou’s acquisition of the cemetery, a disagreement arose between him and the current trustees of the Association (“the Trustees”). One of the issues was whether he had succeeded to the exclusive right to dig graves that had been accorded to Badgehurst under the deeds. If he had not succeeded to the right under the deeds, there was also a disagreement about whether he could make regulations affecting the cemetery which would confer that right on him through the mechanism of clause 3 (1) of the deeds.

5. A number of agreed issues were set down for trial. It was common ground below that Mr Demetriou was bound by the deeds, with the consequence that the judge did not have to decide whether the rights granted were licences or rights in real property. The judge decided that as a matter of interpretation of the deeds Mr Demetriou did not succeed to the exclusive right to dig graves which Badgehurst had had under the deeds. His reasoning is encapsulated in the following paragraphs of his judgment:

> “37. While the use of defined terms is not decisive, the use of the words “successor in title” in some places but not others in the Deeds indicates that it was a considered choice. The right to dig was thus intended to be for Badgehurst alone and not for a

> successor in title. That does not lead to an absurd result. Badgehurst had expressly accepted that others might dig during its ownership of the Cemetery and had obtained a premium for the grants of burial rights. As the Defendant is a successor in title to the Grantor, he does not have the exclusive right under the Deeds to dig graves at the Cemetery.
>
> 38. If the matter had been considered as one of assignment of a benefit to the Grantor under an agreement, then in the context of the time span of these agreements and the nature of the of the rights granted, the right to dig appears to be a personal grant to Badgehurst. As I have noted, there was no evidence to show that rights under the Deeds had been assigned, and on that basis it is not possible to concluded that there was any effective assignment to consider."

6. The judge then turned to consider whether Mr Demetriou had the exclusive right to dig graves by reason of regulations he had made. He considered an argument advanced by the Trustees that once Badgehurst's exclusive right to dig graves had terminated, it was not possible for it to be revived by regulations. He reasoned as follows:

> "43. The [Trustees] argued further that the right to dig was dealt with solely under the Deeds and that it was not possible for the [Mr Demetriou] to regulate that at all. There were two reasons for that. First, while Badgehurst held the exclusive rights to dig, an attempt to impose a fee different from that set out in the Deeds for the first two years would have been ineffective. Secondly, [Mr Demetriou] could not insist on digging if he failed to do in a reasonable time.
>
> 44. The [Trustees'] first argument appears right so far as the first two years of the term were concerned. But that does not mean that Badgehurst would have had no right to try to regulate digging through regulations. That would have been subject to a restriction on derogation from grant, and an attempt to vary the price would likely have been an impermissible derogation. The [Trustees'] second reason is answered by [Mr Demetriou's] acceptance that any right would be subject to implied terms of reasonableness of price and allowing the Claimants to do so should the Defendant not be able to do so in good time.
>
> 45. The Deeds do not address the question of digging graves beyond the right to dig reserved to Badgehurst. A successor in title to Badgehurst thus has some room to regulate in this matter through the regulations of the Cemetery. However, [Mr Demetriou] does not have unlimited rights in this regard. He would not be able to derogate from the grants under the Deeds, and however he seeks to regulate he will be subject to that."

7. He added:

> "47. The result is that [Mr Demetriou] cannot 'insist on digging graves for the Association', and the [Trustees] succeed on the issue as it was drafted.
>
> 48. [Mr Demetriou] may in future be able to draft regulations that go further than the current position without derogating from grant. This means that the sixth issue of a reasonable price for digging may yet arise for decision."

8. Following a further hearing about the form of the order the judge made declarations to give effect to his judgment. The three declarations relevant to this appeal are in paragraphs 1, 2 and 3 of his order:

> "1. The exclusive rights to dig graves at the Cemetery for the Association granted to Badgehurst in the Deeds was not also granted to Badgehurst's successors in title and did not pass to [Mr Demetriou] on his acquisition of the Cemetery.
>
> 2. [Mr Demetriou] is not entitled to insist on digging graves for the Association pursuant to his regulations for the Cemetery as they were at the date of trial.
>
> 3. Pursuant to the Deeds, [Mr Demetriou] is not entitled to arrange or permit burials of persons who are not members of the Association nor to dump rubbish within the areas of the Cemetery over which burial rights were granted to the trustees for the Association by the Deeds."

The application to amend

9. At the outset of the appeal we dealt with an application by Mr Demetriou to amend the grounds of appeal. As originally advanced there were five grounds of appeal. The grounds of appeal were formulated on 5 July 2021; over a year ago. Permission to appeal on those grounds was granted by Newey LJ on 16 February 2022. The Trustees applied to set aside that grant and to cross-appeal on 2 March 2022. I refused to set aside the grant of permission but granted permission to cross-appeal on 13 June 2022. The Trustees served a skeleton argument on 16 June 2022. That skeleton advanced the same arguments in support of the cross appeal as had been in the original skeleton seeking permission to appeal which was filed in April 2022. Mr Demetriou served a replacement skeleton argument on 21 June 2022. It contained no reference to the cross-appeal in the body of the text.

10. As I have said, in the judgment under appeal, the deputy judge said that Mr Demetriou accepted that he was bound by the grants, with the consequence that it was unnecessary for him to decide whether the rights granted were licences or interests in real property. The judge also declared that Mr Demetriou was not entitled to exercise the rights reserved under the deeds to his predecessor in title as a mater of interpretation of the deeds. The declaration to that effect is in paragraph 1 of his order. There was originally no appeal against that paragraph of his order.

11. The appeal was listed for hearing on Wednesday 13 July 2022. At about mid-day on Friday 8 July 2022 Mr Demetriou's solicitors served by email an application to amend the grounds of appeal. The amendments sought were to delete four of the five original grounds of appeal. That is uncontroversial. But it also sought to introduce a new ground of appeal. That ground relates to the juridical nature of an exclusive right of burial. A skeleton argument in support of that ground was sent by email at about 1.15 p.m. that day. An electronic bundle of authorities followed at 6.13 p.m. on the same day.

12. Having read written arguments in support of and in opposition to the application to amend, and having heard Mr Kitson on behalf of Mr Demetriou, we refused the application for permission to amend the grounds of appeal. These are my reasons for joining in that decision.

13. The new ground of appeal asserted that the right of burial was proprietary and ascribed certain legal consequences to that. That involved an attack on paragraph 1 of the judge's order which was not previously in contention. The essence of the argument was that the rights of burial granted by the deeds were proprietary. In those circumstances section 78 of the Law of Property Act 1925 applied to them because the covenant contained in clause 4 of the deeds "touched and concerned" the land. The consequence of that was that Badgehurst's successors in title were entitled to enforce the covenant as if it had expressly included them.

14. In order to amend the grounds of appeal, Mr Demetriou needed the permission of the court under CPR 52.17. The first port of call is the approach taken to amendments. In the case of a very late amendment such as this one, the party seeking to amend has a very heavy burden to show the strength of the new case and why justice to him and to the other party requires him to be able to pursue it. Second, it is necessary to consider the circumstances in which an appeal court will allow a new point to be taken. Where the point is one of law, the court will normally only allow it if the other party has had adequate time to deal with it, the other party has not acted to his detriment on the faith of the earlier omission and the other party can be adequately protected in costs.

15. In substance the application to amend was an application for permission to appeal against paragraph 1 of the judge's order. As such it is a year out of time. In considering whether to extend time in relation to an application for permission to appeal, the court applies the three stage approach in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 906. Was the failure to comply with the time limit serious? Yes, it was. Was there a good reason for the failure? No, there was not. But I must consider all the circumstances of the case. Even if this had been no more than an application to amend the grounds of appeal in relation to part of the order that was already under attack, the approach in *Denton* is still relevant: *Lighting and Lamps UK Ltd v Clarke* [2016] EWCA Civ 5 at [31].

16. Although Mr Demetriou's solicitor and Mr Kitson described it as a "reasonably straightforward" point of law, I am bound to say that in my judgment it is anything but. Gale on Easements (21st ed), for example, states at para 1-25 that although a grant of burial rights is undoubtedly valid, the nature of the right granted is questionable.

17. In *Byran v Whistler* (1828) 8 B & C 288 there was some inconclusive discussion in the Court of King's Bench about the nature of a burial right. Littledale J said in terms

that it did not appear to be an interest in land, although the other judges were more equivocal. The question was discussed in argument before the Court of Appeal in *McGough v Lancaster Burial Board* (1881) 21 QBD 323, but no conclusion was reached. In the context of Highgate Cemetery which was governed by a private Act, McNair J held in *London Cemetery v Cundey* [1953] 1 WLR 786 that it was entitled to grant an exclusive right of burial even though it was *not* empowered to part with any estate or interest in the land. In *Reed v Madon* [1989] Ch 408 Morritt J said that the legal nature of a right to exclusive burial in a part of a church yard was by no means clear. Although he held that under the legislation he was considering a right of exclusive burial was *equated* with a right of property, he did not say that at common law it was. Indeed he expressly refrained from deciding whether it was an interest in land.

18. A right of burial does not obviously feature in section 1 (2) of the Law of Property Act 1925 as being a right in or interest over land that is capable of subsisting at law. Section 4 of the Act deals with equitable interests but the proviso to that section states:

> "Provided that, after the commencement of this Act (and save as hereinafter expressly enacted), an equitable interest in land shall only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before such commencement."

19. If it were to be decided that the right of burial is a property right, the next step in the argument is the assertion that section 78 of the Law of Property Act 1925 applies to the agreement and declaration that grantor should have the exclusive the right to dig graves. Section 78 applies to covenants. So the first question under this head would have been whether the agreement and declaration amounts to a covenant at all. It was said that section 78 was addressed by counsel for the respondents in the court below. So it was, albeit briefly, but only to explain to the judge why section 78 did not apply. Counsel then appearing for Mr Demetriou made no contrary submissions; so that point too is a new one.

20. The third step in the argument is that the covenant touches and concerns the land, so that each successive owner is entitled to enforce it against the grantees or their successors. This, too, was not argued below. That argument would require considering whether section 78 simply extends the class of person entitled to enforce the covenant, or whether it also extends the ambit of the covenant itself.

21. The skeleton argument asserted that the Trustees were the original contracting parties. But that is simply not true. The current respondents were not parties to the original deeds. So that would have raised yet another legal question.

22. In this case the application was made two clear working days before the appeal was listed. It attacked a different part of the judge's order, raised new points which were not argued below; and which are by no means straightforward. Although, at this stage, I could not say that the points were unarguable, equally I could not say that they were strong. The new point was, apparently, prompted by a change of counsel in the week running up to the appeal. Why there was a change of counsel at that late stage has not

been explained. But I do not regard a change of counsel as itself being a good reason for the delay in seeking to amend. The short point is that Mr Demetriou sought to raise a new point which his previous legal team had not thought of; and to appeal against part of the order which was not previously in contention.

23. In our judgment it would have been wholly unfair to counsel for the Trustees to have had to deal with such a wide-ranging point at such short notice. We did not consider that this is a case in which it can be said that the Trustees had had an adequate opportunity to deal with the point.

24. It is also to be noted that PD 52C para 32 (3) states that only exceptionally will the court allow the use of a supplementary skeleton argument lodged later than 7 days before the hearing. This applies to any supplementary argument, even on points which are already in the grounds of appeal. Although that paragraph does not explain any further what might be exceptional, the reappraisal of the appeal by new counsel does not, in my judgment, justify the exercise of that power. As I have said Mr Demetriou was granted PTA some five months before the hearing of the appeal. There was ample opportunity for him to seek a second opinion. I add to that that the points wished to be advanced are new points, which were either not argued or conceded below.

25. We therefore refused permission to amend the grounds of appeal. We did, however, permit Mr Kitson to rely on a skeleton argument in opposition to the cross-appeal despite the fact that it was served lamentably late. Realistically, Mr Gatty on the Trustees' behalf did not oppose that.

The appeal and cross-appeal

26. Accordingly, in Mr Demetriou's appeal, the only surviving ground of appeal is his challenge to part of paragraph 3 of the order. He says that the judge ought to have used the word "plots" rather than "areas" in order to reflect the language of all but one of the deeds.

27. By their cross-appeal the Trustees challenge the concluding words of paragraph 2 of the order ("as they were at the date of trial"). They say, as they said to the judge, that Mr Demetriou is not entitled to confer on himself the excusive right to dig graves in the areas covered by the burial rights through the mechanism of regulations.

Paragraph 3 of the order

28. Although it is true that the word that the judge used in paragraph 3 of the order does not precisely track the words of some of the deeds, I find it difficult to see what difference of any substance that makes. To my eye, at least, the plans attached to the deeds do not delineate any individual plots, whereas the areas themselves are marked by red lines or colouring. Mr Kitson accepted that that was so.

29. The skeleton argument in support of the appeal (drafted by Mr Demetriou's former counsel) did not identify any practical benefit that would be served by amending the text of paragraph 3 of the order. In his oral submissions Mr Kitson told us, apparently on instructions, that the areas delineated on the plans attached to the deeds were capable of containing more burial plots than the numbers stipulated in the deeds themselves. Mr Demetriou might therefore wish to arrange additional burials in those

areas. That was not a point that appears to have been raised before the judge; and we were shown no evidence to establish that contention (which in any event the Trustees disputed); still less a finding to that effect.

30. I would reject this ground of appeal.

Paragraph 2 of the order

31. The Trustees' challenge to paragraph 3 of the order is that the judge ought not to have included the words "as they were at the date of trial". This is essentially the same argument that the Trustees advanced before the judge and which he rejected.

32. The Trustees' argument runs as follows. The meaning of the deeds is to be determined as at their respective dates of execution. Their meaning cannot change over time. Whatever the deeds mean, they mean now what they have always meant. When the deeds were executed, the exclusive right of digging graves was dealt with by means of the agreement and declaration in clause 5. That was a specific provision, whereas the covenant to comply with regulations was a general provision. Where something in a contract has been dealt with by a specific provision, the general provision cannot qualify it. It follows that the Trustees' covenant in clause 3 (1) to comply with regulations cannot have been intended to cover an exclusive right of digging, because that was dealt with by clause 5. The scope of permissible regulations cannot have expanded merely because Badgehurst is no longer the owner of the cemetery.

33. The judge said at [44] that Badgehurst would have had the right to regulate digging through regulations. But in the first place, for as long as Badgehurst had the exclusive right to dig the graves, there would have been no need to regulate digging. How and when digging took place would have been entirely within their own control. If and when the proviso came into effect, then there would have been some scope for regulation by Badgehurst, but not to the extent of reclaiming the exclusive right to dig. Mr Kitson argues that Mr Demetriou might now be able to make regulations requiring digging to be supervised, or for the Trustees to be required to appoint a surveyor to do so. But that is not the point that the Trustees take. Regulations might properly provide for the time at which and manner in which digging was to be conducted; but could not have provided for the exclusive right of digging itself. If regulations could confer on the owner of the cemetery the exclusive right to dig graves, there would have been no need for the agreement and declaration contained in clause 4.

34. It must be borne in mind that the rights granted by the deeds endure for many centuries. The scope of the specific provision is limited to Badgehurst, whereas the general provision extends to its successors in title. Once Badgehurst has dropped out of the picture, the specific provision has no further part to play. It is impossible for even the most thoughtful and careful drafter to foresee what might or might nor need to be dealt with as the centuries unfold. So a covenant to comply with regulations enables the cemetery owner to deal with unforeseen contingencies. The judge's overall approach, as reflected in the declarations that he made, was not to decide legal questions in the abstract; but to evaluate a specific set of regulations as and when it came to be made. He did, however, correctly make it clear that any regulations could not lawfully derogate from the grants contained in the deeds.

35. The grant of a declaration in principle is a matter for judicial discretion. So is the form of the declaration that a judge is prepared to grant. Since a declaration made by the court is a binding legal ruling, it is necessary to be cautious about the way that any such declaration is framed. I do not consider that it can be said that, on the facts of this case, the judge made an appealable error in the exercise of his discretion.

36. In the course of argument there was some discussion about the description of the right that was granted. It was not merely a right to arrange burials or a right to have a body buried. It was a right *of burying* bodies. That is the gerund of a transitive verb. You cannot bury a body without digging a hole in which to bury it. It is arguable, therefore, that it is necessarily implicit in the description of the grant that the Trustees had the right to dig graves in which to bury bodies up to the number permitted by each of the deeds, subject to the rights reserved to Badgehurst.

37. Mr Kitson, as I understood him, accepted that that was a possible interpretation of the description of the right. He accepted that if and when new regulations come to be tested it may become necessary to decide that question, not least because it may have a bearing on whether any such regulations derogate from the granted rights. But a decision on that question was not necessary at this stage. All that the judge decided was that the current regulations did not permit Mr Demetriou to claim the exclusive right to dig graves. Since I have concluded that the judge did not go outside the permissible bounds of his discretion, I agree that this question must wait until such time (if ever) as it becomes necessary to decided it.

38. There is one other footnote that I should add. The deed of 4 May 1985 contains neither the grant of the exclusive right to dig graves to Badgehurst, nor any covenant to comply with regulations. Mr Kitson accepted, I think, that as regards the land over which the rights granted by that deed extend, regulations cannot require the Trustees to engage Mr Demetriou or his contracts to dig the graves. Once again, resolution of that question was not necessary for the judge to make the declaration that he did.

Result

39. I would dismiss both the appeal and the cross-appeal.

Lady Justice Macur:

40. I agree.

Lord Justice Dingemans:

41. I also agree.