Claim No. 9BM30298

Neutral Citation Number: [2011] EWHC 2152 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre

33, Bull Street, Birmingham

Date: Friday 24 th June 2011

Before:-

HIS HONOUR JUDGE PURLE, Q.C.

(Sitting as a High Court Judge)

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B E T W E E N :-

HUDSON INDUSTRIAL SERVICES LIMITED

Claimant

-and-

OWEN ERNEST WOOD (1)

JEAN WOOD (2)

JOHN MORGAN (3)

JENNIFER ANN MORGAN (4)

Defendants

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Mr. D. Taylor instructed by DBL Talbots appeared for the Claimant

Mr. M. Zaman QC instructed by Martin-Kaye appeared for the Defendants

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J U D G M E N T

JUDGE PURLE:

1
In this action the Claimant, Hudson Industrial Services Limited (Hudson) seeks the removal of certain entries on the register preventing first registration of land transferred to it and damages for the wrongful making and maintenance of those entries.

2
The land in question is at Buildwas, Ironbridge, Shropshire, and was formerly in the ownership of Mr. Owen Wood, and his wife Jean Wood, who are the first 2 Defendants. Also parties to the proceedings and the target of the damages claim are John Morgan and Jennifer Morgan (Mr. and Mrs. Morgan) who are the owners and occupiers of adjoining land.

3
Formerly Mr. and Mrs. Owen Wood owned something in excess of 20 acres of farmland, including a house, formerly known as Slip Farm but subsequently renamed Severn View.

4
On 13th July 1990 a deed of gift was entered into by Mr. and Mrs. Owen Wood transferring a piece of land to their son, Mr. David Wood, together with a right of way. The property transferred was Severn View with some outbuildings. Although transferred to Mr. David Wood, Mr. and Mrs. Owen Wood continued to live there, as did Mr. David Wood.

5
Later, on 25th April 1995 Mr. and Mrs. Owen Wood transferred a further piece of land to Mr. David Wood by a second deed of gift. It is that second deed of gift the content and construction of which are in issue. I say that the content is in issue because it has been suggested to me that the attached plan (I have seen the original, or at least what purports to be the original) has at some time been substituted. The original plan, it is said, referred to a smaller area of land.

6
The area of land identified by the plan now attached is approximately three and a quarter acres in extent. The parcels clause of the second deed of gift stated that the land transferred was “approximately one acre or thereabouts which land is, for the purpose of identification only, delineated and edged red on the plan annexed hereto”. There is, therefore, discrepancy between the plan now attached and the stated approximate acreage.

7
It is not possible, however, just from looking at the plan, to ascertain which area of approximately one acre was intended to be referred to. The property transferred, according to the plan, included a yard, an area adjacent to the yard referred to during the trial as “the Gaffer’s Patch”, a driveway and a paddock.

8
If one takes the paddock as a whole that could not be one acre or thereabouts unless one arbitrarily took a slice out of the paddock. If, however, one looks at the yard then that is just over an acre and not much more than an acre even with the Gaffer’s Patch. With or without the Gaffer’s Patch the land could fairly be described as comprising one acre or thereabouts. Then of course there is the driveway which adds to that, but not by much.

9
I have to decide what was the plan originally attached to the second deed of gift. Because that is in issue I have heard a great deal of evidence relating to the subjective intentions of the parties from which I am asked to infer that a wrong plan has at some stage been substituted. The subjective intentions of the parties are not of course relevant to the construction of the deed but they may be evidence of what the deed initially consisted of.

10
Just to complete the essential history, not long after the second deed of gift, namely on 6th June 1995, a further piece of land was transferred to Mr. David Wood by his parents, identified only by reference to a plan, said also to be an “identification only” plan, but with no sensible words of description of any kind. It is accepted that this is an area of land of approximately 0.19 acres consisting of what was formerly a stable block and which had been omitted, possibly inadvertently, from any of the earlier deeds of gift.

11
I return to the issue of what plan was attached to the second deed of gift of 25th April 1995.

12
I heard evidence on this issue from a number of witnesses. The most important witnesses, at least potentially, were Mr. David Wood and Mr. Owen Wood. Mrs. Wood has not given evidence because of her age and medical condition. No adverse inferences are to be drawn from the omission to call her as a witness in those circumstances.

13
Mr. David Wood suffers from the difficulty of being unable readily to read or write. It is a condition which has hampered him throughout his life and which he does his best to cover up. Mr. Zaman, Q.C. for the Defendants was inclined to accept that David Wood suffered certain difficulties (he realistically accepted that there was no alternative on the evidence) but contended that the difficulties were exaggerated by David Wood. There may have been an element of exaggeration from time to time but I do find that his difficulties were real and that he is not the sort of person to pay much attention to the written word. Indeed, he is not the sort of person to pay much attention to detail generally. His evidence was characterised by declarations of cluelessness which were repeated so many times that I lost count. I did not find him a reliable witness when considering the events of 1995 though this was, in fairness to him, a long time ago.

14
Mr. Owen Wood, who also gave evidence, was, largely because of his age and frailty, a very unsatisfactory witness. I do not for one moment suggest that he came to court telling deliberate untruths but he was plainly forgetful and, as Mr. Morgan explained in evidence, he has been in decline over the last three to four years. I can well understand that, having seen him in the witness box. As I have said, I acquit him of any deliberate intention to mislead. Nonetheless, I must take the evidence as I find it and I found him to be a most unreliable witness on points of detail. One need only refer to the fact that he denied more than once that he had ever given Severn View to his son, though plainly he did by the first deed of gift. What, I think, he was confusing was his continued occupation with ownership.

15
Moving to the context of the second deed of gift, there had been, over a period of some two years or more, a number of discussions between David Wood, his parents and solicitors who acted for one or more of them. These related to the proposed transfer of, initially, the remainder of the farmland, that is to say more than 20 acres of it. There was a proposal for a sale and mortgage back at one stage which came to nothing. There was then a proposal for transfer of the remaining land in return for various assurances and promises (recorded in a formal document in May 1994) and there was discussion at times of the transfer of the yard, though whether that would or would not include the Gaffer’s Patch was not specified. Eventually there was discussion and even (around January 1995) a

written undertaking signed by Mr. David Wood in return for the transfer of a further piece of land said to be of one acre or thereabouts without specifying what that one acre was. Given the variety of those previous discussions, I did not find consideration of them particularly helpful in determining the question of what it was that was attached to the second deed of gift.

16
There is no claim here for rectification, fraud or sharp practice. I did hear evidence from the solicitor who drew up the (third) June 1995 deed of gift (Mr Haycocks) and was concerned with mortgaging various bits of land to the bank. He confirmed that the second deed of gift in the form in which it appeared before me was the deed of gift that was delivered to him at the time he was instructed. I accept that evidence. Accordingly, if there was any alteration of the deed of gift it must have occurred before then. Mr. Kirby, another solicitor, who was instrumental in drawing up the second deed of gift (of 25th April 1995) could not remember what plan was attached but he did confirm that he would have checked the deed when it was returned to him -- it was not executed on his premises – and would have noticed if the plan had been changed. Therefore, if there ever was a substitution of the plan, this would have occurred either in Mr. Kirby's offices – and there is no reason to suppose that there was any occasion for that – or during the course of transmission between his offices and the offices of the successor solicitor, Mr Haycocks. A Mr. Mottershaw, it emerged from the evidence, was the most likely candidate to have taken the deed from one place to the other. It was not however suggested that he had tampered with it.

17
During the course of these proceedings Hudson, by a series of requests for further information, sought to pin the Defendants down as to exactly what they were saying about the second deed of gift and how it came to be altered, if it was altered at all. They were largely unsuccessful in their efforts because the Defendants were unable to say how the deed of gift was altered. I can see no reason for its alteration except for fraudulent or other improper purposes and that is neither alleged, nor made good on the evidence.

18
Moreover, one of the purposes of the second deed of gift (of 25th April 1995) was to enable David Wood to charge some of the land in connection with his business. It is Mr. Owen Wood's case that he transferred only the yard. A transfer of the yard without at least the driveway would be most unsatisfactory because it would have made it difficult to mortgage. There would then be no apparent means of access, though there might be implied rights of access. All the conveyancers, however, agreed that that was an unsatisfactory way to leave the matter. Mr. Kirby himself accepted that upon any view the second deed of gift as drafted by him was wanting because it gave rise to access problems, whatever land was within it. He certainly accepted that he should have provided for access if only the yard was being transferred.

19
In my judgment, it is much more likely than not that the second deed of gift as it now appears has the plan originally attached, rather than a substituted plan. Inspection of the deed of gift itself reveals no signs of tampering at any time or any signs of the deed of gift ever having fallen apart. The attached plan is not to any identified scale and so no one could, simply by looking at the plan, work out the approximate acreage. There is therefore no obvious contradiction on the face of the deed between the stated acreage and the plan, thus explaining why the discrepancy could well have been gone unnoticed. Moreover, Mr. David Wood is unlikely to have read the document because of the difficulties he had in reading, though he probably looked at the plan. Mr. Owen Wood also said he would not have

read the document or the plan because he trusted the people he was dealing with, that is to say Mr. David Wood and Mr. Mottershaw. In those circumstances, there is no solid foundation for me to conclude that the second deed of gift was executed by reference to some plan other than that now attached.

20
I now turn to consider the proper construction of the second deed of gift upon the footing that the plan now attached was always attached. It is well established that a plan which is attached for identification purposes only must give way to any specific description identifying the land in the parcels clause. The matter was considered by Rimer LJ, in Strackey v. Ramarsh [2008] E.N.C.R. p8. As he explained: “The plan is intended to identify the position and situation of the land but not its precise boundaries”. Strictly speaking, as the learned Lord Justice in that case explained, the formula should be used only where the verbal description in the parcels identifies the limits of the land with adequate precision. Here of course the verbal description in the second (April 1995) deed of gift does not identify the land with precision, it merely refers to “an area of one acre or thereabouts” without specifying the particular area in question. It is impossible, therefore, to ignore the accompanying plan even though stated to be for the purpose of identification only (see also Withington & Milner Limited v. Winster Engineering Limited [1978] 1 W.L.R. 1462 at 1473F to 1474H and 1475G to 1476C, Spall v. Owen [1982] 44 P. & C.R. 36 at 42, and Strackey v. Ramarsh again at paragraph 33). Although the plan is attached for identification purposes only, it is attached for that very purpose. The verbal description does not identify the land with any precision and, therefore, one is left with a plan that has as its very purpose, even if that is its only purpose, identification of the land in question. That land is the land edged red on the plan, consisting of approximately three and a quarter acres. The plan, being an identification only plan, must give way to physical features on the ground which contradict the boundary as drawn but the general area is that three and a quarter acres, and the verbal description of “one acre or thereabouts” must, in my judgment, be rejected.

21
Accordingly, it seems to me that Hudson is right that the objections to its registration are ill-founded, save in one respect, which was not a matter of controversy before me. There is a small sliver of land along the boundary which, judged solely by the plan, appears to be Hudson’s. It was, however, accepted that, having regard to the features on the ground, that sliver is Mr. and Mrs. Morgan’s land, to whom it was subsequently transferred with other land. That is an example of the significance of the plan being for identification purposes only, the delineated area giving way to the features on the ground when considering precise boundaries.

22
I turn now to consider the damages claim. This arises under section 77(1)(c) of the Land Registration Act 2002. It is accepted that Mr. and Mrs. Morgan owed a duty not to exercise their right to object to an application to the Land Registrar without reasonable cause.

23
What happened after the various deeds of gift was that Mr. David Wood’s business ran into difficulties and foundered on the rocks, which led to possession proceedings against Mr. and Mrs. Owen Wood in respect of Severn View. Mr. and Mrs. Morgan did everything they could to help Mr. and Mrs. Owen Wood, including taking them in into their own property. For that they are to be commended but, unfortunately, the version of events which they got into their heads came from Mr. Owen Wood, who, they must have appreciated, was of failing recollection and who could not safely be relied upon to give an accurate recitation of the history.

24
Mr. Morgan’s early impressions of David Wood were coloured by what he was told about him by Mr. Owen Wood. There had been a sale by Mr. and Mrs. Owen Wood of 14 acres of land to Mr. and Mrs. Morgan in 1999. Mr. Owen Wood told Mr. Morgan that David Wood had had all the money, which in large part he had. The impression given was that Mr. David Wood had in some way misappropriated that money. This was not correct. What in fact occurred was that a loan agreement was executed at the time by Mr. and Mrs. Owen Wood in favour of their son. Mr. and Mrs. Owen Wood received independent legal advice. That agreement created an interest free loan of the bulk of the proceeds of sale of the land sold to the Morgans.

25
Documents revealing the true position regarding this loan were disclosed some time ago. The loan agreement itself was disclosed in earlier land registry adjudication proceedings. Moreover, Mr. and Mrs. Morgan had the deeds of gift at the time they made their objection to first registration. Their case in the adjudication proceedings rested substantially upon the proposition that there had been at some time a substitution of the plan attached to the second deed of gift. This inevitably, to my mind, implicated someone in fraud and wrongdoing. Although that was never pleaded in this case, the allegation has, at least implicitly, been left hanging over Mr. David Wood’s head. As I have mentioned, Mr. Morgan in cross-examination explained that it became apparent that Mr. Wood was confused and that he had declined over the last three to four years. Given that, it seems to me that the Morgans should have taken their lead from the indisputable documents rather than from anything that Mr. Owen Wood told them.

26
At a relatively early stage, a point was taken by the Morgans that the second deed of gift, of April 1995, could not have conveyed more than the yard and driveway because only that yard and driveway were subsequently registered. It did however become clear by March 2006, when Mr. Haycocks wrote to the Morgans’ solicitors (a letter which Mr. Morgan saw at the time) that the reason for the limited registration was that there was no compulsory registration at the time of the April 1995 deed of gift. What necessitated registration was a subsequent mortgage, which related to part only of the land transferred. Therefore, only that part had to be registered. This explanation did not, however, stop the Morgans persisting in their objection.

27
The question I have to consider is whether or not there was reasonable cause for Mr. and Mrs. Morgan to make or persist in their objection. If not, then they are in principle susceptible to a claim for damages. In my judgment, the objections were from the outset made and pursued without reasonable cause, largely for the reasons I have given, namely the unthinking reliance on unreliable statements of Mr. Owen Wood and the untenable construction of the second deed of gift of April 1995, all bolstered by a baseless allegation of substitution of the plan and a misconceived view of the law relating to compulsory registration. Moreover, they persisted in their objection knowing from October 2008 that Hudson claimed it was suffering damage. The Morgans’ solicitors were told of this by a letter of 10th October 2008.

28
I do not attribute improper motive to the Morgans. As adjoining owners they had legitimate concerns of their own as to the activities that were being carried on on the site, and much of their action was motivated by general sympathy for the plight of Mr. and Mrs. Owen Wood. The test is not, however,

one of impropriety but of reasonable cause. In my judgment, there was no reasonable cause for the course of action the Morgans chose to adopt.

29
The question then is whether or not recoverable loss has been proved. Hudson's case is that they always intended to construct a one way system around the workshop which would involve engineering works to the Gaffer's Patch. Title to the Gaffer's Patch has not been registered because of the Morgans' objection. Hudson decided not to proceed with those works at a time when its title was under challenge. I do not see how they could be criticised for that decision. Mr. Zaman, Q.C. sought to persuade me that the claim that Hudson makes is a bogus claim with no substance invented for the purpose of these proceedings. He pointed out that no planning application was ever made or planning advice apparently taken (leaving aside the expert evidence in these proceedings) to progress that plan. However, given the early objection and what Mr. Hudson described as the expense that would be involved in getting planning approval and carrying out the works, it seems to me that it was sensible to put those plans on hold. I do not doubt that that was the plan. What happened instead was that another site owned by Hudson some miles away, known as the Granville site, the lease of which was expiring, was kept going under a lease extension. This was followed by movements of traffic shifting plant from one site to the other. The reason that became necessary was because, without the one way system, the yard was unsuitable for heavy articulated vehicles upon which plant is traditionally carried. Had the one way system been put in (which would have involved levelling the Gaffer's Patch and resurfacing works) more space would have become available, and the regular trips between Buildwas and the Granvillle site would have been avoided.

30
The space problems at Buildwas were accentuated by the storage or parking (it was a moot point which was the appropriate expression) of plant on the site which at one stage attracted the interest of the planners because there was a planning condition prohibiting storage of plant on site. However, the planners held back and Mr. Hudson explained to me in evidence which I accept that in his own discussions with the planners they accepted that it was a grey area whether parking amounted to storage. There is correspondence indicating a slightly stronger line by the planners but they in fact took no further action. I have viewed the Severn View site and the Granville site. It is clear to my mind that the Granville site was much more readily accessible and useable than the Severn View site without the one way system. I accept, therefore, that there were some movements of plant and vehicles between the one site and the other which, had Hudsons' intended use come about, would not have occurred and that this prima facie has put Hudson to expense which it would not otherwise have incurred.

31
The loss and damage is claimed under two heads: additional rent under the extended lease and the costs of vehicle movements between the 2 sites.

32
The amount of the additional rent was put in evidence given by Mr. Blakeman-Pool of Hudson at £7,800. Subject to one point to which I shall come, that seems to me potentially to give rise to a recoverable loss.

33
As regards vehicle movements the evidence gives rise to much greater difficulties. A schedule of loss was put in the source of which was not evident despite valiant efforts on the part of the Defendants'

solicitors to require Hudson to identify that source. Indeed, it was confidently asserted on Hudson's side that there were no source materials. That was a breathtaking assertion and completely wrong. There were primary records in the form of diary entries and logs which were made, initially routinely for the purpose of monitoring the daily business, and subsequently because of the perceived need to record details of the claim. Those underlying records, it would appear, have been destroyed during Hudson's move from the Severn View yard in March 2010. That was after these proceedings had been brought and after the damages claim had been made.

34
I find that an astonishing state of affairs. The Defendants were entitled to see the primary records if for no other reason than to ascertain that there had been an accurate transcription from the primary records to the schedule of loss. A number of questions were put by Mr. Zaman, Q.C. who, with due regard to proportionality, did not go through every entry in the schedule of loss but such questions as he put demonstrated to my mind that the records as produced were not something which I could confidently regard as reliable. Various explanations were given by Mr. Hudson and by Mr. Blakeman-Pool, all of which are summarised in paragraphs 83 to 87 inclusive of Mr Taylor's closing submissions. Mr. Taylor in those submissions properly put the most favourable light he could on the evidence. It was however obvious that neither Mr. Hudson nor Mr. Blakeman-Pool could do anything other than to attempt to interpret the second hand records that had survived. I do not say that by way of criticism of them, but that necessarily involved much in the way of guesswork.

35
For those reasons I am unable to accept the schedule of loss as an accurate record, even when buttressed (as it was) by the late production of some computerised material that also derived from other undisclosed primary records.

36
Mr. Taylor put forward an alternative case which was that I should be satisfied on the evidence (i) that there had been repeated movements of vehicles and (ii) that the estimated costs per movement were accurate. I should, therefore, take into account in the damages calculation movements at the rate of at least, say, two per day which would get Hudson in round figures approximately £30,.000 worth of damages as opposed to the sum in excess of £50,000 that the loss schedule indicated.

37
It is open to the court in an appropriate case to proceed by way of estimates. However, I am not at all sure that the evidence before me would justify an award of anything like as much as £30,000. Moreover, movement of vehicles (and additional rent) are only one side of the balance sheet. Mr. Hudson's evidence was that the works were not started, and not even planning permission was sought, because of the expense. I have no evidence before me which indicates what the expense of carrying out the works to the Gaffer's Patch and the rest of the yard, including planning costs, would have been. It is said on the one hand that there would not have been any planning difficulties because the works were relatively minor (that is Mr. McGlue's evidence, which I accept). Even if there had been planning difficulties, a planning application could not properly have been refused, which is the other limb of his evidence. On the other hand, relatively minor though the works might be in planning terms, it is evident just from seeing the site that substantial costs would be involved. How much is anyone's guess. But I am not here to make guesses. Hudson has to satisfy me, in circumstances where there has been no order for a split trial, that the expense it has been put to exceeds the expense which it has saved by not having to do the work which it intended to undertake. Hudson has failed to satisfy me of this. It may of course be that the work, if undertaken, would have improved the value of the

yard and associated property and that any such improvement would therefore have to be deducted from the saved expenditure, but that is not something which I can assume. It needs evidence. There is none.

38
On the totality of the evidence, I am not satisfied that Hudson has suffered any recoverable loss and in those circumstances the damages claim is dismissed.

39
I shall now hear counsel as to the consequences of this Judgment.

(Counsel made submissions as to costs)

40
I now have to consider the costs consequences of the Judgment I have just delivered. Hudson has won in its claim to clear the objections to its title. That was the only claim made against Mr. and Mrs. Wood, who could have avoided being dragged into these proceedings if they had agreed to abide by the result of the adjudication. Confirmation of this was sought before these proceedings were served. They gave no such confirmation. Accordingly, it seems to me that Hudson is entitled to its costs to be assessed by a detailed assessment if not agreed against the first two Defendants. Those costs will not include any costs referable to the claim for breach of duty, and compensation under the Land Registration Act. So far as Mr. and Mrs. Morgan are concerned, they are in the same position save as to this. They faced the claim for compensation and that claim has failed. Nonetheless, my attention is drawn to correspondence in 2009, both before and after service of these proceedings, in which Hudson offered, firstly in February 2009, to pay £5,000 to the Woods if the objections were withdrawn with each party bearing its own costs. That of course is a better result than Mr. and Mrs. Morgan have achieved given their declared aim to be acting for the benefit of the Woods. Moreover, at that stage (February 2009) Mr. and Mrs. Morgan were on notice of the damages claim which had been articulated the previous year. Accordingly, it was plain from that moment that Hudson was prepared to abandon its damages claim for a speedy resolution. It was a very commercial offer. That was not accepted. £12,500 was sought instead so, tantalisingly, there was on the face of it only £7,500 between the parties. Unfortunately, Mr. and Mrs. Morgan also insisted upon payment of their costs which at that stage approached £20,000. From the remainder of the correspondence that I have seen in that year that became a non-negotiable starting point from which the Morgans were prepared to negotiate (see in particular Martin Kay's letter of 11th December 2009).

41
It seems to me, in the light of those offers, that Hudson is prima facie entitled to its costs. However, as Mr. Zaman points out, the damages claim as well as having failed had some remarkable aspects. There was inadequate disclosure and destruction of documents. This was not deliberately calculated to hinder the course of justice but it nonetheless occurred in a way which I have already said was breathtaking; and even more breathtaking was the continued assertion in correspondence right up to the trial that there were no source documents. It seems to me that, in those circumstances, the pursuit of the damages claim ought to result in some reduction of costs partly to reflect the time spent on an issue which in one sense could hardly be tried fairly because of the loss of source documents and partly to reflect in a proportionate way the court's disapproval of conduct during the course of the proceedings. It seems to me that, in those circumstances and taking a broad approach, I shall make the same order against Mr. and Mrs. Morgan as I make against Mr. and Mrs. Wood. That means that they shall pay the costs not including any costs referable to the breach of duty and damages claim. I

say that even though the breach of duty was established but it seemed to me that the failure to produce the primary records was a serious default which is deserving of censure over and above the costs referable merely to the quantum issue. So breach of duty is included in that. I shall, therefore, leave it to the judge dealing with the assessment to define the boundaries when looking at individual items of work. A fair amount of time was spent on the damages claim in court but it is not always possible, just from what one sees and hears in court, to assess the sort of time that was spent out of court, and so I shall leave that to the judge dealing with the assessment.

42
So that can be written in as a limitation in the order. It is basically issue costs; that is what you are getting. It means, Mr Taylor, that there is no order as to costs on your damages claim so you are not having to pay them but you are not getting them either.
