# TRANSCRIPT OF PROCEEDINGS

Neutral Citation Number: [2020] EWHC 3173 (Ch)

Ref. CH-2019-000346

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**CHANCERY APPEALS (ChD)**

The Rolls Building
7 Rolls Buildings
Fetter Lane
London

**Before MRS JUSTICE FALK DBE**

**IN THE MATTER OF**

**STEVEN SAMMUT & SANDRA SAMMUT-HORSTMAN (Appellants/Defendants)**

**-v-**

**SALLY CATCHPOLE (Respondent/Claimant)**

**MR P CLARKE appeared on behalf of the Appellant**
**MR J DUBIN appeared on behalf of the Respondent**

**JUDGMENT**
**7th JULY 2020**

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MRS JUSTICE FALK:

1. In short, I have decided not to grant permission to appeal. I will give my reasons now.

2. This is an application by the defendants in this action, Steven Sammut and Sandra Sammut-Horstman, for permission to appeal and for permission to adduce further evidence. The appeal is against an order of HHJ Berkley in the Winchester county court, which was sealed on 9 December 2019 following a trial originally heard in March 2018 and a judgment dated 2 July 2018.

3. On 1 April 2020, Morgan J made an order for both applications to be heard orally. He also ordered that the court would consider at the hearing the locus, that is the standing, of the appellants to appeal against the declaration of a right of way made by paragraph 2 of HHJ Berkley's order, and provided that the respondent might attend the hearing and that the usual costs rule in permissions hearings would not apply.

Background

4. The appellants and respondent owned neighbouring farms, the respondent's farm, Glenhead Farm, to the east, and the appellants' farm, Hyde Hill Farm, to the west. The respondent has owned and occupied Glenhead Farm since 1985, and the appellants have owned and occupied Hyde Hill Farm since 2010.

5. The boundary between the farms runs in a roughly north-south direction. Glenhead Farm is higher than Hyde Hill Farm and the boundary runs along a bank, which in places is steep on the Hyde Hill Farm side. At the northern end is a public road, Hyde Lane, which runs along the boundary of the appellants' farm in a roughly south-easterly direction, and then turns roughly north-east along the north-western boundary of the respondent's land, where the bank continues.

6. As the lane turns, the width of the highway expands to create a passing place. There is a roughly triangular area adjacent to this where the northern end of both parties' properties meet the lane at a roughly 90 degree angle to each other. The appellants have a gate onto the lane from their boundary, adjacent to the southern apex of the triangle. The main access to Glenhead Farm is a private drive further east along Hyde Lane, but it is possible to access the lane from a field gate in the respondent's top field, down the bank from the field over unregistered land into the triangular area where the Sammuts also access the lane.

7. The respondent sought a declaration as to the position of the boundary between the two farms and a declaration of a right of way onto the lane, which she claimed that the appellants

had interfered with. The appellants counterclaimed, including for trespass. They disputed the precise location of the boundary. More importantly for these purposes, they also claimed that the unregistered land was theirs, or, in the alternative, that they had sufficient control over it to prevent the respondent accessing the highway from the gate in her field.

8. The judge determined the boundary, preferring the expert evidence of the respondent's expert to that of the appellants. There is no appeal against that part of the order. In doing so, and importantly, he found that the appellants' boundary did not extend north of their gate either into any verge beyond their gate or onto the lane. So he rejected the appellants' argument that they were the owners of any part of the disputed unregistered land.

9. Although not expressly referred to in the order, the judge also considered whether the appellants had rights as possessors to prevent the respondent accessing the highway across the unregistered land between the boundary of Glenhead Farm and the lane, on the basis that the ownership of this land was not known and therefore that if the appellants were in actual possession and control they would be able to exclude the respondent and, indeed, others apart from the true owner (see paragraph 86). He concluded at paragraphs 93 and 94 of his judgment that the appellants had never exercised anything like the degree of control required to amount to having taken possession of the land to the north of their gate, either at ground level or anywhere further up the bank towards the respondent's property, and therefore were not entitled to prevent access to that property.

10. The judge recorded at paragraph 95 that that was enough to dispose of the matter, but, in case he was wrong, he went on to make further factual findings as a result of which he agreed that the respondent had a right of way onto the lane, having established an easement by virtue of the doctrine of lost modern grant.

11. The appeal is against the part of the order that declares this right of way and does so in terms that it can be used for all purposes and with or without animals or vehicles. There is also an appeal against the order for the appellants to pay most of the respondent's costs. The appellants have also applied to adduce further evidence comprising particulars of sale, replies to enquiries and the 1950 root of title in the 1985 sale to the respondent, which they obtained following the hearing.

Grounds of appeal

12. Turning to the grounds of appeal, there are four grounds of appeal, although they are very closely linked. All relate to the declaration of the right of way and none to the location

of the boundary or the judge's conclusion that the appellants had not established possession and control of any area beyond their gate.

13. The first ground is that the judge erred in making a number of findings of fact about use of the access. In summary, the complaint is that the evidence did not justify the factual findings made about the level of use and period of use, either at all or at least for livestock and machinery.

14. The second ground is that the judge erred in finding that user of the access was sufficiently definite and continuous to establish a prescriptive right of way.

15. The third ground is that the judge erred in finding that the servient owner had constructive knowledge of the use (this ground incorrectly refers to the respondent rather than servient owner).

16. The fourth ground is that the judge erred in finding that there was a right of way in the wide terms that he did, and should have found either that no right of way existed, or that there was only a limited right of way to use the access no more than a few times a year, for farm purposes only, and limited as to use to the field at the top of the bank.

The Judge's findings

17. It is important to clarify what the judge did and did not find about the extent of the appellants' ownership and possession. Although it appears that the respondent accepted that the appellants owned the subsoil directly north of their boundary under the ad medium filum presumption, that acceptance by the respondent did not extend to acceptance of ownership of the unregistered land between her land and the highway. It was also pointed out to the judge by the respondent's counsel that the presumption gave conflicting rights to each party because the boundaries were at a roughly 90 degree angle where they met (see paragraphs 6 and 71 of the judgment). The respondent's position was that she did not need a right of way over the appellants' land, because her access was entirely across unregistered land the owner of which was not known, and directly onto the highway.

18. The judge found at paragraphs 84 and 85 that there was no reason to depart from the registered title, which showed the limitations of ownership. He expressly stated at paragraph 84 that "there is no evidence that the bank to the north of the defendants' gate was ever part of the defendants' farm" and was more likely to have formed part of the claimant's farm. He did not make a finding that the appellants owned any part of the land beyond the boundary as fixed by his order. The parties were both stuck with the limits of their registered title.

19. There has been reference this morning to a very small triangle of land, which it is said is between the highway and the respondent's gate access, but still adjacent to the boundary of the appellants' land, and there was some suggestion of there still being a dispute about ownership of that, but that is not reflected in the judge's decision and order, which was to fix the boundaries in accordance with that order and not make any provision for the appellants to own any part of the land beyond their gate. There is also no specific finding by the judge, except as I mention below, about a telegraph pole that the appellants had laid on the ground to the east of their gate in the path of the access that he held that the respondent had.

20. So I do not agree that the judge accepted either the appellants' position on ownership, or even the respondent's apparent concession as to ownership, of part of the land north of the gate. Instead, the judge determined at paragraph 85 that there was no reason to depart from the registered title, which showed the limitations of ownership. At paragraph 86 he explained that he was going to consider whether the appellants were entitled to prevent the respondent crossing the sliver of unregistered land to the highway expressly on the basis that ownership of that land was not known. In other words, the effect of the decision is not to find that the appellants owned any part of the land beyond their gate and certainly none that is relevant to the respondent's access.

Locus: submissions

21. The appellants' position on the question of locus is, in summary, that it is determined by the question whether the judge had jurisdiction to declare the right of way. He did have that jurisdiction. It was an appropriate exercise of it and therefore the court should entertain an appeal against his decision on that issue.

22. The respondent, unsurprisingly, does not dispute that the judge had jurisdiction, or that it was appropriate for him to exercise it. After all, the declaration granted was one that the respondent herself had sought. However, the judge's unchallenged findings about the boundaries meant, the respondent says, that the respondent's easement does not pass over any of the appellants' land. Further, the contention that the appellants had exercised sufficient possession or control over the land also failed, the laying of the telegraph pole being too little and too late and any tidying up of rubbish and scrap metal not amounting to an intention to take control. In those circumstances, the respondent submits that allowing the appeal to proceed would seek to disturb a right which has no effect on the appellants, because they do not have the requisite proprietary or possessory rights.

Locus: analysis

23. Any form of prescription, including by the doctrine of lost modern grant, presupposes some form of grant by the absolute owner of the servient tenement to the absolute owner of the dominant tenant (see Gale on the Law of Easements at 4.76). In principle, the existence and extent of any grant of an easement is a matter between those two owners, and not anyone else.

24. The judge rightly concluded that his decisions about the location of the boundary and the absence of possession or control by the appellants disposed of the dispute as between the parties. Neither party challenges the judge's decision to go on and make a declaration as to the right of way claimed by the respondent. They were right not to do so, but that does not mean that the existence and extent of that right of way is a right in respect of which the appellants should be permitted to appeal. As neither the owners nor possessors, of the strip of land in question, and in circumstances where they are not challenging those findings on appeal, they have no legal rights which would be affected by the outcome of the appeal.

25. Put another way, there is no present dispute between the parties as to their respective legal rights which would be affected by an appeal. It is true that as owners of the neighbouring property the appellants have a real interest, indeed I am sure a very strong interest, in the dispute. They are very interested in it and by it, but their legal rights would not be affected. What is determined by the declaration is the extent of the respondent's legal rights and not those of the appellants.

26. That is not to say there are no circumstances in which the appellants' legal rights could be affected. The respondent does not dispute the appellants' own ability to access the lane through their gate. The declaration of a right of way does not disturb the right the appellants have to access their own land. If the respondent were to take action which amounted to a substantial interference with the appellants' right of access, for example, blocking it or churning up the surface so it was unusable, then the appellants would have a right to complain because their legal rights would be interfered with.

27. A point was made that one of the effects of the judge's order is to require the right of way to be registered, not only as benefiting the respondent's registered title (Glenhead Farm) but also against the title to the appellants' farm, Hyde Hill Farm. That is unusual, so I considered whether that would make any difference. Normally, the burden of a right of way

would not attach to any title other than the title of the land over which it passed (and that of the servient tenement).

28. It was explained to me by counsel for the respondent, and I accept this, that the reason the judge made the order in the way he did was essentially a product of the nature of the dispute, which commenced with interference with what the respondent said was her right of access. I do not consider that the fact that the judge has made an order in these terms, or that registration against the appellants' title may be contemplated (in fact it is not reflected expressly in the order) makes any difference. The fact of the matter is that no part of the right of way passes over land either owned or possessed by the appellants.

29. I asked the appellants' counsel what might happen if the respondent managed to identify the unregistered owner of the land and negotiated the grant of a right of way in the terms declared. The reality is that as long as their own land and own access is not substantially interfered with, the appellants would not be able to complain. It is no answer to that to suggest that the appellants might themselves be able to negotiate to buy the unregistered land or that they could take possession of it. Those are not the facts before this court and they are not the facts as found by the judge.

30. There was a dispute in the county court about the respective extent of the parties' legal rights. It was not inappropriate for the judge to exercise his discretion to go on and make a finding about the right of way, even though it was not necessary to his decision. However, the position is different in this court, and the question I have to consider is whether it would be appropriate for this court to entertain an appeal about the discretionary grant of declaratory relief in circumstances where there is no longer any live issue about the existence or extent of a legal right as between the parties.

31. Although the court does have a broad discretionary power to grant declarations, there are limits to it. For a relatively recent statement see *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387 at [120], in particular the first three subparagraphs, which read as follows:

> "(1) The power of the court to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.
>
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question."

32. For another very recent example showing the width of the court's discretion, see *Mexichem UK Ltd v Honeywell International* [2020] EWCA Civ 473, where Floyd LJ said at [13]:

> "The court enjoys a broad and flexible discretion to grant declaratory relief where it would serve a useful purpose to do so. A declaration should not be made where it serves no useful purpose, but, subject to that, the approach is one of discretion rather than jurisdiction….."

33. As these extracts show, the approach the court now takes does allow some flexibility and, indeed, a greater flexibility than that recognised in the House of Lords' decision in *Gouriet v Union of Post Office Workers* [1978] AC 435. These extracts also amply demonstrate why the judge had the discretion to grant the declaration that he did in this case.

34. Counsel for the appellants relied, in particular, on *Milebush Properties v Tameside Metropolitan Borough Council* [2011] EWCA Civ 270. That was a case that related to a right of way that a developer undertook to grant as a term of a section 106 agreement. It was held that one of the landowners who would be entitled to benefit from the right of way was able to enforce the undertaking, even though the landowner was not a party to the agreement in question and so did not itself have the legal right vested in it. However, it can be seen very readily why there was a legitimate interest in that case in having the right of way declared. Similarly, in this case, Mrs Catchpole, the respondent, had a legitimate interest in having the right of way declared where it had been interfered with.

35. Counsel for the appellants also referred me to statements at sections 5-21 to 5-23 in *Zamir & Woolf, The Declaratory Judgment*, including to the effect that an interest in the outcome of the dispute is sufficient. The authors cite the judgment of Millett LJ in *Re S* [1996] Fam 1, in particular where he referred to the need for a real and present dispute between the parties as to the existence or extent of a legal right, and made the point that it is not necessary that the legal right be a right which is vested in either party. That is, of course, right, but what Millett LJ also said was that not only must the legal right be contested by the parties, but each of them should be affected by the determination of the issue.

36. Whilst the appellants may consider that they are affected, they are not in legal terms. Their legal rights are not affected by the existence or scope of the right of way that the judge declared. It makes no difference to their legal rights, at least in the absence of any substantial interference with their land or their access to it, and none has been suggested.

37. As the defendants in the lower court, the appellants obviously in principle have standing to seek permission to appeal. There is no procedural obstacle to them doing so under CPR 52. However, the court's power to grant permission to appeal under CPR 52.6 is discretionary. The rule provides that the court may give permission to appeal if there is a real prospect of success or some other compelling reason for the appeal to be heard. The court is not required to grant permission if either of these tests is met: it retains a discretion and, as is always the case, it must exercise any discretion conferred by the rules in accordance with the overriding objective.

38. In this case, any legal issue as to the existence and extent of an easement would be between the respondent and the unidentified owner of the unregistered land over which the easement would exist. The outcome of any appeal could affect the respondent's legal rights but it could not affect the legal rights of the appellants. This is also not a case where there is any suggestion that there is an element of public interest that means that the court should intervene to permit an appeal.

39. The matter might be tested this way. Suppose that the judge had not gone on to make a declaration of the right of way. In that case, the appellants would not have been able lawfully to challenge subsequent use of the access by the respondent because they would be bound by the determination that they did not own or possess the land. Whether they went into possession later and tried to claim it would be another matter. That, as I say, is not the facts before this court. On the facts before this court, there is no legal right that they could be seeking to protect.

40. The same would apply if the judge had declared the existence of a limited right of way and the appellants subsequently sought to argue that the respondent was making use of the access to a greater extent than permitted. Again, I appreciate the significance of this matter to the appellants and their view that it has a real impact, or a potential real impact, on their land, but the court's concern is private law rights. That is obvious from *Gouriet* and, although the position has been relaxed to an extent following *Gouriet*, that is the foundation. The question is whether the parties' respective legal rights are appropriately engaged. They were engaged before the county court judge. They would not be, as far as the appellants are concerned, on appeal.

Conclusions

41. In all these circumstances, I do not consider that it is appropriate to grant permission to appeal. It would unnecessarily prolong a dispute that does not now engage the appellants' legal rights and it would involve additional expense and delay in achieving finality as well as requiring additional court resources. Granting permission to appeal would not be proportionate and would simply not serve a useful purpose. The appellants are clearly interested as neighbours, but that interest is not sufficient in the absence of any impact on their legal rights.

42. As holder of the right claimed, a right which the appellants disputed, the respondent clearly had the appropriate standing to seek a declaration as to its existence, but it does not follow that the appellants should be entitled to challenge that finding on appeal when they have not challenged the court's finding that they neither own nor control the land in question.

43. In the light of this conclusion, I do not need to express a view either on the application to adduce further evidence, or on the question whether the grounds of appeal would, if the appellants had the appropriate standing, disclose a real prospect of success, and I did not hear submissions on those issues.

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*We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.*