IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
APPEALS LIST (ChD)
[2020] EWHC 237 (Ch)

Appeal No. CH-2018-000206

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday 30 January 2020

Before:

HIS HONOUR JUDGE HODGE QC

Sitting as a Judge of the High Court

B E T W E E N :

(1) BARRY BOAS
(2) DENISE BOAS
(3) ANDREW RICHARD BOAS

Claimants/Appellants

- and -

AVENTURE INTERNATIONAL LIMITED

Defendant/Respondent

MR DANIEL BURTON (instructed by Raymond Saul & Co LLP) appeared on behalf of the Claimants/Appellants.

MR JOSHUA SWIRSKY (instructed by Prometheus Law) appeared on behalf of the Defendant/Respondent.

J U D G M E N T

JUDGE HODGE QC:

1 This is my extemporary judgment in the case of Barry Boas and two others (as claimants and appellants) against Aventure International Limited (as defendant and respondent), Appeal Reference number CH-2018-000206. Had he been asked to consider this case, Sir Arthur Conan Doyle might have described it as 'The Case of the Three Fences'.

2 This extemporary judgment is divided into seven sections as follows: (1) Introduction (2) Background (3) The Recorder's judgment (4) Permission to appeal (5) Applicable law (6) Submissions (7) Conclusions.

INTRODUCTION

3 This is an appeal from a judgment of Mr Recorder Lawrence Cohen QC, sitting in the County Court at Central London Civil Justice Centre, on the trial of a Part 7 claim issued on 31 March 2016 seeking a declaration as to the true boundary separating the parties' freehold land together with injunctive relief and/or damages for trespass.

4 The trial took place over three days between 8 and 10 May 2018 and the learned Recorder handed down a reserved judgment on 12 July 2018. The proceedings were the result of the partial removal by the respondent, in August 2014, of a metal palisade fence which the appellants assert had been situated on the line of the true boundary between the parties' land followed by the construction by the respondent, in September 2014, of a new fence which was some 1.13 m closer to the appellants' land. This new section of fencing extends for some 28.3 m and thus the area which is the subject-matter of the present dispute comprises some 32 sq.m. of land. A helpful plan of the area in question appears at page 68 of the appeal bundle.

5 A further plan was prepared for the purposes of this appeal by the appellants' surveyor. This appears at page 59 of the appeal bundle. This plan post-dates the handing down of the Recorder's judgment by about a month. It is not an agreed plan, and the appellants have not sought to rely upon it as further evidence on this appeal. It is indicative of the claimants' analysis and understanding of various features of the land identified in the evidence given at the trial but I make no findings as to its accuracy and I treat it (as is common ground) as being of no evidential value on this appeal.

6 Permission to appeal was granted by the late Henry Carr J on 12 March 2019 at a hearing attended by counsel for both parties in accordance with case management directions which had been given by Mann J on 20 November 2018. Henry Carr J's reasons for giving permission to appeal were delivered in an extemporary judgment, an approved transcript whereof (bearing the neutral citation number [2019] EWHC 1020 (Ch)) appears at pages 61C to E of the appeal bundle.

7 Both at the trial and on the appeal, both before Henry Carr J and now me, the claimants (and appellants) were represented by Mr Daniel Burton (of counsel) and the defendant (and respondent) was represented by Mr Joshua Swirsky (also of counsel). I understand that I have been authorised by the Chancellor to hear this appeal from the Recorder sitting as a Judge of the High Court under s.9(1) of the Senior Courts Act 1981. The hearing of this appeal occupied a full court day yesterday (29 January 2020) preceded by a half day's pre-reading by me.

8 Both counsel have produced helpful and detailed written skeleton arguments and they have provided two bundles comprising some ten case law authorities. Mr Burton addressed me in opening for a little over two hours. Mr Swirsky replied, either side of the luncheon

adjournment, for two hours, and Mr Burton then replied for about 25 minutes. The hearing concluded at about 4.20 p.m. yesterday and I adjourned overnight to map out this extemporary judgment.

BACKGROUND

9 I can take this from Mr Burton's skeleton argument. The parties are the freeholders of neighbouring units on an industrial estate known as the Hainault Business Park in the County of Essex. Specifically:

(1) The appellants are the registered freehold proprietors of land known as 2-6 Fowler Road. The claimants' land includes a commercial yard which is let to a tenant who runs a garage providing vehicle repairs. The first and second appellants purchased the land in the middle of 2000, and the third appellant became a joint owner in April 2013.

(2) The respondent is the registered freehold proprietor of land known variously as 8-10 Fowler Road and Units P, Q, R, S, and T Pegasus Works, Roebuck Road, Hainault Business Park. The defendant's land also comprises commercial premises and is also let to tenants. The defendant first purchased the land on 30 June 1991 but it sold it on 5 July 2007, repurchasing it on 12 June 2014.

10 The extent of the plots of land and the features relevant to this claim are illustrated by the plan which was annexed to the Particulars of Claim (at page 68) and the Grounds of Appeal. This plan gives a simple overview of the position of certain key features of the boundary. Specifically:

(1) There is a retaining wall some 4 to 4.5 ft high at the south east end of the yard on the claimants' land which runs parallel to the defendant's land and is marked in black on the plan.

(2) A metal palisade fence dating from 2004 was situated on top of the retaining wall, 1.5 m back from the edge, and it ran for approximately 50 m from points A to C. It is marked in red as the "Original Fence".

(3) Between the 2004 fence and the retaining wall was a grass strip measuring 1.5 m in width with acted as a soakaway for water running down into the claimants' land at a lower level.

(4) The new fence, which is marked in yellow on the plan, was erected by the respondent in September 2014 close to the edge of the retaining wall between points C and B. The respondent also concreted over the soakaway up to and slightly beyond the edge of the retaining wall. The 2004 fence remains in place between points A and C on the plan because the land to the south and east is not within the respondent's land ownership.

(5) The disputed land is marked in green cross-hatching. It amounts to a rectangular strip of land between the new fence and the 2004 fence some 1.13 m wide and 28.3 m long and thus comprising some 32 sq.m in area.

11 The primary issue in dispute between the parties at the trial relating to the position of the boundary was the position of an original fence which had pre-dated the 2004 fence and which both parties accepted as representing the true position of the boundary.

12 In summary, the history of the land is as follows:

(1) The claimants' land and the defendant's land was in the common ownership of the London County Council pursuant to a conveyance dated February 1948. No copy of this conveyance has been located.

(2) The defendant's land was carved out of this larger estate by a conveyance from the Greater London Council, as the statutory successor to London County Council, dated 20 September 1983. No copy of this 1983 conveyance can now be located. The land was subsequently first registered on 14 November 1983.

(3) The claimants' land was created by a conveyance dated 5 May 1988 from the London Residuary Body, as the successor in title to the Greater London Council. A copy of this conveyance was before the court. It contained a parcels clause and a plan delineating the boundary by a verged red line. The claimants' land was subsequently first registered on 23 May 1988.

13 In summary, the appellants' case at trial was that:

(1) The Original fence consisted of mesh supported by concrete posts and was erected prior to 8 June 2000 and marks the boundary line between the parties' land.

(2) The respondent entered on to the claimants' land in August 2014 and removed the 2004 fence without permission. It then erected the new fence encroaching on to the claimants' land and installed concrete on the claimants' land.

(3) The respondent has wrongly refused to remove the new fence or to replace the 2004 fence and remove the concrete, and the appellants seek declaratory relief, injunctive relief and/or damages.

14 In summary, the respondent's case was that it did remove the 2004 fence and it replaced it with the new fence and that that new fence is not situated in the same position as the 2004 fence. However, the true boundary line is not the 2004 fence and the position of the new fence is consistent with the true boundary line.

15 Mr Burton notes that during and after the trial - but before judgment was handed down on 12 July 2018 - the following relevant evidence was before the judge:

(1) Aerial photographs of the land from 1953 showing, amongst other things, a series of concrete posts with a fence and a structure later identified and designated as the "Bicycle Shed".

(2) An edition of the Ordnance Survey plan for the land from 1963/1964 showing two straight parallel lines (later found to represent the retaining wall and a fence).

(3) The edition of the Ordnance Survey plan of the land from 1987 showing two parallel lines (later found to represent the retaining wall and a fence). The intervening 1973 edition of the Ordnance Survey plan has not been located and was not before the court. It was probably by reference to this plan that the plan attached to the 1983 Conveyance was drawn).

(4) A series of Google Earth satellite images dated from 1999 to 2017 showing the position of the boundary both before and after the construction of the 2004 fence and, later, the new fence.

(5) A colour photograph dated 8 June 2000 (at page 202) taken by the appellants' surveyor showing the original fence in place, together with the soakaway.

(6) A series of colour photographs shot on an iPhone by the director of the respondent, Mr Jonathan Sullivan, in or around September 2014, during the construction of the new fence, showing the disputed land before the soakaway was concreted over and the new fence was erected. Since the area shown was concreted over by the respondent, these elements have not been visible on the ground since September 2014.

(7) A series of colour photographs dated January 2017 taken by the appellants' surveyor showing elderly concrete fence posts in place at points A and B (namely along the line of the 2004 fence).

(8) An edition of the Ordnance Survey plan from 2018 which was requested by the recorder after the hearing.

(9) A series of expert reports from (a) the appellants' surveyor, Mr Simon Levy, and (b) the respondent's surveyor, Mr Mike Worby, plus a joint statement from the experts. No oral expert evidence was called at the trial.

(10) Witness statements, including statements from the first appellant (Mr Barry Boas) and Mr Jonathan Sullivan, as supplemented by oral evidence at trial.

(11) At a site visit on the afternoon of the second day of the trial (9 May 2018) the Recorder observed a series of elderly concrete fence posts between points A and C adjacent to the line of the 2004 fence (which remained in place between those two points).

THE RECORDER'S JUDGMENT

16 The Recorder's judgment is analysed at paragraph 16 of Mr Burton's skeleton argument. In his oral opening, Mr Burton complemented the Recorder for having conscientiously gone about his difficult task. He acknowledged that the first two thirds of the Recorder's judgment were absolutely fine. At paragraphs 27 to 39 of his judgment, the Recorder had set out his approach to the extrinsic evidence and to the burden of proof. At paragraph 17 of his written skeleton, Mr Burton recorded that the appellants do not criticise the learned Recorder's assessment of the law relating to boundary disputes nor his approach to the task of determining the boundary. Rather, Mr Burton asserts that it was the Recorder's assessment of the evidence where he fell into error.

17 At paragraph 16 of his written skeleton, Mr Burton records that in his judgment, the Recorder preferred the respondent's case on the position of the boundary (which Mr Burton says was itself only confirmed during the course of the trial). The Recorder held (amongst other things) that:

(1) The onus of proof was initially on the respondent to show that the original fence had been erected in a different position to the 2004 fence: see paragraph 39.

(2) It was impossible to say without extrinsic evidence that the red line on the 1988 Conveyance plan represented the original fence: see paragraph 49.

(3) The retaining wall had been built on the claimants' land by 1963-1964: see paragraphs 56 to 57.1.

(4) Aerial photographs from 1953 showed a bicycle shed and a line of concrete fence posts on the land: see paragraph 51.2

(5) The Recorder was not able to gain anything but the most limited assistance from the aerial photographs from Google Earth which showed the boundary fence from 1999 onwards. At paragraph 62 of his judgment, the Recorder said this:

> "I have been shown during Mr Burton's closing submissions aerial photographs from Google Earth dated in 1999. I do not find myself able to gain anything but the most limited assistance from them. I can see the electricity sub-station in situ close to point A in Roebuck Road and what appears to be a pile of spoil on the claimants' land alongside it."

(6) The Recorder was unable to gain a great deal of assistance from a colour photograph dated 8 June 2000 (at page 202) in either print or electronic format which showed the disputed land before the erection of the 2004 fence: see paragraph 63. The Recorder said this:

> "In preparation for the purchase of the claimants' land by the first two claimants, Mr Simon Levy surveyed the site. [The] photograph [which is now at page 202 of the appeal bundle] was taken. Mr Burton describes this photograph in his submissions as a "smoking gun" - it shows the original fence in place. I was unable to gain a great deal of assistance from the print of this photograph. I could not make any real deductions from it in its printed form. I was sent an electronic version of this which is much clearer when displayed and magnified on a high definition screen which is able to lighten and darken the image. Although I will find what I can in relation to it, I cannot accept its characterisation by Mr Burton. In short, what I can deduce is as follows:
>
> 63.1 The bicycle shed on the defendant's land has disappeared and there is standing a very small flimsy brick building which would not surprise me if it held industrial size dustbins. I cannot make a finding as to its purpose as that would be speculation but my description as to its size and appearance is useful to me.
>
> 63.2 A fence on the same type of concrete fence posts is clearly visible. However, the fence is clearly in a state of disrepair. The wire mesh is visible and is torn from the top to about half way down and is literally hanging. Finally, some of the concrete fencing posts are dark in colour and look weathered whereas others are light in colour as if they had been replaced. This gives me confidence and I find that the line of the fence

> which I have described in 1953 was unchanged, at least at this point. Importantly, it does not yet tell me anything firm as to the crucial question of the position of the fence in comparison to any other feature such as the retaining wall."

Mr Burton relies upon the Recorder's finding that the line of the fence which he has described in 1953 was unchanged at this time, i.e. in June 2000, at least at that point along the boundary. What Mr Burton does criticise, however, is the final sentence of paragraph 63.2: that the photograph did not tell the Recorder anything firm as to the crucial question of the position of the fence in comparison to any other features such as the retaining wall;

(7) Two photographs (at pages 205 and 206 of the appeal bundle) dated September 2014 and taken by the respondent's director, Mr Jonathan Sullivan. These were said by the Recorder to be of assistance and to depict (a) the remains of the old bicycle shed from the 1953 aerial photographs and (b) the remains of two old concrete fence posts still in the ground closer to the retaining wall and the new fence: see paragraphs 69-70.

(8) The Recorder observed on the site visit two further concrete posts further towards Roebuck Road where the 2004 fence still follows its original line. One of those fence posts was still in the ground vertically where the 2004 fence still follows its original line: see paragraph 71.

(9) The Recorder accepted that Mr Sullivan was more likely to be correct than Mr Boas in his recollection that the line of the new fence was on the same line as the original fence and he found this as a fact: see paragraphs 76-77.

(10) The respondent would be entitled to a declaration that the boundary between the parties' land ran along the outer face (i.e. the face on the appellants' side) of the new fence.

(11) On finding that the boundary between the claimants' and the defendant's land was along the line of the new fence, the respondent had nevertheless trespassed by a few centimetres such that the appellants were entitled to an injunction to this limited extent: see paragraph 80.

(12) The appellants have not proved any damage in trespass and, in any event (although no decision was made or required) the appellants could not maintain an action for damages in circumstances where they were not in possession and there was no permanent injury to the land which affected the reversion: see paragraph 88.

(13) It was unnecessary to enter into the question of whether the draftsman of the 1988 Conveyance plan had made a mistake: see paragraph 90.

18 The Recorder's finding was that the red line on the 1988 Conveyance plan represented the original fence. Where he differed from the appellants' submission was his factual finding as to the line of the original fence, which he found to be closer to the retaining wall than the line of the 2004 fence. The Recorder's order declared that the boundary between the parties' land ran along the outer face (i.e. the face on the claimants' side) of the fence which had been erected in 2014 from point B to point C (as identified in red on the plan annexed to the court's order). That declaration was said to relate solely to the boundary as delineated on the annexed plan and no declaration was made in respect of any other boundary in respect of either the claimants' land or the defendant's land.

19 In his closing submissions, Mr Swirsky invited me to re-read paragraphs 68 to 77 of the Recorder's judgment. In the event, I have re-read overnight the whole of paragraphs 58 to 79 of the judgment together with all of the paragraphs identified at paragraph 16 of Mr Burton's written skeleton argument.

PERMISSION TO APPEAL

20 The extemporary judgment of Henry Carr J on the application for permission to appeal provides a helpful focus for the issues which fall to be determined on this appeal. It also affords a useful foretaste of the parties' submissions.

21 At paragraph 1, Henry Carr J records that the application was one for permission to appeal against Mr Recorder Lawrence Cohen QC's judgment. The proceedings concerned a boundary dispute between the parties. In August 2014, the respondent had removed a metal palisade fence which, so the appellants asserted, was situated on the line of the true boundary between the parties' land and it had constructed a new fence in September 2014 in a different position.

22 At paragraph 2, the judge states that the dispute might be characterised by reference to three fences:

(i) A fence which was erected in the 1950s;

(ii) A fence which was erected in 2004; and

(iii) The new fence erected in 2014.

The true line of the boundary, it appeared to be agreed, was on the line of the fence from the 1950s. The question was, therefore, where was that fence? Was it along the line of the 2004 fence or the 2014 fence (assuming they were in different positions)?

23 At paragraph 3, Henry Carr J records that the Recorder had had an extremely difficult job because the relevant conveyance from 1983 had been lost. He had relied, however, on a 1988 conveyance, deciding, on the balance of probabilities, that it was likely to be the same as the 1983 conveyance for the purposes of ascertaining the boundary. The Recorder had relied very significantly on extrinsic evidence. The judgment depended on the judge having had a site visit, which he had found "very helpful", plus looking at the series of photographs and plans, on the basis of which he had reached his conclusions. There was expert evidence, but the experts were not cross-examined and therefore the judge merely considered the contents of their written reports. Oral evidence was said not to be of any great significance in the present case or, really, of any significance at all.

24 At paragraph 4, Henry Carr J records that in support of the application for permission to appeal, Mr Burton, appearing for the appellants, had made three general points. Firstly, the exercise conducted by the judge for determination of the boundary was the exercise of construction of a conveyance in the light of extrinsic evidence. There was one right answer and no margin of error, unlike, for example, a case where a judge had exercised his discretion. Secondly, because the core evidence was photographs and plans, the appeal court was in the same position as the trial court. It was a question of looking at photographs and plans. The appeal was not challenging any oral evidence. The question was whether the judge had clearly fallen into error in drawing the inferences as to what the photographs showed. Thirdly, Mr Burton had submitted that boundary disputes were essentially concerned with the construction of the original grant or conveyance, and whether a wrong inference had been drawn from extrinsic evidence. He had referred Henry Carr J to the Court of Appeal decision in *Dixon v*

Hodgson [2011] EWCA Civ 1612 and he had suggested that, here, the judge had misdirected himself on what the photographs and plans showed.

25 At paragraph 5, Henry Carr J records that Mr Swirsky, appearing on the application for the respondent, had pointed out - the judge thought correctly - that the grounds on which permission was sought were essentially errors of fact that the judge was alleged to have made. Mr Swirsky had submitted that the judge had made reasoned findings on the evidence having carefully considered the conveyancing documents, the oral evidence (such as it was), extrinsic evidence, and his own site visit. Mr Swirsky had reminded the judge of the warnings in cases, for example such as *Henderson v Foxworth Investments Limited* [2014] 1 WLR 2600, that it is not a question of whether the appellate court would have reached a different conclusion. What mattered was whether the decision under appeal was one that no reasonable judge could have reached. Mr Swirsky also submitted that this was really an attempt to re-run the trial.

26 At paragraph 6, Henry Carr J records that when initially considering the application, Mann J had directed that it should be heard orally because it really was a question of being shown the relevant photographs and forming a view as to whether there was a realistic prospect of success that, based on those photographs, the judge had clearly fallen into error in the sense that no reasonable judge could have reached the conclusion that he did.

27 At paragraph 7 Henry Carr J says this:

> "Having initially been extremely cautious about granting permission to appeal, I have been persuaded that I should do so in the present case. I do not think that it is appropriate for me to give a detailed judgment as to what I have seen in the photographs because, of course, there will be an appeal on that issue. However, comparing what Mr Burton described as his "smoking gun" photograph (on page 202 of the bundle), which shows the position of the fence in 2000, i.e. prior to 2004, with the current position of the fence (which is shown on page 223), it does appear to me that there is at least a realistic prospect of the appellants demonstrating that the line of the fence has been moved. On page 202, in 2000, it at least appears that there was quite a significant distance between the retaining wall and the fence. On the other hand, the position of the 2014 fence appears to abut very close to the retaining wall, much closer than was shown in 2000."

28 At paragraph 8 Henry Carr J continues and concludes:

> "The judge does not really deal with this point in his judgment and whilst I am very conscious that an appeal court will pay very considerable respect to the judgment of the judge, I am satisfied on the basis of what I have been shown, plus additional photographs which it is unnecessary to mention, that there is a realistic prospect of success on the appeal. That does not mean the appeal will succeed. It means that permission should be granted. So, for various reasons, I have decided to grant permission to appeal."

29 Mr Burton invites the court to note, for what it is worth, that Henry Carr J did not see fit to direct that the appeal court should undertake a site visit and view.

30 I have found Henry Carr J's extemporary judgment on the permission to appeal application a useful distillation of the battleground on this present appeal.

APPLICABLE LAW

31 There is no issue as to the correct approach to the determination of boundary disputes. At paragraph 22 of his skeleton argument, Mr Burton indicated that the essence of the court's task in determining the true position of the boundary was that it was an exercise in construction. General guidance for courts in determining the position of a boundary was said to be found in the House of Lords' decision in *Alan Wibberley Building Limited v Insley* [1999] 1 WLR 894, as distilled by Mummery LJ at paragraph 9 of his judgment in *Pennock v Hodgson* [2010] EWCA Civ 873 as follows:

> "(1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land, in this case the conveyance to the defendant being first in time.
>
> (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 private 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."

32 Turning to the court's approach to appeals, the starting point is CPR 52.21(3). The appeal court should only allow an appeal if the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court. An appeal court should only interfere with a trial judge's findings of fact, and thus allow an appeal on the basis of a challenge to such a finding, where it properly determines that the critical finding of fact is unsupported by the evidence, or where the decisions is one which no reasonable judge could have reached: see *The Mayor and Burgesses of the London Borough of Haringey v Ahmed* [2017] EWCA Civ 1861 at paragraphs 29 to 31 per Hamblen LJ.

33 In circumstances where the key evidence is documentary (in the form of photographs and plans) rather than oral evidence, an appeal court is said to be in just as good a position as the trial judge to interpret the evidence and is entitled to reverse the findings of fact on which the trial judge relied to find in favour of a party. Mr Burton instances the case of *Manning v Stylianou* [2006] EWCA Civ 1655. He refers me to paragraphs 12 and 13 in the judgment of Maurice Kay LJ. Mr Burton also submits, in reliance upon the judgment of Waller LJ at paragraph 19, that whilst practitioners should not confuse the approach to reviewing an exercise of discretion with the approach to reviewing a judge's findings of fact, when, as in a boundary dispute, the exercise involves the consideration and the balancing of various pieces of extrinsic evidence in reaching a conclusion on the construction of a conveyance, the exercise should be regarded as a mixed question of fact and law.

34 Mr Burton submits that in a case, such as the present, where the decision was arrived at on the basis of inferences from the photographs and other documents rather than in reliance upon oral evidence, the appeal court should pay no special deference to the trial judge. It should

not be over reliant on the sanctity of the trial judge's conclusions. Rather, the appeal court is said to be in the same position as the court of first instance and should allow the appeal if satisfied that the judge construed the documentary evidence incorrectly or drew the wrong inferences from the primary facts.

35 In *Manning v Stylianou*, Maurice Kay LJ said this (at paragraphs 12 and 13):

> "12. ...There is no doubt that the judge's use of the photographs ... played a crucial part in his conclusion that the metal stump identified by him as the culprit ... was on the defendant's forecourt. I consider that the judge was wrong about that. Mr Cliff's attempt to support the judge's reasoning and conclusion is founded to a significant extent on Mr Gilbert's sketch plan. However, the judge did not rely on it for this purpose and, as I have said, it is irreconcilable with the photographs. Mr Cliff's attempts to interpret the photographs so as to position the phone boxes on, or more on, the defendant's land does not convince me at all.
>
> 13. It is with great hesitation that this court should interfere with the conclusion of a trial judge on such a matter. However, I am satisfied that this is not simply a case of taking a different view: it is a case of the judge being wrong about a crucial finding in the case. It is a matter which, with respect, we are in no worse a position to assess, having before us all the material that the judge had before him and which was so influential upon his decision."

36 At paragraph 19 Waller LJ said this:

> "...I would emphasise that an appeal on fact is not concerned with reviewing the exercise of a judge's discretion. It is not because there is room for two views of the facts that the Court of Appeal is less inclined to interfere with the judge's conclusion as compared, for example, to his or her views on points of law. The finding of fact is a finding that, on the balance of probability, something actually existed or an event actually occurred. The deference that a court pays to a judge's findings of fact stems from the advantage that the judge may have had in the trial process, of seeing the witnesses, having a greater feel for the atmosphere of the trial and matters such as that. We have interfered in this case because we were in as good a position as the judge in relation to the photographs on which he founded his judgment. But what I urge practitioners to do is not to confuse the approach to reviewing an exercise of discretion with the approach to reviewing a judge's findings of fact..."

37 Mr Swirsky seeks to distinguish the present case from *Manning v Stylianou* on the basis that that was a personal injury case involving the claimant tripping over a metal stump. The issue on appeal, and also the issue at trial, had been the position of the metal stump. Was it on the defendant's land or not? That can be seen from paragraph 11 of the judgment. That issue was determinative of the case and the Court of Appeal had been able to see that the trial judge was wrong by reference to two photographs. It was not a case where there had been the wealth of evidence, albeit imperfect, that there was in the current case. Even then, as paragraph 13 of Maurice Kay LJ's judgment was said to show, the Court of Appeal had been extremely cautious about overturning the trial judge's findings of fact.

38 Mr Burton submits that when construing a conveyance to determine the position of a boundary, the appeal court will interfere if the judge has taken into account immaterial factors, has omitted to take into account material factors, has erred in principle, or has come to a decision that was impermissible. Mr Burton relies upon the approach of the Court of Appeal in the case of *Dixon v Hodgson*. The judgment was delivered by Black LJ. At paragraph 6 she recorded that the basis for the substantive appeal was that Recorder had applied the wrong legal test when determining the boundary or, if he had applied the correct test, he had construed the documentary evidence incorrectly and he had drawn the wrong factual inferences from the documents and the physical features on the site. This was said impressively to sum up the applicable legal test and to represent precisely the situation in the instant case.

39 Mr Burton cited from the concluding paragraphs of Black LJ's judgment (with which the other two members of the court, Sir David Keene and Longmore LJ had agreed):

> "65. ...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 ... 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."

40 Mr Burton submits that this is not an attempt to re-run the original trial. However, he says that the appeal court is under a duty to ensure that the lower court came to a correct conclusion and to interfere with the lower court's judgment where the appeal court is satisfied that the lower court was plainly wrong. Mr Swirsky characterised the *Hodgson* case as an example of the trial judge having been plainly wrong and probably also as having made an error of law.

41 Mr Burton stresses that the appeal court will interfere if the judge's decision is plainly wrong. He cites the Court of Appeal's decision in the case of *Stuart v Goldberg* [2008] EWCA Civ 2, [2008] 1 WLR 823. He referred me first to paragraph 76 in the judgment of Sedley LJ:

> "...As the words 'reluctant' and 'generally' imply, the appellate court also has a broader role which entitles it to intervene if, notwithstanding the absence of either a mistaken inclusion or exclusion of factors or a perverse conclusion, the decision at which the judge has arrived is plainly wrong. To reserve more to this court would be to render the exercise of judgment at first or second instance merely provisional; but to reserve less would be to abdicate part of the appellate function. For these reasons I respectfully adopt what is said at the end of paragraph 81 of Sir Anthony Clarke MR's judgment."

42 That paragraph reads as follows:

> "If the judge reached a conclusion that was plainly wrong, it would be the duty of the appeal court to interfere. I feel sure that in referring to the possibility of [sic] a judge might come to a conclusion that was impermissible or not open to him Thomas LJ intended to include the case where the judge is plainly wrong. In any event, I am firmly of the view that it should be included."

43 Mr Swirsky emphasises what Sir Anthony Clarke MR went on to say at paragraph 82:

> "Although I agree that the exercise upon which a judge of first instance embarks in a case of this kind is not, strictly speaking, the exercise of a discretion, the role of an appellate court is very similar in the two classes of case. This can be seen from Thomas LJ's conclusion that the appellant must persuade the court that the judge was wrong and will only succeed in doing so if he shows that the judge 'has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him' or is plainly wrong. The line between the approach of an appellate court reviewing the exercise of a discretion and its role reviewing a decision of this kind is a [sic] very narrow. This is because the decision whether a second action is an abuse of court involves the court balancing a series of different factors before reaching its conclusion."

44 Mr Swirsky submits that great caution should be shown before an appeal court interferes with a decision of the lower court. This is said not to be one of those cases.

45 Mr Swirsky submits that it is only in rare cases that an appellate court should go behind a trial judge's decision on the facts. He has referred me to Lord Reed's warning in *Henderson v Foxworth Investments Limited* at paragraph 62:

> "Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone 'plainly wrong', and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

46 Mr Swirsky reminds me of the warning given at paragraph 63 that an appellate court should not come to a different conclusion on the evidence from the court below "unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion". Mr Swirsky applies that to a situation, such as the present, where the trial judge has conducted a site view. Mr Swirsky submits that the appeal court should not come to a different conclusion than the lower court where there has been a site visit and view unless it is satisfied that any advantage enjoyed by the trial judge by reason of the site visit and view could not be sufficient to explain or justify the trial judge's conclusion. Mr Burton reminds me that this is not a case in which Henry Carr J had directed that the appeal court should undertake its own site view.

47 Mr Swirsky also reminds me of what is said at paragraph 67 of Lord Reed's judgment:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

48 Mr Burton would say that this is a case of a demonstrable misunderstanding of relevant evidence.

49 Mr Swirsky also referred me to the decision of the Supreme Court in the earlier case of *McGraddie v McGraddie* [2013] UKSC 58 at paragraphs 3 and 4. There, it was emphasised that a trial on the merits should be "the main event" rather than "a try out on the road". Mr Swirsky submitted that the appeal court should not be asked to consider the case afresh and he emphasised the high threshold that the appellants had to overcome. He submits that the observations in these authorities show that deference to the trial judge goes beyond merely his advantage in hearing oral evidence. In particular, it would extend to the case where the trial judge has undertaken a site visit and view.

50 Mr Swirsky also relied upon the 'Greek Yoghurt' case of *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5. He referred me to Lewison LJ's summary at paragraph 114 of the reasons why appellate courts generally should not go behind findings of fact made by trial judges unless they are compelled to do so. At paragraph 114 of his judgment, Lewison LJ said this (omitting case citations):

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them... These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include
>
> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

51 Mr Swirsky says that this is a case of "island hopping". It is a case in which the appellants are seeking to have "a second go". He says that it is a duplication of the trial judge's role in the hope of achieving different findings of fact.

52 Mr Swirsky also referred me to what Lewison LJ had to say at paragraph 115. I quote again omitting case law authorities:

> "It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations..."

53 Mr Swirsky submits that these cases set a high threshold. Appeals on the facts should succeed only where the judge's decision on the facts is inexplicable or unreasonable. There must be an identifiable error and not just a different analysis that is favourable to the appellants. In the present case, the Recorder approached the case carefully, systematically, and conscientiously. He has reached a conclusion holistically by putting all the evidence together and the appeal court should not interfere with it.

54 For the purposes of the present appeal, I derive the following propositions from the authorities:

(1) An appeal court should only interfere with the findings of fact made by the trial judge if it is satisfied that a critical finding of fact is unsupported by the evidence, or the decision is one which no reasonable judge could have reached on the evidence in the case.

(2) Although the court can interfere where it is satisfied that the trial judge is plainly wrong, this means that the court must be satisfied that the decision under appeal was one that no reasonable judge could have reached on the evidence before him.

(3) The appeal court should only interfere with the findings of fact made by a trial judge if it is compelled to do so and only after it has reminded itself of the considerations specifically identified by Lewison LJ in his judgment in the 'Greek Yoghurt' case; and

(4) Specifically, on the facts of the present case, the appeal court should only interfere with the Recorder's decision if it is convinced that the Recorder drew the wrong conclusions from the photographic and other evidence relied upon by the appellants.

SUBMISSIONS

55 In his Grounds of Appeal and skeleton argument Mr Burton identified no less than seven errors in the Recorder's assessment of the evidence which are said to be of critical relevance to his determination of the true line of the boundary between the parties' properties. I propose to reverse Mr Burton's suggested errors (1) and (2) to give them a more logical and coherent structure and because it is really Mr Burton's second suggested error (the first to

which I shall refer) which is really the critical point at which the learned Recorder's factual analysis is said to have gone fatally wrong.

56 As so re-ordered, Mr Burton submits that the judge's errors were, in summary, as follows: First, the Recorder was wrong to find that the so-called "smoking gun" photograph (at page 202) dated 8 June 2000 was of no assistance in determining the position of the original fence in circumstances where the photograph is said clearly to show a significant verge between the outside of the retaining wall containing four metal frames and six concrete fence posts consistent with the position of the 2004 fence. The Recorder is said to have given insufficient weight to this evidence. Mr Burton develops this argument at paragraphs 38 to 45 of his written skeleton.

57 Secondly, the Recorder was wrong to find that the remains shown in the September 2014 photograph are part of the bicycle shed which is visible in the 1954 aerial photographs (at pages 182 to 184 and pages 184A and B of the appeal bundle). It is said that, in consequence, the Recorder subsequently gave too much weight to this finding which Mr Burton says was not really canvassed during the course of the trial.

58 Thirdly, it is said that the Recorder was wrong to find that the photographs from September 2014 (at pages 205-206 of the appeal bundle) showed elderly concrete posts in situ close to the retaining wall. He gave too much weight to this evidence.

59 Fourthly, it is said that the Recorder failed to have due regard to the straight line of the concrete fence posts shown in the 1953 aerial photographs. He gave insufficient weight to this evidence.

60 Fifthly, it is said that the Recorder was wrong to find that the Google Earth satellite photographs from 1999 through to 2003 and following provided no assistance in circumstances where the maps all show the retaining wall and a parallel line consistent with a fence which was about 1.5 m from the edge of the wall. Again, it is said that the Recorder gave insufficient weight to this evidence.

61 Sixthly, it is said that having correctly held that the parallel lines on all of the editions of the Ordnance Survey plan and the plan for the 1988 Conveyance and, by inference, the 1983 Conveyance represented the retaining wall and a fence, the Recorder failed to have due regard to the position and straightness of those lines and the position of the red line on the 1988 and, by inference, the 1983 Conveyance plans. It is said that the Recorder gave insufficient weight to that evidence.

62 Seventhly, it is said that the Recorder failed to have due regard to the position of original concrete fence posts at points A and C on the plan, as well as concrete fence posts he observed during the course of his site visit, and also the appellants' expert evidence which illustrated that the posts were all in a straight line following the line of the 2004 fence. Again, it is said that the Recorder gave insufficient weight to this evidence.

63 I propose to focus upon the first of these suggested errors. I do so because if the "smoking gun" photograph (at page 202) is a good point, in my judgment it feeds into, and vitiates, the whole of the approach to, and analysis of, the evidence adopted by the Recorder. It was this point which led Henry Carr J to give permission to appeal. The characterisation of the photograph as a "smoking gun" was apparently first deployed in Mr Burton's closing oral submissions although that characterisation does not, in terms, appear at the relevant paragraphs - paragraphs 20 and 22 - of Mr Burton's post-hearing, but pre-judgment, written closing submissions dated 11 May 2018. The point was so described at paragraph 63 of the

Recorder's judgment. However, the Recorder said that he was unable to gain a great deal of assistance from the photograph and could not accept its characterisation by Mr Burton.

64 In closing, Mr Burton emphasised that the Recorder had made the important finding at paragraph 63.2 of his judgment that the line of the 1953 fence had been unchanged at this point. That finding has to be viewed in conjunction with the Recorder's earlier finding, at the end of paragraph 40 of his judgement, that counsel on both sides had been right to say that the boundary was indicated by the line of the original fence.

65 The question which the Recorder therefore had to determine was precisely where the original fence was at the material date, which must be the date of the 1983 Conveyance by which the two parcels of land, now owned by the appellants and the respondent, first passed out of the common ownership of the Greater London Council. As Mr Burton put it at the end of his reply, the Recorder made a finding that the fence posts shown on the "smoking gun" photograph were the original fence posts dating from 1953 (or later replacements). The June 2000 photograph shows that they were in the same position as the 2004 fence and not the position in which the Recorder found them to be. Mr Burton says that the appeal is really as simple as that. Mr Burton says that the judge was plainly wrong. The error in this case is sufficiently great to get over the bar of allowing this appeal wherever that bar is placed.

66 Earlier in his reply, Mr Burton submitted that the Recorder had clearly misdirected himself on the clear evidence in the photograph. Mr Burton was not seeking to re-run the trial. The Recorder (even though he had viewed the site) was in no special position different to that of this appeal court. The Recorder was plainly wrong, and his key decision on the evidence was clearly incorrect. His conclusion was one at which no reasonable tribunal, properly directed, could have arrived. That view is said to be supplemented by the Google Earth photographs, where the grass verge is clearly visible from 1999 onwards. That verge is said to be consistent all the way through the series of photographs.

67 As to the objection of the difficulties of perspective, Mr Burton submitted that the white Ford Coupe in the far corner of the photograph at the back is sufficient to give perspective. The photograph at page 223 clearly shows the extent of the verge. It was said to be as plain as day what the June 2000 photograph showed. It was said to be incompatible with any possible conclusion that the new 2014 fence had been placed in the same position as the original fence. The position of that original fence was clearly shown on the photograph at page 202 and it was manifestly not in the same position as the new 2014 fence.

68 Mr Burton had developed that argument at paragraphs 38-45 of his written skeleton. The June 2000 photograph taken by the appellants' surveyor, Mr Levy, in anticipation of the purchase of the property by the first and second appellants was a crucial piece of evidence as to the position of the original fence. Indeed, apart from some of the Google Earth satellite photographs, it was the only photographic evidence which showed the land before the construction of the 2004 fence and after the construction of the retaining wall. In objective terms, the photograph was said to show the following:

(1) The yard in the appellants' land at a perspective facing into the respondent's land. The respondent's land was said to be clearly visible in the top right of the photograph, especially the red brick building with the blue door.

(2) The retaining wall and the original fence with six (or possibly seven) standing concrete fence posts with connecting wire mesh.

(3) There was a significant grassy strip between the outside of the edge of the retaining wall and the original fence on which there were at least four metal frames or boxes of significant depth which were said to be consistent with there being approximately 1.5 m between the original fence and the edge of the retaining wall and thus located on the area which served as the soakaway.

(4) There was a tree or two trees which had grown in the soakaway between the edge of the retaining wall and the original fence. There was perhaps a seventh concrete fence post just visible behind one of the trees.

69 Mr Burton submits that the Recorder was therefore wrong to conclude (at the end of paragraph 63.2 of his judgment) that the photograph:

> "Importantly … does not yet tell me anything firm as to the crucial question of the position of the fence in comparison to any other feature such as the retaining wall."

70 With respect to the Recorder, this conclusion is said by Mr Burton to be unsustainable insofar as it was unsupported by the contents of the photograph and the decision reached on that photograph was one which no reasonable judge could have reached. Mr Burton says that it is telling that Henry Carr J relied heavily on the photograph when granting permission to appeal. Specifically, that photograph is said clearly to show the position of the original fence (with at least six elderly concrete fence posts) along with the grass soakaway. This is said to be wholly consistent with the appellants' case on the position of the boundary and wholly inconsistent with the respondent's case.

71 Contrary to the Recorder's express finding, Mr Burton submits that the photograph is determinative in illustrating that the position of the original fence was significantly further back towards the respondent's land from the position of the new fence and therefore it could not be on the line of the new fence (on which the Recorder held that it was a matter of inherent probability that a replacement fence had been built on the same line as the replaced fence: see paragraph 39 of the judgment). Mr Burton concludes that this error caused the Recorder to give insufficient weight to this important piece of evidence and it thereby contributed to him giving undue weight to the September 2014 photographs.

72 Mr Swirsky began his submissions by identifying the trigger for the present dispute and the fundamental issue between the parties. The trigger for the litigation had been the respondent's erection of a new fence in 2014. That fence had replaced the earlier 2004 fence which, in turn, had replaced an earlier fence (or fences). Mr Swirsky submitted that there was likely to have been more than one pre-2004 fence.

73 The fundamental dispute was said to be that:

(1) The respondent contends that the 2014 fence was built along the line of the original fence while the 2004 fence, erected by a land agent then employed by both parties, had encroached on the respondent's land; whereas

(2) The appellants say that the 2004 fence was built along the same line as the original fence and it is the 2014 fence that is encroaching on the appellants' land.

74 Mr Swirsky points out that the Recorder had correctly identified the issues in the case at paragraph 14 of his judgment. For present purposes, it is sufficient to refer to paragraph 14.1:

> "Where does the boundary lie between the claimants' land and the defendant's land? The parties appear to have been very close to one another in principle albeit reached by somewhat different reasoning. Each party appears to accept that the boundary lay on the claimants' side to the face of the original fence. The difference between them is where was the line of the original fence at the material date, that is 20 September 1983, which is the date of the relevant conveyance? I regard this factual question as part of the process of the interpretation of the 1983 conveyance and I am conscious of the need to collate and interpret historical information as to what was then found to be on site."

75 Mr Swirsky emphasises that although the appellants have sought to identify seven factual errors that they say the Recorder made, what they really mean is that the Recorder made findings on these points which did not agree with the appellants' case. In advancing their present arguments, the appellants are said to make many of the points that they did in their closing submissions, points which have been rejected by the Recorder. Mr Swirsky submits that, in effect, the appellants are seeking to re-argue their case after a bit of time for reflection having failed before the trial judge.

76 The respondent's case is said to be simple. The Recorder made a reasoned finding on the evidence as to the position of the boundary having carefully considered:

(1) The conveyancing documents;

(2) The oral evidence that he heard;

(3) The extrinsic evidence available from maps, photographs, and so forth; and

(4) The extrinsic evidence that was visible on the site view.

77 Mr Swirsky emphasises that the Recorder had to examine a number of documents, plans, and photographs, as well as hearing oral evidence and visiting the site over half a day. It is not a case, Mr Swirsky says, where an appellate court can look at a plan or a photograph and say that the trial judge was plainly wrong. In this case, the appellate court is being asked to reject the careful findings of the Recorder and effectively to ignore:

(1) The site visit;

(2) The Recorder's view of the evidence; and

(3) The careful consideration of the totality of the evidence by the Recorder.

78 Mr Swirsky submits that in order to do justice to the case, the appeal court would have to replicate the trial and look at all the evidence, not just that highlighted by the appellants. It would also need to consider the respondent's arguments on the totality of the evidence rather than just the points made by the appellants. It would need to repeat the exercise of going back over the conveyancing history. He submits that it would not be possible to do this without the appeal court conducting a site view as well. Mr Swirsky points to the fact that Mr Burton's skeleton argument runs to 76 numbered paragraphs, extending over some 27 pages. This is said to be indicative, in itself, of the fact that this is an attempt to re-argue the whole case. Mr Swirsky submits that the Recorder's judgment makes sense of the evidence that he found for the reasons he gives at paragraphs 37 and following of his judgment.

79 Mr Swirsky submits that the Recorder was right to reach the conclusions that he did. He arrived at those conclusions after carefully considering all the available evidence and acknowledging that he was doing the best he could on the evidence that was available to him. When deciding the question of the boundary, it had been common ground that the Recorder had to construe the relevant conveyancing documents; but, in doing so, he was entitled to have regard to the available extrinsic evidence. Findings on that extrinsic evidence were questions of fact that were no different from any other findings of fact made at trial.

80 Whilst much of the evidence in the case was documentary or physical, there was also oral evidence in the case, in particular from Mr Sullivan for the respondent and Mr Boas for the appellants. This oral evidence directly concerned the position of the fences in 2004 and 2014. The Recorder found that he preferred the evidence of Mr Sullivan. Therefore, this is not a case where it can be said, as the appellants seem to suggest, that the case was decided solely by reference to the documents.

81 On the "smoking gun" point, Mr Swirsky acknowledges that this photograph was the high point of the appellants' case at trial. However, it was not taken for the purpose of showing where the boundary was. In fact, the fence is really in the background of the subject-matter of the photograph. The photograph was taken from a strange angle and Mr Swirsky says it is not possible to know what effect that has on the perception of the position of the fence posts. He points out that it is well known that photographs can be deceptive because of the angle at which they are taken and also the perspective.

82 In this case, the photograph does not show where the fence posts meet the ground. The bottoms of the posts are said to be lost in the long grass. The fence posts clearly descend into the ground but it is not clear where this is. It is impossible to determine how much further in the fence posts go. In these circumstances, it is said that the Recorder was right to dismiss the photograph as being definitive. The photographs do no more than raise a doubt; and the appellants must go further and show that the fence was much further away from the retaining wall than the 2014 fence.

83 Mr Swirsky submits that, rather than failing to give sufficient weight to this photograph, as alleged by the appellants, the Recorder simply failed to treat it as determinative, as the appellants had wanted. It is said to be clear from his judgment that the Recorder did consider the photograph carefully in the light of all the other evidence. In effect, Mr Swirsky says, what the appellants are now saying is that most of the evidence in the case was unnecessary. All the Recorder had to do was to look at this photograph and that was determinative of the case. Mr Swirsky points out that this was not the way the case had been argued at trial as can be seen from the appellants' own proposed findings of fact which were put to the trial judge. Mr Swirsky says that the case is far more complex, on the appellants' case, than they now seek to present it.

84 In the course of his oral submissions, I referred Mr Swirsky to the metal structures that clearly stood on the verge on the appellants' side of the fence. Mr Swirsky submitted that it was dangerous to speculate about their depth. He did not think that Mr Levy had dealt with those structures in his expert evidence at all and had he thought that it was going to assist the appellants' case, Mr Levy would have been astute to make points about them. When pressed about the view of the metal structures and the fence posts shown on the photograph at page 202, Mr Swirsky said that all he could say was that one was really entering the realm of speculation. The photograph might show something of significance but it might not. He could not shed any further light on the photograph. To do so would be to give evidence.

85 Mr Swirsky concluded his submissions by reminding the court that there was a higher threshold for an appeal on the facts and it was clear on any fair reading of the Recorder's judgment that he had approached this case carefully and conscientiously. He could not be said to have reached an irrational conclusion. Those, in summary, were the submissions.

CONCLUSIONS

86 The Recorder's conscientious, reserved judgment proceeded in stages. He began at paragraph 28 by recording that during the course of the trial, it had become common ground between the parties that the 1983 Conveyance was the one by reference to which the boundary must be defined. As the conveyance by which the common owner had conveyed away the respondent's land to a third party whilst retaining the appellants' land, this must, in my judgment, be right.

87 At the end of paragraph 40 of his judgment, the Recorder indicated that his consideration of the conveyancing history indicated that counsel on both sides had been right in submitting that the boundary had been indicated by the line of the original fence. The question which the Recorder had to determine was where the original fence had been at the material date, which was the date of the 1983 Conveyance.

88 Towards the end of paragraph 63.2 of his judgment, the Recorder had concluded that the line of the fence in 1953, at least at this point, had been unchanged by the time of the June 2000 photograph. It followed that the line of the fence as shown in the June 2000 photograph was the line of the true boundary between the properties of the appellants and the respondent. The photograph at page 202 showed the line of the original boundary fence. There is no challenge to any part of the Recorder's reasoning thus far, and it seems to me that that reasoning is impeccable.

89 Where, in my judgment, the Recorder clearly went wrong was in finding that he was unable to gain a great deal of assistance from the photograph at page 202. The penultimate sentence of paragraph 63.2 of the judgment, that the line of the fence was unchanged in the year 2000 from 1953, was clearly correct; but, in my judgment, the next sentence of paragraph 63.2, the final sentence, is clearly wrong. The Recorder said that the photograph did not tell him anything firm as to the crucial question of the position of the fence in comparison to any other feature, such as the retaining wall. I am satisfied that the Recorder clearly fell into error on that for the reasons which were advanced by Mr Burton and which I have set out in the preceding section of this judgment.

90 Looked at on its own, it is clear that the width of the verge on top of the retaining wall on the appellants' side of the fence, as shown on the June 2000 photograph, is clearly much wider than the area at the top of the retaining wall on the appellants' side of the 2014 fence as shown on the photographs at pages 222, 223, and 226. This is clearly the case even apart from the position of the trees and the unidentifiable metal structures. When this was put to him in the course of his oral submissions, it seemed to me that Mr Swirsky had no real answer to this point. The position becomes even clearer when one compares and contrasts the photograph taken in June 2000 (at page 202) with the later photographs after the construction of the 2014 fence at pages 222, 223, and 226.

91 I am conscious that Henry Carr J was only concerned with whether the appeal had a realistic prospect of success and not with whether it should succeed. However, in my judgment, albeit his views were preliminary and provisional, Henry Carr J really hit the nail on the head when he says at paragraph 7 of his judgment that "there was quite a significant distance between the retaining wall and the fence" that was there in 2000, whereas the position of the 2014

fence abuts very close to the retaining wall and much closer than was shown in the 2000 photograph.

92 I would not accept Mr Burton's characterisation of this issue as one of mixed law and fact. The issues as to the construction of a document are clearly matters of law but here there is no issue as to the true construction of the 1983 or 1988 Conveyances. The issue is purely the factual question of identifying the parcel of land that was shown verged red on the relevant conveyancing plan.

93 The Recorder correctly found that the true boundary was the line of the original fence. That gave rise to the further question of fact: what was the line of that original fence? The Recorder found that this was the line of the fence that was shown on the June 2000 photograph at page 202. Where, in my judgment, he fell into error was in failing to conclude, as a matter of fact, that this was clearly not on the line of the 2014 fence.

94 Mr Swirsky submits (at paragraph 30 of his written skeleton argument) that this is not a case where an appellate court can look at a plan or a photograph and say that the trial judge was plainly wrong. I disagree. In my judgment, if one looks at the photograph at page 202, it is clear that the original fence was further back towards the respondent's property than the line of the current 2014 fence. I am satisfied that the original fence was in the same position as the line of the 2004 fence.

95 In my judgment, that conclusion derives further support from the Google Earth photographs. The Recorder dealt with these at paragraph 62 of his judgment. Mr Swirsky submits that these photographs are simply not clear enough for any conclusion to be based upon them in order to determine the true location of the boundary. He therefore submits that the learned Recorder was right not to base his decision on these photographs.

96 Mr Burton, on the other hand, points out that the Recorder simply referred to photographs dated in 1999 when, in fact, there were a series of photographs dating from 1999 all the way through to the year 2018. Mr Burton submits that, in reality, the aerial photographs from September 1999 (at page 201), what would appear to be the same photograph at page 200 (although it is dated December 2002), and what is clearly the different photograph from December 2003 (at page 199) all show the retaining wall with a parallel line consistent with a fence which, judging by the size of the cars parked adjacent to it, was around 1.5 m from the edge of the retaining wall. Mr Burton submits that that can only be the original fence.

97 Further, the aerial photographs between June 2006 and July 2013 (at pages 198 back to 191) all show sufficiently clearly the retaining wall and a parallel line consistent with a metal fence which, again judging from the size of the cars parked adjacent to it, was around 1.5 m from the edge of the retaining wall. That, it is said, can only be the 2004 fence. Mr Burton therefore submits that the learned Recorder not only dealt insufficiently with the extent of the Google Earth photographs insofar as he appeared only to deal with the photograph from 1999, or, alternatively, failed to appreciate the different timing of the taking of the photographs, but he also failed to give due weight to them insofar as they clearly corroborated and supported the appellants' case that the original fence and the 2004 fence were erected in a straight line around 1.5 m from the edge of the retaining wall.

98 I derive particular assistance from the photographs from December 2003 (at page 199) and 2006 (at page 198), taken both before and after the erection of the 2004 fence. In my judgment, they show a consistent position as to the relative positions of the fence and the retaining wall. Those aerial photographs on their own would not have led me to conclude that the Recorder was clearly wrong in his conclusions as to the location of the original fence; but

in my judgment they provide further support for the conclusion I have reached as to the location of the original fence from the photograph at page 202 taken in June 2000.

99 In my judgment, the inferences and conclusions that the Recorder drew from the 2014 photographs clearly cannot stand in the light of my analysis of the effect of the June 2000 photograph. Without the June 2000 photograph, the arguments advanced by Mr Burton in support of his other suggested errors on the part of the Recorder would not have persuaded me that the Recorder's decision was clearly wrong; but in my judgment the Recorder's conclusions as to what is shown on the 2014 photographs clearly must be incorrect in the light of the clear inferences and conclusions that any reasonable judge would draw from the June 2000 photograph(at page 202).

100 At paragraph 31 of his skeleton argument, Mr Swirsky submits that the appellants need to show that on seven distinct issues, and despite his carefully reasoned judgment, the Recorder reached a conclusion that no reasonable judge could have reached. I do not accept that the appellants need to establish the precise grounds for their seven suggested errors. Rather, I am satisfied that the Recorder's conclusions as to what is shown on the 2014 photographs cannot stand in the light of the conclusion which he, or any reasonable judge, would and should have reached from the June 2000 photograph as to the location of the original fence. I am satisfied that the conclusions the Recorder reached as to what was shown on the 2014 photographs cannot be correct. I am satisfied that those conclusions cannot override the clear conclusion at which any reasonable judge, properly directed, would have arrived on the basis of the June 2000 photograph.

101 For these reasons, I am satisfied that this is, indeed, one of those extremely rare cases where the first instance judge clearly failed to appreciate the true significance and impact of a piece of evidence that was before him - in this case the June 2000 photograph - and failed to draw the correct inferences and conclusions from it. I am satisfied, notwithstanding the factors and warnings identified and provided by Lewison LJ in the 'Greek Yoghurt' case, that on this one crucial issue of fact, the Recorder, who had otherwise approached his case conscientiously and impeccably, arrived at a conclusion at which no reasonable judge could have arrived. I acknowledge that I am thereby differing from the Recorder in a case where he had had the benefit of visiting and viewing the site, and had recorded also that he had found this site visit to be "valuable"; but I would point out that the view had taken place after the removal of the 2004 fence, and after the relevant part of the grass verge had already been concreted over.

102 I would also emphasise two further unusual features of this case. The first is that there was no oral expert evidence, and the written expert evidence was of limited value. Secondly, and perhaps more significantly, as Mr Burton mentioned in his reply, the oral evidence played "a very unuseful role" in the case. On its own, and without regard to the extrinsic evidence, the evidence of neither of the two witnesses who spoke to the replacement of the original fence in 2004, Mr Boas and Mr Sullivan, was of assistance to the Recorder: see paragraph 65 of his judgment. The Recorder's preference for the evidence of Mr Sullivan over that of Mr Boas was conditioned by his view of the effect of the 2014 photographs. Had the learned Recorder reached a different conclusion on the basis of the June 2000 photograph, then in my judgment it is clear that he would not have expressed the preference that he did for Mr Sullivan's evidence over that of Mr Boas. So, this is not a case where the Recorder derived any real benefit from the oral evidence.

103 So, for those reasons, on the substantive issue as to the true boundary between the parties' properties, I would find in favour of Mr Burton's submissions and allow the appeal.

104 On the issue of trespass, in the course of his oral closing Mr Swirsky indicated that if he were wrong about the true position of the boundary, the appropriate order would be for the court to require the respondent to restore the boundary fence to its original position. He indicated that the respondent was prepared to restore the boundary fence in that way. I will hear further submissions on this but it does seem to me that that is the appropriate form of order to make in this case.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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