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PROPERTY TEAM NEWSLETTER

Article: Boundary Plans – when what you see is not what you get

In the recent case of *Strachey v. Ramage* [2008] EWCA Civ384 the Court of Appeal has again had to consider the general principles as to the interpretation of conveyances where there is inconsistency between the verbal description of the parcels, the plan, and the physical situation on the ground.

S owned some fields adjoining W's land. In 1988 the then common owner of both parcels erected a fence between them and sold them to the predecessors of S and R respectively. The conveyance of the adjoining land, dated February 2008, contained a verbal description of the parcels and incorporated a plan. The plan, notably, was "for the purpose of identification only". Clause 4 of the conveyance referred to an existing fence as "the boundary fence". A dispute arose between S and R concerning the boundary position. S claimed that the boundary was marked by the fence. The plan, however, appeared to show the boundary as lying on a different line from that followed by the fence, and R claimed that such line was in fact the boundary. The judge held that the relevant section of the boundary was marked by the imaginary line claimed by R, unrepresented by any physical feature on the ground, and falling mainly on S's side of the fence.

Where parties to a conveyance use a verbal description of the parcels as well as a plan, they can specify whether the verbal description or the plan is to prevail in case of an inconsistency between them. If the delineation on the plan is expressed to be 'for the purpose of identification only', the verbal description will prevail. However, if that description is insufficient or leaves any uncertainty, the plan can be looked at for whatever assistance it can provide (see *Johnson v. Shaw* [2004] 1 P.& C.R. 123, per Peter Gibson LJ). So whilst it is a well-established principle that extrinsic evidence is not admissible to contradict the terms of a conveyance where such terms are clear, extrinsic evidence may be considered, in the case of ambiguity or uncertainty, to enable the court to find the parties' intentions. (see *Scarfe v. Adams* [1981] 1 All ER 843; *Ali v. Lane* [2006] EWCA Civ 1532; *Haycocks v Neville* [2007] EWCA Civ 78). An 'identification only' plan may thus be considered, in determining what land was intended to be conveyed, where the description of the parcels is inadequate, or "totally imprecise".

In *Strachey* the Court of Appeal held that the judge had erred in using the plan in order to identify the boundary, because that ignored the provisions of Clause 4 which expressly referred to "the boundary fence" - being the fence erected in February 1988. That was an answer to the dispute and one which could not be trumped by reference to an 'identification only' plan.

The decision in *Strachey* may be contrasted with *Beale v. Harvey* [2003] EWCA Civ 1883 which, on its face, was similar in fact: H bought one of two adjacent plots which were being developed. At that time a fence on the land ran from one of the retaining walls. After exchange, but before completion, the developer agreed to allow H to start landscaping her garden along this fence. Shortly afterwards B bought the neighbouring plot. After exchange, but before completion, he noticed that, according to the plans on which both sales were based, the fence was in the wrong place. The developer agreed to realign the fence, and offered to make good the loss to H. She refused, relying on the developer's conduct in approving her subsequent use of the land. Her argument failed.

The material difference between these cases is that in *Beale* the plan annexed to the transfer was described as "the dominant description" and it was held that the red edging on it must be given its full weight. Consequently the plan, which had also been attached to the contract, took precedence over the line of the retaining wall and fence built by the developers in the wrong place between the date of the contract and the Transfer. The "dominant description" contained in the plan was not displaced by the evidence of the existence of an actual fence on a different line, or of the parties actions in relation to it. So care must be taken not to overlook the limits of an 'identification only' plan. It may be referred to, but only where the description of the parcels is

unclear or imprecise, and only provided it does not conflict with anything explicit in the description, or the other terms of the conveyance.

Andrew Skelly

Did you see..... ? Recent cases you may have missed

Real Property

Easement, Right of Way, Prescription Act 1832, s.2, Wimbledon and Putney Commons Act 1871 ss8 and 35.

Housden & another v Conservators of Wimbledon and Putney Commons [2008] EWCA Civ 200

The Claimants had applied to register a vehicular right of way over a strip of land forming part of the Commons. Both the Adjudicator and the High Court had agreed with the Defendants' case that (1) pursuant to the 1871 Act the grant of an easement by them would be ultra vires; and (2) this constituted a bar to acquisition by prescription under the 1832 Act.

Held: The appeal was allowed. On a true construction of the 1871 Act the Ds were not prevented from granting an easement. As such it was not necessary to consider to second point but, in the circumstances, it was appropriate to so do. The Court of Appeal held it was bound by *The Proprietors of the Staffordshire and Worcester Canal Navigation v The Proprietors of the Birmingham Canal Navigation (1866) LR 1HL 254*: a statutory claim to prescription by 40 years long user could be defeated where they can have been no presumption of grant.

Real Property

Estate Agents; Commission; Introduction to a Purchaser; Estate Agents (Provision of Information) Regulations 1991

Foxtons Ltd v Pelkey Bicknell and another [2008] EWCA Civ 419

The vendors (V) appealed against the decision of the trial judge allowing Foxtons (F) to claim commission in respect of the sale of V's property to K in accordance with its terms, which reflected the wording of the Estate Agents (Provision of Information) Regulations 1991. K had originally viewed the property when F was the sole agent, but her subsequent purchase was over three months later and followed a viewing arranged by another estate agent at a time when F was operating under a multi-agency agreement. The judge held that the words 'at any time' negated any requirement that F be the effective cause of the sale, although he held that F was in fact the effective cause. V appealed, contending that the term 'a purchaser' in the phrase 'a purchaser introduced by us' meant 'a person who becomes a purchaser as a result of' F's introduction.

Held: The interpretation of the phrase 'a purchaser' as put forward by V was to be preferred. It was not apparent why an estate agent should be entitled to commission on a purchase for which he had no responsibility and which effectively originated after the expiry of the sole agency agreement. In order to be entitled to commission under its standard terms for having introduced a purchaser, F had to show that it had introduced the person concerned as the eventual purchaser; or in other words, that it had introduced the purchaser to the purchase and not just to the property. In the circumstances, the judge's finding that F was the effective cause of the sale, essentially that K was a purchaser introduced by F, was unsustainable. The appeal would be allowed.

Real Property

Co-ownership; beneficial interests' determination of parties' intentions

Lynne Fowler v Carl Anthony Barron [2008] EWCA Civ 377

F appealed against the decision of the trial judge that the property in which she and B had lived together and which had been registered in their joint names belonged entirely to B beneficially by reason of a resulting trust. The property had been bought with the aid of a joint mortgage, which B alone had made payments towards along with utility bills etc, and B had also provided the deposit and the balance of the purchase monies as well as caring for the parties' children while F worked. There was no declaration of trust. The judge accepted B's evidence that he had intended that the property would become F's by way of survivorship and did not refer to the fact that the parties had mutual wills which left the interest in the property to each other. F submitted that the judge had wrongly approached the question of beneficial entitlement by reference to a resulting trust rather than to a common intention constructive trust and that the presumption of a beneficial joint tenancy could not be rebutted simply because she had made no contribution to the cost of acquiring the property.

Held: The judge had erred by seeking to determine the parties' intentions by focusing on their financial contributions. Following *Stack v Dowden*, where there is no express agreement the parties' intentions are to be ascertained in the light of the whole course of their conduct in relation to it. A presumption of joint beneficial ownership arose from the fact that the property was registered in the joint names of the parties, and while it was open to B to rebut that presumption, this could not be done by B's secret intention that F should only benefit in the event of his death and his mistaken belief as to the effect of putting the property into joint names, which had not been communicated to F, was immaterial. As such, B had not discharged the burden of showing that it was not the parties' shared intention that F should have a one half-share in the property.

Case summaries Alice Marshment and Andy Creer

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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Robert Leonard	1976	Kerry Bretherton	1992	Alastair Redpath-Stevens	1998
Wendy Parker	1978	Alexander Goold	1994	Andrew Lane	1999
Karl King	1985	Andrew Skelly	1994	Sarah McCann	2001
Michelle Stevens-Hoare	1986	Alexander Bastin	1995	Dean Underwood	2002
Steven Woolf	1989	Edward Rowntree	1996	Michael Wheeler	2003
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