



[2019] EWHC 3560 (QB)  
IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ON APPEAL FROM THE COUNTY  
COURT AT GUILDFORD

No. QA-2019-000203

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Wednesday, 27 November 2019

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

B E T W E E N :

ABBOTS RIDE LAND LIMITED

Claimant/Appellant

- and -

(1) SURREY COUNTY COUNCIL  
(2) WATES DEVELOPMENTS LIMITED

Defendants/Respondents

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MR R. GREEN and MR R. CALZAVARA (instructed by Ladders Solicitors LLP) appeared on behalf of the Claimant/Appellant.

THE FIRST DEFENDANT/RESPONDENT did not appear and was not represented.

MR T. MOULD QC (instructed by Counsel) appeared on behalf of the Second Defendant/Respondent.

J U D G M E N T

(Transcript prepared without the aid of documents)

MRS JUSTICE ANDREWS:

- 1 This is an appeal against the judgment of HH Judge Evans-Gordon dated 10 September 2018 refusing to grant the Appellant a declaration that a length of grass verge adjoining Waverley Lane in Farnham, Surrey (“the Verge”) is not a highway or part of a highway subject to public rights of way.
- 2 The Appellant (“the Owner”) is the registered freehold proprietor of the Verge; the First Respondent (“the Council”) is the local highway authority; and the Second Respondent (“the Developer”) is a construction company which has an option on freehold land on the north and south side of Waverley Lane, which lies to the north and south-west of the Verge.
- 3 The Owner is the proprietor of two parcels of land that abut Waverley Lane. The first parcel, registered under title no SY 156443, runs to the east and west of the junction with Abbots Ride, and includes the strip of verge at the extreme eastern end, outside the boundary of what is now No. 62 Waverley Lane. The second parcel, registered under title no SY 826986, joins the two easterly pieces of verge falling under the other title to make a continuous strip which constitutes the Verge that is the subject matter of the claim. This is best illustrated by Plan 1 annexed to the Particulars of Claim. (If this judgment is published, I would ask that a copy of that plan be annexed to it).
- 4 The commercial reason behind this dispute is that the Developer wants to build housing on the option land. However, even if it obtains planning permission for the development, it must carry out certain highway improvement works to land on the south side of Waverley Lane pursuant to an agreement made with the Council under section 106 of the Town and Country Planning Act 1990. Those works include the creation of a new pedestrian footway along that part of the Verge which immediately adjoins the road surface of Waverley Lane.

The ability to carry out such works is dependent on the status of the Verge as public highway.

5 In the County Court, the Council (supported by the Developer) successfully contended that the Verge has been part of the highway that is Waverley Lane since the late 1950s or early 1960s. One of its officers, Ian Taylor, gave evidence in support of that assertion. Despite its success at trial, the Council has indicated that, whilst it entirely supports the Judge's decision, it does not wish to play an active part in this appeal and has left the Developer to make the running.

6 The Judge decided that the Verge been dedicated to the public for use as part of the highway for two alternate reasons summarised in paragraph 40 of her judgment: –

the Verge was expressly dedicated as highway by its then freehold owner, Macari Limited (“Macari”) under an agreement it made with Farnham Urban District Council on 5 July 1957 (“the 1957 Agreement”).

Alternatively, such dedication, and acceptance by the public, could be inferred from the facts of the case.

7 Whilst the construction of the 1957 agreement is a matter of law, in order to succeed in this appeal the Developer must also overcome the high hurdle of establishing that the judge's inferences and conclusions drawn from what are quintessentially issues of fact, based on the evidence, were outside the bounds within which reasonable disagreement is possible: see the observations of Lewison LJ (delivering the judgment of the Court of Appeal) in *Fortune v Wiltshire Council* [2013] 1WLR 808 at [28]-[30] (“*Fortune*”).

8 It is unnecessary to determine whether the point of construction is right if the judge's alternative conclusions are unassailable. Unsurprisingly, therefore, they became the focus of the legal argument before me.

**RELEVANT LEGAL PRINCIPLES**

- 9 At common law a highway is a way over which members of the public have the right to pass and repass without hindrance on foot, on horseback or in or on vehicles: see *Gullicksen v Pembrokeshire County Council* [2002] 3 WLR 1072, per Sedley LJ at p.1076, and *Transport for London v London Borough of Southwark* [2018] UKSC 63 per Lord Briggs JSC at [6].
- 10 Whilst highways can be created by statute, that was not the case here. The legal principles that govern the creation of a highway at common law were uncontroversial. There must be a dedication of the land by the landowner for use as a highway, and there must be acceptance of the dedication by or on behalf of the public.
- 11 Dedication is primarily a question of intention. It may be proved by express words or conduct, or it may be inferred from the available evidence. An inference of acceptance may be drawn from the same evidence. Dedication by inference from the landowner's acquiescence in public use of the way in question is the most common method of establishing the existence of a highway, but it is not the sole basis upon which dedication may be established: see *Fortune* at [22]. Where an inquiry goes back over many years, direct evidence will often be impossible to find, and the fact-finding tribunal must draw inferences from circumstantial evidence. In that regard, Lewison LJ quoted with approval the direction given by Pollock CB to the jury in *R v Exall* (1866) 4 F&F 922 at 929:

*"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope composed of*

*several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."*

12 In *Fortune* the Court of Appeal upheld the decision of the trial judge, based on all the evidence taken in the round, despite disagreeing with some of the strands on which he relied; for example, the evidence about maintenance, which they described as "not contributing significantly to either side's case".

13 Section 32 of the Highways Act 1980 provides that:

"A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

14 In the present case, the judge found both elements proven. Dedication was inferred from the many strands of evidence to which she referred in paragraph 37, and acceptance from the matters to which she referred in paragraph 38.

15 Mr Green, on behalf of the appellant, realistically did not seek to challenge the judge's findings on acceptance. He concentrated instead upon the finding of express or implied dedication, by reference to the matters in paragraph 37, which he submitted individually and

collectively could not give rise to the inference which the judge drew of an intention by the landowner to dedicate the land to public use. As most, he submitted, Macari intended in 1957 to make a gratuitous transfer of ownership of the Verge to the Council at some time in the future, in order that it could widen the carriageway of Waverley Lane. That was something quite different from intending that the public should be able to pass over it before the road widening took place. In any event, even if this was wrong and Macari did intend to dedicate the verge to public use, Macari changed its mind and/or put it outside its power to follow through that intention when it sold the plot to what became number 56 Abbots Ride, whose boundary crosses the improvement line and includes part of the Verge. There was no evidence, submitted Mr Green, that the new owners of that part of the Verge, Mr and Mrs Turner, intended that it should be dedicated to the public as a highway.

16 In order to examine whether that challenge is well founded, it is necessary to say something about the background to the 1957 agreement. Waverley Lane is an ancient highway that runs between the town of Farnham (to the west) and Waverley Abbey (to the east). By 1922, FUDC was considering widening Waverley Lane, although, because it is a Class II road, it may be that the Council, rather than FUDC, was the relevant Highway Authority which bore the ultimate responsibility for approving and implementing any such scheme.

17 In 1924, FUDC made new streets and buildings byelaws which provided that, subject to certain specified exceptions, new streets laid out for use as a carriage road should be at least 40 feet in width. However, when a proposed widening scheme came up for consideration by the Highways and Lighting Committee of FUDC in 1932, the County Engineer was told by the Ministry of Transport that not less than 50 feet would be accepted for a Class II road of the nature of Waverley Lane.

- 18 By then, the Public Health Act 1925 had come into force. By section 30 of that Act, local authorities were able to make orders declaring existing highways to be a “new street” for the purpose of applying their bylaws relating to new streets to them. FUDC did make such an order in respect of Waverley Lane, but not until 5 June 1934. By section 33 of the 1925 Act, local authorities were empowered to prescribe an improvement line, that is, a line beyond which no buildings may be built so that a street or road may be widened. Section 33(8) enables the local authority to purchase any land not occupied by buildings lying between the improvement line and the boundary of the street, or any interest in such land.
- 19 On 5 April 1932, FUDC resolved to provide in the town planning scheme for the widening of Waverley Lane to a uniform width of 50 feet and two public footpaths, with a building line of 25 feet. The County Surveyor was to be instructed to draw up the necessary plans, which would be submitted to FUDC and then to the Council. Minutes of subsequent meetings of the FUDC Highways and Lighting Committee show that the Council initially decided to defer implementation of the proposed scheme. However, in the light of what was described as "considerable development taking place in Waverley Lane", and concerns about the increasing danger to the pedestrians, the matter was reconsidered in 1933.
- 20 Despite attempts by frontagers to persuade the Council to adopt a modified scheme, which would have involved widening to only 40 feet, it appeared that to do so would have resulted in a loss of grant from the road fund, and the Committee decided that the Council should not accept a financial liability in respect of the widening of the road. It therefore recommended the submission to the Council for its approval of a scheme to widen to a uniform width of 50 feet on the amended line indicated in the plans. That improvement line has been in place ever since. It appears that the Judge was mistaken when she stated that the improvement line was imposed under the bylaws, as it was already in place prior to their application to

Waverley Lane in 1934. It must have been imposed under section 33 of the 1925 Act, but nothing turns on that.

21 A survey of frontages along Waverley Lane was carried out by the Council's Highways and Bridges Department in 1937, but nothing was done to implement the proposed widening scheme. Nothing of any real significance occurred between then and the time of the 1957 agreement. As the Judge found, by the mid-1950s both sides of Waverley Lane up to what is now Abbots Ride had largely been developed. Macari, which was a developer, acquired the land of which the verge forms a part, and in 1957 it wished to build several houses on it. The layout of the proposed development is set out in Plan 1 annexed to the 1957 agreement, and the Judge accurately describes what it shows in paragraph 5 of her judgment.

22 The 1957 agreement was made under s.146 of the Public Health Act 1875. In simple terms, it provided that Macari was the owner of the relevant land, which it was developing as a building estate, and that for these purposes it was going to construct a road, to be known as Abbots Ride, for public use. Macari wished the road on completion to be adopted as a public highway maintainable by the local authority at public expense. Mr Green drew particular attention to clause 5, which provided that once the Council's surveyor had certified that the road was properly and completely constructed in accordance with the terms of the agreement, "then the same shall be and remain forever open to the use of the public and become a highway repairable by the inhabitants at large" - an example of an express dedication. He contrasted that language with the rubric on the Plan which shows the red and green hatched land "to be surrendered to the Highway Authority when the development of the adjoining plots takes place (sec 30 Public Health Act 1925)".



23 The Judge, in paragraph 22, characterised the owner's case below on that wording in these terms:

*"The wording on Plan 1 does not constitute an immediate dedication by Macari. At best it indicates an indication to dedicate at some time in the future ... Further, the use of the word 'surrender' on Plan 1 indicates that some further step involving a transfer of land was required. It does not equate to the grant of a public right of way."*

I had understood that to be the way in which the case was being put on appeal, but Mr Green submitted that the word "surrender" did not mean dedicate or give for highway purposes, and could not possibly be interpreted in that way. It meant, and could only mean, transfer gratuitously.

24 Whatever it means, the surrender envisaged is a surrender to the Highway Authority, but it is self-evidently not intended to happen immediately. The timing of the surrender is stated to be when the development of the adjoining plots takes place. The question whether a clause in an agreement or an annotation recorded on the face of the document evinces an immediate dedication that will become effective upon the happening of future events, or instead signifies an intention to dedicate in the future, conditional upon something else happening first, is essentially a matter of construction. I was referred to *Secretary of State for the Environment Transport and the Regions v Baylis (Gloucester) Ltd. & Ors.* [2000] 800 P&CR 324 ("*Baylis*") in which Mr Kim Lewison QC (as he then was) considered the question whether an express dedication clause in a memorandum operated immediately or was conditional upon the completion of further works. In that case words such as "hereby" and "forthwith" pointed to the clause falling within the former category.

- 25 The words on the plan in the present case, in my judgment, put it firmly into the latter category. There was clearly a present intention on the part of Macari that the verge would be surrendered to the Highway Authority, but that surrender was not to happen until completion of the relevant parts of the development. That is what the annotation says. I part company with the Judge in finding that the surrender was conditional upon the completion and adoption of Abbots Ride, which could have happened either before or after the relevant development was completed. Although there was no evidence as to precisely when the development of those adjoining plots was finalised, it appears to have been some time in the early 1960s.
- 26 I do agree with the Judge, however, that the only sensible reading of the annotation is that all the hatched land, both green and red, is to be surrendered. Parts of the hatched land were expressly designated to be used as a visibility splay or otherwise to provide sight lines, including, most importantly, for vehicles exiting Abbots Ride into Waverley Lane. Sight lines are marked in the corner of the red hatched areas as well as the green. The whole of the Verge was an area abutting a highway, upon which Macari, as a developer, would be unable to build because of the improvement line. The existence of that line would have indicated to Macari that there was an intention on the part of the Council to widen Waverley Lane and thus to use the verge for highway purposes, which may or may not have included constructing a footpath.
- 27 What then is meant by "surrender"? In context, the interpretation that best fits the background and the overall purpose of the contract is plainly "make available to the Highway Authority for public use". I reject Mr Green's submission that the word "surrender" could only be interpreted as meaning transfer of ownership. Macari would have been well aware of the formalities necessary for transferring ownership of land, and it is

highly unlikely that a promise or intention to transfer ownership would be recorded so informally. In any event, making the land available to the Highway Authority for use as a public highway would not necessarily have involved transferring ownership. A promise to transfer ownership of the land to the Highway Authority would make no sense in this context unless it also carried with it an intention that the transferred land should be used as part of the public highway. There would be no reason to give it to the Council otherwise.

28 Mr Green referred to the Scottish case of *Elmford Ltd. v City of Glasgow Council (No.2)* [2001] SC 267, in which a frontager unsuccessfully argued that he had a right of way over a strip of land that had been compulsorily purchased by a Highway Authority but which did not form part of the metalled surface of the road that was eventually constructed. Mr Green submitted that an intention to transfer land to a public authority in the expectation that it will build a public highway on the land or widen an existing highway to include that land, did not encompass an intention to allow the public to pass and repass on the land before it was put to such use. Once the land was transferred, it would be a matter for the Highway Authority to decide how it was to be used, and there is a distinction to be drawn between allowing the Highway Authority to use land and telling the public that they may walk or drive over it.

29 The case of *Elmford* laid down no general principles, and, in my view, it takes matters no further. As the judge in *Elmford* observed, the right of the public to have access and egress over land on the basis that it forms part of the highway depends on whether the land in question can be said to have been publicly dedicated as part of the highway. That will be a question of fact in each particular case. In that case the local authority was always the relevant landowner and it did not dedicate that strip as part of the highway. There was no

question of a prior landowner dedicating the land for public use before the local authority acquired it.

30 Here, the intention of Macari in making the Verge available to the Highway Authority was that it should be used as part of the public highway. It was not necessary that Macari should have had it in mind that it be turned into a footpath rather than be used as part of the extension of the existing carriageway. Moreover, the Judge was entitled to infer from the evidence that both at the time when the 1957 agreement was made, and at the time that the dedication took effect in the early 1960s, the Highway Authority - in this case the Council - had the same intention. The acts adumbrated in para.38 of the judgment were plainly an assertion of the public right to use the Verge as part of the highway. Indeed, the Council constructed footpaths in 1966 on part of the hatched land in the belief that it was part of the highway.

31 The next question is whether Macari changed its mind, and what effect the sale of the plot of land to Mr and Mrs Turner had on matters. The plans show quite clearly that, unlike all the other houses built in Abbots Ride, the boundary of the plot that was sold to the Turners in 1958 extended beyond the improvement line all the way to Waverley Lane, encompassing part of the Verge. There was a practical reason for this, namely that a septic tank was to be put in the Turners' garden and the land beyond the improvement line served as the leaching area from that tank. That function would not of course affect any person's ability to pass and repass along the surface of the Verge.

32 Mr Green relied upon clause 8 of the Transfer which required the Turners "to erect and maintain a good and substantial live or dead fence along the boundary of the land agreed to be sold shown by the T within the boundary of the said plan". The boundary in question is a

diagonal boundary which demarcates the Turners' land and a neighbouring plot which was later developed into what became 62 Waverley Lane. The plan clearly shows both the building line and the improvement line, and the boundary in question goes through both; but sensibly construed, the parties to the Transfer cannot have intended the transferees to do something which might put them in breach of section 33 of the Public Health Act 1925 by erecting a structure in an area beyond the improvement line.

33 Mr Mould QC submitted that there was nothing in clause 8 or in the plan annexed to the transfer document that was inconsistent with the intention to dedicate the part of the Verge that now formed part of the Turners' property to the public. The natural inference to be drawn is that both Macari and the Turners understood that the diagonal boundary fence or hedging would and must be formed so as not to impinge into the area that was saved for road widening improvements. Indeed, that is exactly what happened. I agree that the transfer document is, at worst, equivocal and, at best, consistent with an intention to dedicate. It does not establish that Macari had changed its mind.

34 Mr Green pointed out that if Macari had sold the land before the future contingency had been fulfilled, it had put it out of its power to dedicate the Verge - or at least that part of it which now belonged to the Turners. It was therefore essential that there was evidence of dedication by the Turners as well as by Macari.

35 Whilst there is no evidence that the Turners were aware of the 1957 agreement, they were plainly aware of the existence of and reasons for the improvement line. They had abided by the restrictions and they did put a boundary fence up along the improvement line - which reflected the same boundary limitations as the adjoining properties. The Judge expressly recognised in paragraph 32 of her judgment that the imposition of an improvement line,

together with the erection of a boundary fence or hedge, is not by itself - I stress "by itself" - sufficient evidence of a dedication or an intention to dedicate - see *Hale v Norfolk County Council* [2001] Ch 717 - but that does not mean that it cannot form part of the strands of circumstantial evidence from which an inference of dedication can properly be drawn.

36 The Judge relied on some correspondence passing between the Turners and FUDC in November 1958, seeking FUDC's agreement to make what was described as "a small entrance gate" onto Waverley Lane. The planning officer responded by referring to the Council's policy to restrict the number of accesses to classified roads and saying that it was unlikely that the necessary application for planning permission would be granted. I am not myself persuaded that this was the strongest piece of evidence. It is far from clear that what the Turners wanted was a means of access to the Verge, rather than a right of access to and from their property directly onto the carriageway. The estate layout was such that at that time all properties within the development were intended to be accessed by a road leading off Abbots Ride into a *cul de sac*.

37 However, as with Macari, dedication of the relevant part of the verge by the Turners could reasonably be inferred from the evidence as a whole, in particular, the condoning of the Council's treatment of the Verge as part of the public highway over many years. Given the particular significance of the leaching area to the Turners' property, the fact that they allowed gas and utilities pipes to be laid under the Verge without requiring wayleave or taking any other steps to control the works, is a fairly clear indication of dedication.

38 Mr Green criticised a number of the strands of evidence referred to by the Judge in paragraph 37 of her judgment. He submitted that there was no reason to infer dedication of one part of the hatched land from the dedication of another part of the hatched land. The

Verge that is the subject of this claim only runs to the east of the junction with Abbots Ride. He sought to distinguish the decision in *Baylis* that one can draw such an inference from the dedication of the part, on the basis that that was a case of express dedication and therefore the extent of what had been dedicated was clear. I see no reason why the approach in that case should not apply with equal force to a case of implied dedication where the subject matter was plainly the whole of the hatched land designated in the Plan annexed to the 1957 agreement. The fact that there was no protest when part of that land was turned into a footpath is powerful evidence that the intention evinced in the 1957 agreement was being brought into effect and carried through.

39 Mr Green submitted that the clearing and saving of the visibility splays and sight lines was a neutral factor. I cannot accept that submission. As Mr Mould pointed out, the grass verge as indicated on the Plan annexed to the 1957 agreement served the function of preserving sight lines once the estate roads had come into use, and that was an important highway purpose.

40 Looking at all the evidence in the round, I am satisfied that the Judge was entitled to infer that the Turners and Macari intended to dedicate the hatched land/Verge as a highway. There was sufficient circumstantial evidence to support that decision, irrespective of the fact that some of the strands may not have been as strong as others. For these reasons, this appeal must fail. Whilst it is unnecessary to decide the point, I should add for the sake of completeness that I would respectfully disagree with the Judge on the question of express dedication for the reasons I have already given.

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**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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**\*\* This transcript has been approved by the Judge \*\***