

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 17/04/2018

Before :

MASTER BOWLES

Between :

Richard Charles Harper Pennant
- and -
Watkin Jones & Sons Limited

Claimant

Defendant

Nicholas Trompeter (instructed by **Forsters LLP**) for the **Claimant**
Julian Greenhill (instructed by **Shoosmiths LLP**) for the **Defendant**

Hearing date: 24th January 2018

Judgment Approved

Master Bowles

1. By an application notice, dated 8th November 2017, the Claimant, Richard Charles Pennant, the current proprietor of the Penrhyn Estate, Bangor (the Estate) seeks summary judgment against the Defendant, Watkin Jones Limited. The relief sought relates to the construction of a deed, dated 4th January 1978 (the 1978 deed), entered into between predecessors in title of each of the Claimant and the Defendant. The court is asked to determine, in particular, whether the rights granted, by way of easement, to the Defendant's predecessor in title, the British Broadcasting Corporation (BBC), by clause 1 (b) of the 1978 deed, were apt, or sufficient, to include the right to lay a sewer under that part of the private roadway, connecting the Defendant's land to the main A5 public highway, where the roadway crosses

over two bridges (a single span river bridge across the River Cegin and a two span railway bridge over the now disused Penrhyn railway).

2. It is the Claimant's case that the deed does not have that effect and, therefore, that the pressurised foul water drain that the Defendant has laid under the surface of the roadway as it crosses over the two bridges, is an actionable trespass. It is the Defendant's case that, properly construed, the deed does give it the right to lay the foul water drain and, therefore, that, subject to other matters, not forming part of the current application, no actionable trespass has arisen.
3. The factual matrix surrounding the 1978 deed and the grant of the rights contained in the 1978 deed are not in any dispute.
4. In or about 1977, the BBC was minded to purchase and develop a plot of paddock land to the East of the two bridges from its then owner, Gwynedd County Council (Gwynedd). That land was bounded to the North, West and South by land forming part of the Estate. Adjacent and to the North of the land intended to be purchased by the BBC and forming part of the Estate was (and is) the private roadway, with which this case is concerned and which runs across the Estate from East to West, crossing the two railway arches over the defunct Penrhyn railway and then crossing the river bridge, known as the Penrhyn Bridge. The roadway continues, to the South West until it joins the main A5 highway.
5. In order to facilitate its intended development and in parallel with its negotiations for the purchase of the paddock land from Gwynedd, the BBC entered into discussions and negotiations with the Estate in respect of the acquisition of easements over the Estate, both in respect of access and in respect of the installation and connection of mains services, including mains sewerage. The Estate, itself,

seems to have been happy to entertain these negotiations as a means of securing an easement of way over the intended BBC land.

6. The negotiations commenced in early 1977 and were concluded in late 1977. The 1978 deed, giving effect to the agreements made between the Estate and the BBC, was executed on 4th January 1978. On the same day, the BBC completed its purchase of the paddock land. The parties to the 1978 deed were the BBC, referred to in the 1978 deed as ‘the Corporation’, and Lady Janet Douglas Pennant, the Claimant’s predecessor in title, referred to in the 1978 deed as ‘the Grantor’.
7. The 1978 deed, as completed, recited that the BBC was ‘seised in fee simple in possession of a piece or parcel of land at Port Penrhyn Bangor ...which is for the purpose of identification only shown on the map or plan annexed hereto and thereon edged Red’.
8. The deed further recited that ‘the land on the Northerly Westerly and Southerly sides of the said piece of land including the roadway and bridges coloured Brown on the said map or plan ... were vested in the Grantor in fee simple..’ and that the parties had ‘agreed to grant to each other’ the rights mentioned in the deed on the terms and conditions set out in the deed.
9. The rights material to this application were set out in clauses 1(a) and 1(b) of the 1978 deed and the covenants and conditions material to this application in clauses 3(e) and 5 thereof. I have placed in square brackets a number of words, which are shown from the final pre-execution draft of the 1978 deed to have been added to the draft, by way of manuscript interpolations, as part of the negotiations between the parties. I will refer to this draft and those interpolations later in this judgment.

10. By clause 1 (a), the BBC was granted in fee simple ‘ A right of way with or without vehicles at all times and for all purposes ... over the roadway [including the footpath] and bridges coloured Brown on the said map or plan.’
11. By clause 1 (b), the BBC was granted in fee simple ‘The right to enter onto the said roadway [including the footpaths] with or without workmen and appliances to lay and thereafter inspect maintain repair and renew under the roadway [including the footpaths] a sewer or drain gas and water supply pipes and an electricity cable to connect the property of the Corporation to the mains services’.
12. By clause 3(e), the BBC covenanted ‘To pay a fair proportion according to user of the cost of repairing maintaining renewing or re-constructing the said roadway and bridges.’
13. By clause 5, the parties to the deed agreed and declared ‘that if the said roadway and bridges shall not be maintained in a reasonable state of repair by the Grantor the Corporation after giving three months written notice to the Grantor ... shall be entitled to effect the necessary maintenance and repairs at its own expense and to recover a fair proportion of the cost from the grantor and other users of the said roadway’.
14. The map or plan referred to in the recitals and in clause 1 (a) of the 1978 deed shows, coloured Brown, the roadway, described in paragraph 4 of this judgment, running West to East, adjacent to and abutting on the Northern boundary of the land purchased from Gwynedd and edged Red on the plan and then extending West across the two bridges and veering South West to join the A5.

15. It was not in dispute before me that, both in 1978 and now, the public sewer, to which the Defendant's foul water drain is, or is intended to be, connected, runs alongside the A5 and, therefore, to the West of the bridges. Dwr Cymru Welsh Water has confirmed that in 1978 it had no 'assets' on the North and East side of the river and the contemporaneous correspondence, at, or prior, to the grant of the rights contained in the 1978 deed confirms, both, that the mains services, including the public sewer, were then, as now, located under, or adjacent to, the A5 and that the parties to the 1978 deed were aware of that fact.
16. When the application came on, I asked the parties whether, it being an application under CPR 24, I was being asked to determine whether there was a realistic prospect of a construction of the 1978 deed other than that contended for by the Claimant, or, whether I was being asked to bite the bullet and determine and resolve the relevant question of construction. I was asked to do the latter and I have accepted that task.
17. I should make clear, however, that this judgment does not seek to resolve all matters between the parties. It is, for example, the Claimant's case that, even if the Defendant has the right to lay a sewer under the surface of the roadway, as it crosses the bridges, that right is contingent upon the Defendant's approval of the Claimant's plans and specifications in respect of the works required to lay the sewer and that that approval has been reasonably withheld. It is further the Claimant's case that, because the land owned by the Defendant and being developed by the Defendant is of a greater extent than, simply, the land acquired from the BBC and because the right granted by clause 1(b) of the 1978 Deed is a right to 'connect the property of the Corporation to the mains services' and not a right to connect any

other land to those services, the right granted does not extend to a right to lay a sewer serving that other land, such that, if the sewer does serve land other than the land acquired from the BBC, it is outside the ambit of the rights granted by clause 1(b). Neither of those matters are determined by this judgment.

18. Inevitably, given the extent of the recent discussion in the higher courts as to the proper approach to the construction of contracts and as to the nuances pertaining to that approach, there was some considerable debate, before me, as to the principles of construction to be applied in the determination of the intended meaning of clause 1(b). In particular, the parties debated the circumstances in which the commercial common sense of the matter could be brought into play as an aid to construction.

19. There was also discussion as to the extent, if at all, that I could take into account, as an aid to construction, the final pre-execution draft of the 1978 deed and the fact that, that final draft, showed that, in the final stages of negotiation, the words, that I have earlier set out within square brackets, had been interpolated into the text of both clauses 1(a) and 1(b).

20. There was, also, arising out of Mr Greenhill's submissions on behalf of the Defendant, a question raised as to whether and to what extent I was entitled, as a matter of construction, rather than rectification, to construe the rights granted by clause 1(b) so as to correct a perceived mistake in the language used. Because the point came late in the day, I gave the Claimant's counsel, Mr Trompeter, permission to put in short written representations on this aspect of the matter. In the event, however, given the view I take as to the proper construction of the 1978 deed and the rights granted thereunder, I have felt no need to explore this question and I say no more about it.

21. In regard to the role of commercial common sense as a tool of construction, it seems to me that, following the Supreme Court judgments, in **Arnold v Britton [2015] UKSC 36** and **Wood v Capita Insurance Services Ltd [2017] UKSC 24**, it is now clear that in the construction of a contract, including, therefore, a deed of easement, such as the one with which I am concerned, the court's task, in ascertaining the objective meaning of the words in issue, is to balance the literalist, or, as Mr Trompeter would have it, the textualist approach, to the meaning of the words used, against any counter-indications arising from the context, the surrounding circumstances and the commercial common sense of the agreement. The commercial common sense of the agreement is not to be regarded as a factor in its own right, entitling the court to retrospectively override injudicious terms agreed by the parties, but, simply reflects an aspect, albeit an important aspect, of the context and circumstances pertaining at the time when the contract was made and bearing upon the likely intentions of the parties to the contract at the time it was made.
22. Accordingly, the task of the court is to balance the indications arising from the language used against any contra-indications arising from the surrounding circumstances, including, as part of that context, the commercial common sense of the supposed construction, in one unitary process. In that process, in a case where rival constructions exist, the court can test those constructions against considerations of commercial, or business, common sense, in order to determine the intention of the parties.
23. In regard to the role (if any) to be given, within the process of construction, to any indications, as to construction, or intention, arising out of the interpolations shown to have been incorporated into the final draft of the 1978 deed before it was

executed, I have no doubt at all that those interpolations have no legitimate role in that process.

24. As it seems to me, the effect (and the only effect) of the interpolations is to inform the court of changes that were negotiated between the parties in the course of the parties reaching final agreement as to the terms of the 1978 deed. As such and as evidence of the content of the parties' negotiations, they are inadmissible as aids to construction.

25. Mr Trompeter sought to rely upon the decision of the Court of Appeal, in **Ladbroke Group Plc v Bristol City Council [1988] 1 EGLR 126**, in support of his argument that I could have regard to the final draft of the 1978 deed and the interpolations within it.

26. **Ladbroke**, however, was quite a different case. In that case, the court was called upon to construe a lease granted pursuant to a building agreement, which agreement had had annexed to it an agreed intended draft lease in somewhat different language to the lease ultimately executed. In the context, of the construction of the lease ultimately executed, it was held that the court could, as part of the surrounding circumstances, have regard to the terms of the draft lease previously agreed between the parties.

27. In **Ladbroke**, the court was being asked to look at what had been previously agreed between the parties, in order to cast light upon what had ultimately been agreed. In this case, the court is asked to do a wholly different and impermissible thing; namely to look at the final draft of the 1978 deed, pre-execution, in order to see, by reference to the manuscript interpolations, how that final draft had come into existence in that form. The final draft is to be looked at as a record, in effect, of

the negotiations leading to the final draft. That continues to be impermissible as an aid to construction.

28. The correct starting point, as I see it, in construing clause 1(b) of the 1978 deed is the language of clause 1(b) itself. That provision entitles the Defendant, as successor to the BBC, to enter on to the 'said roadway including the footpaths ... to lay and thereafter inspect maintain repair and renew under the said roadway including the footpaths a sewer or drain ... to connect' the property previously owned by the BBC 'to the mains services'.

29. In essence, therefore, it is a right, in the Defendant, to go onto the roadway and to lay a sewer under 'the said roadway' in order to connect that property to the mains services. It is not in dispute but that the foul water drain that the Defendant has laid has been laid for that purpose. I leave out of account the question, not considered in this judgment, as to whether the Defendant may have gone beyond the bounds of any right granted by the 1978 deed by utilising the deed to benefit land other than the land purchased by the BBC in 1978.

30. The question, flowing from the above, is what is meant by 'the said roadway', under which the Defendant is entitled to lay its sewer.

31. The answer, as it seems to me, is to be found, primarily, in the language of clause 1(a) of the 1978 deed. That clause, which, of course, immediately precedes clause 1(b), describes the right of way granted by clause 1(a) as being a right over 'the roadway including the footpath and bridges coloured Brown on the said map or plan'.

32. As already stated, the roadway coloured brown on the map annexed to the 1978 deed is the roadway which runs East to West to the North of what is now the Defendant's land and which crosses the two bridges to reach the main A5 highway. It is under this roadway, including, therefore, the roadway, as it crosses the two bridges, that, on the face of the 1978 deed, the Defendant is entitled to lay its sewer.
33. In elaboration of the foregoing and ignoring, as I should, any conclusions which might otherwise be drawn from the manuscript interpolations, it seems to me that the roadway over which the right of way is granted and, hence, the roadway under which the Defendant is entitled to lay its sewer is the roadway, which is coloured brown on the plan. The words 'including the footpath and bridges' are, as I see it, explanatory; making clear, if not already clear, that the right over the roadway includes a right over the footpath and a right over the bridges and, hence, that, as might be expected, the roadway over which the right of way is given is the entirety of the roadway coloured brown, including, therefore, the roadway as it crosses the two bridges.
34. Even if one should, as one should not, have regard to the fact that the interpolated words, 'including the footpath(s)', might suggest that the rights granted over the roadway did not expressly include a grant of rights over the bridges and even if one were to read the clause as excluding the interpolated words (as in the recital to the 1978 deed), so that the right granted, by clause 1(a), was a right over 'the roadway and bridges coloured Brown', there is nothing in that formulation to suggest that the roadway, which, together with the bridges, was shown coloured brown on the plan annexed to the 1978 deed, did not and was not intended to include the entirety of the roadway coloured brown, including, therefore, that part of the roadway which

passed over the two bridges, or therefore, that the right granted under clause 1(b) did not include a right to lay a sewer under the roadway as it passed across the two bridges.

35. It follows, as I see it, that, quite irrespective of any considerations of commercial common sense, or the intended purpose of this aspect of the 1978 deed, the ordinary meaning to be attached to the words used entitled the Defendant to go on to the roadway, including that part of the roadway that crossed the bridges, and to lay its sewer under the entirety of that roadway.

36. The issue, arising, therefore, is whether, as contended upon behalf of the Claimant, there is anything in the language, or text, of the 1978 deed to establish a contrary and overriding intention.

37. Mr Trompeter submits that that contrary and overriding intention is to be found in the fact that, in contradistinction to clause 1(a), clause 1(b) makes no express mention of the bridges and, consequentially, makes no express grant to the Defendant of a right to go onto the bridges for the purposes of laying its sewer. He says that the absence of any grant of rights over the bridges, by clause 1(b), must have been deliberate, given that the bridges were expressly mentioned in the, immediately preceding, clause 1(a) and that, in the absence of such a grant, the Defendant has had no right to go onto the bridges for that purpose.

38. The short answer to Mr Trompeter's point is that, given the right, granted by clause 1(b), to enter on to the roadway and the further right granted, by clause 1(b), to lay the sewer under the roadway, there was no need to grant any express right in respect of the bridges. The rights granted by clause 1(b) already included both the right to

go on to the roadway where it crossed the bridges and the right to lay the sewer under the roadway, at the point where it crossed the bridges.

39. Mr Trompeter's argument can, as I see it, only have substance if, as he submitted, the phrase 'roadway including the footpath and bridges coloured Brown', in clause 1(a) of the 1978 deed, is not to be construed, as I have construed it in paragraph 33 of this judgment, as meaning that the right granted over the roadway included rights over the footpath and bridges, but, rather, that the rights granted by clause 1(a), although expressed, compendiously, as rights granted over 'the roadway including the footpath and bridges coloured Brown', were intended to distinguish between the roadway, including the footpath, and the bridges, such that the right granted over the roadway was to be construed as a right over the roadway, other than where it crossed the bridges and did not, therefore, of itself and notwithstanding that the physical roadway crossed the bridges, give rise to a right over the roadway as it crossed the bridges.

40. If that was the intended construction of clause 1(a) and, if, therefore, in clause 1(b), the right granted to the BBC (and now the Defendant) to enter on to the 'said roadway' and to lay a sewer under the 'said roadway' was a right over the roadway, other than where it crossed the bridges, then, as Mr Trompeter submitted, the effect would be, as is his case, that the Defendant would not have had the right to lay a sewer under the physical roadway as it crosses the bridges, which it has sought to exercise, and the Defendant's conduct would, therefore have constituted and be a trespass.

41. I have to say, however, that I find Mr Trompeter's construction of the 1978 deed unlikely and not one that the parties, viewing the matter objectively, can have

intended. I do not think that the absence of the reference to the bridges in clause 1(b) of the 1978 deed can bear the weight, in terms of the construction of the 1978 deed, that Mr Trompeter asks it to bear.

42. As I have already indicated, it seems to me that the reason why clause 1(b) contains no reference to, or any express grant over, or in respect of, the bridges is because, on what seems to me to be the ordinary meaning of the words used, there was no need for such a grant, in order to enable the BBC and, now, the Defendant to lay its sewer under the whole length of the roadway, including where the roadway crossed the bridges.

43. It further seems to me to be an unlikely construction of clause 1(a) of the 1978 deed and, correspondingly, an unlikely construction of clause 1(b) of the 1978 deed, that, in the context of a physical roadway which crosses over the two bridges, the rights, purportedly granted in respect of that roadway, should exclude rights in respect of the section of the roadway that crosses the two bridges.

44. Additionally, testing Mr Trompeter's proposed construction, by reference to the commercial common sense and intended purpose of this part of the 1978 deed, as contemplated by Lord Hodge, in **Wood**, it seems to me that his construction is, very clearly, found to be wanting.

45. The clear and explicit purpose of clause 1(b) was to enable the BBC (now the Defendant) to lay a sewer for the purpose of connecting the BBC's land, now held by the Defendant, to the main sewer. At the time of the grant, as now, and as known to the parties at the date of the grant, the main sewer lay to the West of the bridges to the West of the land to be served by the sewer and across the two bridges from that land. To achieve the intended purpose of clause 1(b), by the mechanism

contemplated by clause 1(b), namely by laying the sewer under the roadway, which, with the bridges, was shown coloured brown on the plan attached to the 1978 deed, the rights granted by the deed must have been intended to be sufficient to enable the sewer to be laid under the roadway as it crossed the bridges. A construction of the 1978 deed which allowed the sewer to be laid under the roadway, either side of the bridges, but not as it crossed the bridges, would, inevitably defeat that purpose and cannot, as I see it, possibly, have been intended by the parties.

46. The foregoing, might well be said to raise a question as to why, in clause 1(a) of the 1978 deed, or, indeed, in the recitals to the deed, it was necessary to make mention of the bridges at all, given that the right, which, on my construction, was granted over the roadway was, or would have been, in itself, sufficient to achieve the grant of an effective right of way across the land coloured brown on the deed plan.

47. The answer, I think, is twofold.

48. Firstly, as set out in paragraph 33 of this judgment, the specific reference to the bridges, as being included within the roadway over which rights were granted under clause 1(a) of the 1978 deed, serves to provide a helpful clarification, or confirmation, that the roadway over and under which rights are granted by clauses 1(a) and 1(b) of the 1978 deed and which is coloured brown on the deed plan includes and is intended to include the entirety of the roadway, as shown on the plan, including, therefore that part of the roadway that crosses the bridges.

49. Secondly, the specific reference, in clause 1(a) of the 1978 deed and in the recital to the 1978 deed, to the bridges, is, as it seems to me, intended to cross-relate to the obligations set out in clauses 3(e) and 5 of the 1978 deed.

50. Those clauses impose, by clause 3(e), an obligation upon the BBC and its successors to pay a fair proportion of the costs of repairing and maintaining the roadway and the bridges; and, by clause 5, a right, in favour of the BBC and its successors to carry out works of repair to the roadway and bridges and to charge a fair proportion of the costs of such works to the Estate, in the event that the Estate had failed, following service of a notice, to keep the roadway and bridges in reasonable repair.
51. It seems to me that, because the parties had, quite understandably, in the context of a right of way, for all purposes, over the roadway which crossed the bridges, agreed that the BBC and its successors should have obligations and rights in respect not merely of the roadway, crossing the bridges, but the bridges themselves (the state of repair of the bridges being, at least to an extent, a function of the use made of the roadway crossing the bridges), it was, if not necessary, then at least coherent, for the bridges and their position to be identified in the recitals to the deed and in that part of the deed (clause 1(a)) establishing the right of way.
52. In the result, I am satisfied that, subject to the other issues arising between the parties and summarised in paragraph 17 of this judgment, the rights granted to the BBC and its successors by clause 1(b) of the 1978 deed are sufficient to entitle the Defendant to lay its sewer under the roadway described in paragraph 4 of this judgment, including under that part of the roadway which crosses the two bridges over, respectively, the River Cegin and the disused Penrhyn railway. On that footing and on the same basis, I am satisfied that the foul water drain, that the Defendant has laid under the roadway as it crosses the two bridges, does not constitute a trespass.

53. In consequence, I shall dismiss the Claimant's application for summary judgment in respect of the issues discussed in this judgment and, if called upon, will make declarations reflecting the issues of construction that I have determined.