

JERSEY / JUDGMENT

Fogarty -v- St Martin's Cottage Limited [2017] JCA 096 (20 June 2017)

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Court of Appeal 20 June 2017 Before : Jonathan Crow, Q. C., President; Sir Richard Collas, Bailiff of Guernsey; and David Perry, Q. C. Between Catriona Mary Fogarty Appellant And St Martin's Cottage Limited Respondent Advocate D. J. Benest and J. N. Heywood for the Appellant.

Advocates C. Hall and R. A. Falle for the Respondent. application for leave TO APPEAL collas ja: This is the judgment of the Court The Application 1. The Applicant has sought leave to appeal to the Judicial Committee of the Privy Council our judgment in the Jersey Court of Appeal reported at Fogarty-v-St Martin's Cottage Limited

[2016] JCA 180 in which we allowed a cross-appeal and dismissed an appeal against a judgment of the Héritage Division of the Royal Court in the matter of Fogarty v St Martin's Cottage Limited

[2015] JRC 068 . The Factual circumstances 2. The facts (which are set out in full in the judgments of the Royal Court and Court of Appeal) can be summarised briefly for present purposes. The Applicant, who was the Appellant in the Court of Appeal and the Plaintiff in the Royal Court, is the owner of a dwelling-house and land known as 'Clairmont', lying to the west of the Respondent's house and land called 'Treetops'. It was agreed between the parties that a wall forming part of Treetops intruded over the boundary line onto Clairmont's land and that close to the boundary there were a number of openings, including windows made of clear glass, in Treetops' walls that overlooked Clairmont. Proceedings in the Royal Court and Court of Appeal 3. In the Royal Court, the Applicant sought orders that the encroachments and openings be removed or demolished and that damages be awarded pending their removal. The Royal Court found that the intrusion and the openings were unlawful and held that damages would be an appropriate remedy in lieu of a mandatory injunction requiring the removal or demolition of the offending structures. On appeal to the Court of Appeal, the Applicant sought orders that the Royal Court's judgment be set aside; that the encroaching wall be demolished; that the offending openings be blocked or removed; and that damages be payable until such works were completed. In its cross-appeal, the Respondent sought orders that such rights and/or servitudes be implied as would permit the encroaching walls and offending windows to be retained. 4. In our decision, we allowed the cross-appeal. We held that by application of the customary law principle of destination de père de famille and the ancillary rights of necessity or of

"besoin indispensable", the Respondent had the right to retain the offending structures.

Those principles and their application to the circumstances of the case are explained later in this

judgment.

5. In light of that finding, there was strictly no need to decide the issues on the Applicant's appeal. Nevertheless, we stated in the judgment that if it had been necessary to do so, we would have upheld the Royal Court's decision to award damages on the ground that the power to grant a mandatory injunction is discretionary and, in exercise of that discretion, the Court may award damages in lieu ; the Royal Court had considered the appropriate circumstances; and we would not have been minded to interfere with the exercise of its discretion. Furthermore, if the customary law had precluded the Royal Court from ever refusing an order for demolition and ordering damages in lieu , the Human Rights (Jersey) Law 2000 would now have come to the rescue and fortified the Court's equitable jurisdiction by equipping it with the necessary power. In the draft notice of appeal, the Applicant seeks to appeal those findings notwithstanding that they were not relevant to the decision. Notice of Appeal 6. In her draft Notice of Appeal in respect of which leave is sought, the Applicant contends that the Court of Appeal was: (i) wrong in law in determining that Jersey Law recognises a discretion to award damages in lieu of a mandatory injunction to remove encroachments; (ii) in any event, wrong in fact to say that the instant case was appropriate to exercise such a discretion; (iii) wrong in law to say the Human Rights (Jersey) Law has any application in the instant case; and (iv) wrong in law and in fact in determining that the principles of destination de père de famille are applicable to the instant case. 7. The application for leave to appeal is opposed by the Respondent. We have decided the application on the papers having received written submissions from both parties. The Court of Appeal's decision 8. Before considering further the merits of the Application, it is necessary to explain our finding that the principles of destination de père de famille are applicable to the circumstances of the instant case. 9. The disputes over the boundary between Clairmont and Treetops have a long history, the full details of which are recited in the earlier judgments. In this Court's judgment, the key document was concluded on 2nd February 2007 when the Appellant and the predecessor in title to the Respondent passed a contract before the Royal Court ("the Boundary Contract") in which they declared that, inter alia , they had agreed to de-limit their respective properties by way of two new boundary stones. The Respondent purchased Treetops one month later, on 2nd March. Subsequently, the Appellant's Advocate wrote to the beneficial owners of the Respondent advising that: (i) there could be an encroachment; (ii) there were windows in Treetops with clear glass within 3 Jersey feet (2 feet 9 inches imperial) from the boundary; and (iii) the Respondent had no contractual rights over Clairmont to maintain its property. The letter was the first notification the beneficial owners had received of the encroachments. 10. After a contested hearing, the Royal Court found as fact that a portion of the wall which forms part of Treetops encroaches over the boundary line (as defined in the Boundary Contract). A greater

portion of the wall encroaches within one and a half Jersey feet (1 foot 4½ inches imperial) and further that windows in Treetops with clear glass and capable of being opened, together with other openings including drains, had been constructed within three Jersey feet (2 feet 9 inches imperial) of the boundary. The Royal Court held that the latter features encroach on two customary law reliefs that apply between the properties: (a) a relief of one and a half Jersey feet which extends from and along the boundary upon which no wall or building may be constructed; and (b) a relief of three Jersey feet which extends from and along the boundary and which proscribes the incorporation of any windows or openings into any structure which is built within that relief. The Royal Court held that there was no right to retain the offending features but declined to order their demolition and removal, ordering damages in lieu . 11. When considering the award of damages, the Royal Court said in its judgment that the encroachments which now exist were probably created by the Boundary Contract and not before. We interpreted that statement as a finding of fact by the Royal Court (on the civil standard of proof) that the effect of the Boundary Contract had been to move the boundary line towards Treetops thereby transferring an area of land from Treetops to Clairmont sufficient in size to give rise to the encroachments. 12. Earlier in its judgment the Royal Court had rejected the application of destination de père de famille and had not revisited that conclusion after finding that the encroachments had been created by the Boundary Contract. In that respect we held that the Royal Court was in error. 13. The principle of destination de père de famille is recognised in the customary law of Jersey (and still applies in modern French law). Where it applies, it creates a rebuttable presumption that the two properties created by an instrument of division are to be maintained in the state they were at the time of division. The presumption may be rebutted by, for example, a contrary indication in the instrument of division. 14. Reversing the decision of the Royal Court, we held that in the light of the Royal Court's factual finding that it was the Boundary Contract which created the encroachments: (i) as a matter of law the principle of destination de père de famille applies in the instant case; and (ii) as a matter of fact, the terms of the instrument of division (the Boundary Contract) were clear and expressed no contrary indication. 15. Consequently, the Respondent and its successors in title have the benefit of a right to retain the encroachments as they were at the time of completing the Boundary Contract, together with the ancillary right of access on to Clairmont in case of necessity in order to maintain the structures. Discussion 16. The Applicant's grounds of appeal in the draft Notice of Appeal are: "1. The Court of Appeal erred in law in determining that Jersey law recognises an equitable discretion to award damages in lieu of removal or demolition of structures which encroach over a boundary line and/or over and/or onto the customary law reliefs; and/or 2. If such a discretion did exist, the Court of Appeal erred in upholding the Royal Court's determination that the instant case was an appropriate one in which to exercise that discretion and 3. The Court of Appeal erred in law in determining that the principles and provisions of the Human Rights (Jersey) Law 2000 have any application to this case; and 4. The Court of Appeal erred in law and in fact in determining that the principles of destination du père de famille are applicable to this case in that: a. The Court of Appeal erred in law in determining that a contrat de bornage is a contract of division and operates

to divide land previously held in single ownership; and b. The Court of Appeal erred in fact in determining that the location of the boundary line, prior to the *contrat de bornage*, was in such a location as would mean that there were no encroachments; and c. The Court of Appeal erred in fact and in law in determining that the *contrat de bornage*, absent express provision to the contrary, must be read as implicitly granting permission for encroachments, over the boundary line and/or over and/or onto the customary law reliefs, to remain; and/or d. The Court of Appeal erred in law and in fact in determining that the parties' clearly expressed contrary intention could not be considered when interpreting the *contrat de bornage* and what effect, if any, the *contrat de bornage* had, or is to be taken as having had, on the issue of encroachments; and 5. The Court of Appeal erred in law and in fact in determining that no relief, whether of 1½ Jersey feet in respect of structures or of 3 Jersey feet in respect of windows and openings, operates between Treetops and Clairmont, whether as a result of customary law or as a result of contractual title, in respect of existing structures." 17. The first three grounds relate to issues in our judgment which are not relevant to the basis on which we determined the appeal and cross-appeal. 18. In relation to the fourth ground and the four sub-paragraphs set out: (i) (sub-paragraphs (a and b)) The Applicant's contention relies upon her belief that it was the Court of Appeal that determined that the location of the boundary line prior to the Boundary Contract was in such a location as would mean there were no encroachments. In that respect she has misinterpreted the decision. We did not make such a finding and were in no position to do so. The finding was in the judgment of the Royal Court: "... we think that the encroachments which now exist were probably created by the boundary contract and probably did not exist before" (para 92(iv)). In the final sentence of that paragraph there is a clear statement that the Royal Court was making a finding that the boundary moved towards Treetops under the Boundary Contract and resulted in the encroachments (see para 76 of our judgment): "the advantage which the [Appellant] secured by the boundary contract" Contrary to the Appellant's assertion, the Court of Appeal did not determine as a matter of law that a *contract de bornage* is a contract of division and operates to divide land previously held in single ownership. We held that the facts found by the Royal Court amounted to a determination as a matter of fact that the Boundary Contract operated to divide land previously held in the single ownership of the owner of Treetops. The instant case is distinguishable from those where a boundary line is so unclear that when a new line is agreed between the neighbours in a *contract de bornage*, no one would be able to say who has gained or lost which pieces of land. (ii) (sub-paragraph (c)) Absent any contrary indication in the Boundary Contract, we reached the conclusion that the effect of the transfer of land under the terms of the Boundary Contract was to grant implicit permission for the encroachments to remain by application of the principles of *destination de père de famille*. (iii) (sub-paragraph (d)) We concluded (in paragraph 98) that the terms of the Boundary Contract were unambiguous, their plain and natural meaning was clear and there was no reason to look outside the contract for evidence of the parties' intention. In any event, the Royal Court had found (para 62) that it was impossible to draw any conclusion as to the presumed intention of the parties. The contention in the grounds of appeal that the parties had expressed clearly a contrary

intention against retention of the encroachments is not supported by the findings of the court at first instance. 19. In relation to the fifth ground of appeal, our decision that no relief operates between the properties for the benefit of Clairmont flows from the Royal Court's finding of fact as to the effect of the Boundary Contract and the operation as a matter of law of the principles of destination de père de famille . The Law concerning Appeals to the Judicial Committee of the Privy Council 20. Leave to appeal is required either from the Court of Appeal or with special leave of Her Majesty in Council pursuant to Article 14(1) of the Court of Appeal (Jersey) Law 1961 as amended and pursuant to Rule 10 of the Judicial Committee (Appellate Jurisdiction) Rules (as amended). 21. The test to be applied by the Court of Appeal is whether the proposed issues raise a legal question of such general public importance that leave should be granted for the case to be sent for consideration by the Privy Council. Decision 22. It is only the fourth and fifth grounds of appeal that raise issues relevant to the reasons on which the proceedings in the Court of Appeal were decided. Those grounds do not raise any issues of general public importance as they relate to the factual findings of the Royal Court and the application to those findings of the established principles of destination de père de famille and relief . Whilst it might be considered that the first three grounds of appeal could raise issues of more general importance, they all relate to issues that were not relevant to our decision in the Court of Appeal. For those reasons, it is not appropriate to grant leave to appeal to the Judicial Committee of the Privy Council and the application is therefore dismissed. Authorities Fogarty-v-St Martin's Cottage Limited

[2016] JCA 180 . Fogarty v St Martin's Cottage Limited

[2015] JRC 068 . Human Rights (Jersey) Law 2000. Court of Appeal (Jersey) Law 1961. Judicial Committee (Appellate Jurisdiction) Rules 2009. Page Last Updated: 21 Jun 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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