

JERSEY / JUDGMENT

Schlaefer v Morris [2023]

JRC 038 (09 March 2023)

[2023] JRC 038

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judgment

the bailiff: 1. This is an application by Timo Stefan Schlaefer ("the Plaintiff") by way of a summons dated 20 April 2022 in which he seeks summary judgment against Professor Howard Redfern Morris ("the Defendant") pursuant to Rule 7/1 of the Royal Court Rules 2004 (as amended) ("Rule 7/1"). 2. This is, in effect, a boundary and encroachment dispute. The background is as follows. 3. The Plaintiff owns a property known as Rocher Rouge and the Defendant is the owner of a neighbouring property known as Rochez. Both of these properties are on Les Ruisseaux Estate, St Brelade. The Plaintiff and the Defendant were unable to agree where the boundary was between their properties and on 24 February 2021 a Vue de Vicomte (the "Vue") took place which established the boundary in part by reference to eleven GPS coordinates as recorded in the Deputy Viscount's Record of the Vue, to which we will make reference hereunder. 4. The Vue has not been appealed and accordingly the boundary is as established in the Vue which has been registered in the Rolls of the Royal Court by Act of Court dated 26 March 2021. We pause to note that the coordinates for a part of the boundary identified as BP1 were subsequently revised by agreement and recorded in an Addendum to the Record of the Vue dated 24th May 2021. 5. A restrictive covenant applies between the two properties for the benefit of the Plaintiff's property Rocher Rouge ("the Restrictive Covenant"). It is in the following terms: "...the purchaser will not erect or place any building, construction, edifice or thing whatsoever on the property at a distance closer than six imperial feet from the south-west limit of the property save and except firstly, the constructions forming part of the foul drainage system serving the property (which include the Tuke and Bell system and the new foul drainage pipe and appurtenances described in the present contract) and secondly, the constructions forming part of, or combined with, the swimming pool situate on the property, if these constructions infringe the restriction imposed by the present clause." 6. The Vue established the boundary between Rochez and Rocher Rouge as: "... An imaginary line drawn from the West corner of a retaining wall on the South-West side of 'Rochez' against a wall on the West side of 'Le Rocher Rouge' (to be established as the first GPS point - "pb1") towards the South-East across a second imaginary point ("pb2") marked by a boundary stone which was planted at six feet one inch to the West of the Southern corner of another retaining wall (within the bounds of 'Rochez' and below the swimming pool dependent therefrom) and at eighteen feet two and a half inches to the South-

East of the Western corner thereof) and extended until reaching the exposed edge of the Grand Rocher, the boundary line was then drawn following the exposed edge of the Grand Rocher towards the West (inclining South) ("pb3"), then following the exposed edge of the Grand Rocher towards South-West again ("pb4"), then following the exposed edge of the Grand Rocher towards the South-West again ("pb5"), then following the East edge of the concrete block steps towards the South (inclining West) ("pb6"), then following the exposed edge of the Grand Rocher towards the South ("pb7"), then following the exposed edge of the Grand Rocher towards the South again ("pb8"), then following the exposed edge of the Grand Rocher towards the East (inclining South) ("pb9"), then following the exposed edge of the Grand Rocher towards the East ("pb10") and then extended in a straight line to the South-East across an imaginary point ("pb11") until reaching the East limit of the properties and at my request the Arpenteur Public in the presence of the Experts marked the boundary of the 'Grand Rocher' with 9 marks highlighted in red paint around the sides of the 'Grand Rocher' ("pb3-pb11") so that a later attendance on site could be held for the GPS points to be electronically established accordingly." 7. An Addendum on 3 March 2021 is in the following terms: "... The GPS points are tabulated and shown on the accompanying plan prepared by Digimap (Jersey) Limited. The original red-marked location of bp4 was unusable due to the very inaccurate GPS reading obtained as a result of being under an overhanging tree, therefore a new bp4 was taken close to the original and against the edge of the same section of the Grand Rocher following the line of the exposed rock forming the Grand Rocher. The GPS points, as required by the parties, are relied upon by the parties as establishing the boundary between their respective properties....." The Addendum of 24 May is in the following terms: "... The revised Jersey Grid Coordinates for "bp1" are:- Eastings: 36626.57 Northings: 65115.88 The revised Jersey Grid coordinates for "bp1" are in replacement of the "X" and "Y" coordinates respectively for "bp1" as set out in the table shown on the plan prepared by 'Digimap Jersey Limited' dated 4th March 2021 and of which a copy accompanied my record, details set out under the heading 3rd March 2021. The "X" and "Y" coordinates respectively for "bp1" as set out in the table dated 4th March 2021 are thus cancelled by agreement between the parties. The revised Jersey Grid coordinates for "bp1", as agreed by the parties, are relied upon by the parties as establishing the boundary between their respective properties with no confirmation given by Arpenteur Public..." 8. The Plaintiff claims that the Defendant has established a number of structures within the area prohibited by the Restrictive Covenant and on or near the boundary. It is alleged that these structures are encroachments and / or a breach of the Restrictive Covenant. 9. In particular, the Plaintiff alleges that in or around November 2019 the Defendant erected a series of structures to the South-West of the South-Western wall of the Defendant's pool terrace within that part of Rochez which is subject to the Restrictive Covenant. In particular, it is alleged that the Defendant has extended a timber frame staircase leading from the Defendant's pool terrace on to both the Plaintiff's property and that part of the Defendant's property which is subject to the Restrictive Covenant. In addition, it is alleged that a number of other staircases and wooden structures have been constructed either on that part of the Defendant's land which is subject to the Restrictive Covenant or alternatively on Rocher Rouge. 10. In his Answer to the Order of Justice, the Defendant describes the conduct of the Vue and mentions certain things that he asserts he was told by those carrying out the Vue. We have no independent evidence relating

to this but, even if we did, it seems to us that we are bound by the terms of the Vue as set out in the Record which has, as a description of the boundary, not been appealed. 11. The Defendant also makes references to the justification for steps that he might have taken in creating timber structures as, for example, the 'partial disability of both himself and his wife' but denies that they are, in effect, encroachments. The Defendant is, to an extent, critical of the Vue but, as we have indicated, the Vue has not been appealed and it remains the definitive statement of the boundary. 12. As we understand the pleadings, the Defendant has admitted some encroachment but denies many others and appears to assert that the Restrictive Covenant, by reason of the establishment of the boundary by the Vue, should be declared null and void. 13. In his Skeleton Argument, the Defendant suggests that the Court should not rush to summary judgment because, in part, the Plaintiff has not specified in his Order of Justice exactly which of the wooden boardwalks and structures he claims contravene the law. The Defendant repeats that they were established for reasons of disability access. He denies, as pleaded, that any of the structures are on Rocher Rouge or in breach of the Restrictive Covenant or indeed of any principle of customary law. Those which he agrees are encroachments he accepts should be removed. 14. The Skeleton Arguments deal with a number of matters which we view as wholly irrelevant to our determination. There are explanations as to sequences of events, allegations about motivation, paranoia, personal insults, obfuscations and fabrications, none of which have any place in our determination of the issue before us. That issue is whether, on any reasonable interpretation of the Defendant's pleaded case, he has a realistic prospect of defending the Plaintiff's claim. 15. It seems to us, therefore, that we must look to whether the boundary can be clearly identified from the Record of the Vue and what, if anything, is the effect of the Restrictive Covenant. 16. In the conclusion to the Skeleton Argument, the Defendant asks the Court to 'apply the law, whether customary or contract law, in an appropriately flexible and pragmatic manner to this site which is....unique in Jersey...' . The law on summary judgment 17. The Plaintiff's summons seeks an order that the Defendant's Answer be summarily dismissed on the grounds that the Defendant has no real prospect of defending the Plaintiff's claim that the Defendant has encroached on the Plaintiff's land and should be required to remove the said encroachments (as defined in the Plaintiff's Order of Justice of 3 February 2022) within such timescale as the Court may order. The Plaintiff also seeks costs on an indemnity basis. 18. Rule 7/1 is in the following terms: "The Court may in any proceedings give summary judgment against a plaintiff or defendant on the whole of a claim or on a particular issue in any pleading if - (a) it considers that - (i) the plaintiff has no real prospect of succeeding on the claim or issue, or (ii) the defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial." 19. The test to be applied for summary judgment is conveniently stated by McNeil JA in *Hard Rock Limited and Another v HRCY Limited*

[2018] JCA 152 in which, in quoting from *Easyair Limited v Opal Telecom Limited*

[2009] EWHC 339 (Ch) , the learned judge characterised the test as: "(i) The Court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success.... (ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable... (iii) In reaching its conclusion the Court must not conduct a

'mini trial'... (iv) This does not mean the Court must take at face value and without analysis everything that a claimant says in his statements before the Court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents....

- (v) However, in reaching its conclusion the Court must take into account not only the evidence actually placed before it on the application of a summary judgment, but also the evidence that can reasonably be expected to be available at trial.... (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the Court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case... (vii) On the other hand it is not uncommon for an application ... to give rise to a short point of law or construction and, if the Court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the Court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction...." 20. Does this matter turn on facts which are not currently before the Court and which, to the extent that they are material, are in dispute? It seems to us that they do not. The *Vue* remains the definitive statement of the boundary. In our view, we see no basis in law for arguing that the Restrictive Covenant can or should be disapplied. It was established by hereditary contract and that contractual position has not altered. 21. The essential nature of a *Vue de Vicomte* is not to establish a 'new boundary' but, by using the best information and materials available, and the expertise of the experts brought in to assist the Viscount, to identify where the existing boundary is. 22. There is argument before us about whether or not a relief features in the boundary, to which we will turn in due course, but it seems to us that the essential matters before the Court, although there is a great deal of extraneous and irrelevant material deployed, is the Record of the *Vue*, the terms of the Restrictive Covenant and a legal question relating to relief. It seems to us that these issues are primarily those of construction or of law and are unlikely on the facts as we understand them to in any sense be fact specific. We do not, accordingly, think that this is a matter that could not be dealt with within the context of summary judgment if it is justified.

The law on relief 23. In the original papers put before us, there was some reference to the law on relief for which we are grateful. At the end of the hearing, we sought further submissions because it appeared to us that at least one of the learned commentators, namely Alfred Messervy writing in 1888 in his work on *Tables dans L'Arpentage*, had not been considered. 24. We are grateful to counsel for the further research provided. 25. The Plaintiff claims that the arguments of the Defendant ignore the fact that any boundary enclosure, by reason of customary law, should be set back from the boundary by one and a half Jersey feet by way of relief unless, of course, the relief has been removed by title. We have now before us significant authority and learning on the subject. 26. Philip Le Geyt, writing in 1847 in his chapter 'De relief de muraille', at page 346, says: "C'est bien parmi nous une maxime constante, qu'un mur ou une costière de maison doit avoir un pied et demy de relief ou distance, entre l'assiette du mur et l'héritage voisin, soit aux champs ou à la ville." 27. Messervy (1888) in *L'Arpentage* writes as follows: "Le relief - dans ce sens, est l'entendue qui se trouve et qu'emporte de droit, tout fossé, muraille, banque ou contrebanque, pignon, &c., vers la terre adjoignante, s'il n'y a titre du contraire. Relief d'une muraille est un pied et demi pied. ... d'un pignon avec étroitures, un demi pied. ... sans étroitures et la couverture ayant d'ancienneté ses égouts, un pied et demi pied. ...d'une côtère de maison, un pied et demi pied. ...d'un fossé qui n'a que deux pieds sous plantes, deux pieds. ...qui n'a que trois pieds " trois pieds. ... ayant quatre pieds ou plus, quatre pieds; c'est-à-dire que le relief s'étend aussi loin qu'est le fossé haut, n'excédant pas quatre pieds de largeur. Lorsque le fossé est étroit, cette mesure est prise du centre du fossé ou de quelques vieux pieds d'épines, s'il y en a parce qu'ils sont censés y avoir existé an-dela de memoire d'homme. Si le fossé est large à haut, la mesure est prise du côté et non du centre. Relief pour Banques, sans plantes dessus, un demi pied. ... avec plantes dessus, un pied et demi pied. Contrebanque, est un fossé maçonné d'un côté, relief un pied et demi. Arbres en plein vent, la mesure se prend du centre, comme aussi des arbres et vieilles épines sur les fossés, relief un pied et demi. Borne ou Devise, n'a point de relief de droit et la mesure se prend du centre, elle est toujours plantée à l'extrémité du terrain, et lorsqu'on batit on laisse entre la devise et le terrain, la largeur du relief selon in nature de la bâtisse, c'est encore un principe que le droit de jointure anéantit le relief s'il n'y a titre du contraire." 28. C S Le Gros in his chapter 'Du Relief Des Maison Et Des Terres' in *Traité du Droit Coutumier de L'Ile de Jersey* states: "D'une façon Générale, on entend par relief une dépendance ou accessoire d'un fossé, mur, banque, &c.. qui consiste en une certaine largeur de terrain qui longe la terre, le chemin on la propriété contiguë, et qui est établi par la coutume ou la convention. Le fossé, le mur, la côtère d'une maison, la banque avec plantes, la contre-banque, et les vieilles épines sur les fossés ont chacun un relief d'un pied et demi. Dans ce dernier cas la mesure est prise du centre de l'épine. La banque sans plantes n'a qu'un relief d'un demi pied. On ne peut construire mur ou bâtiment quelconque à moins qu'on ne laisse une distance d'au moins un pied et demi de la propriété contiguë du voisin. Ex. 1720, Septembre 14. Corps de Cour. Entre Mr Helier Mauger et Mr Jean Gavey. M. Gavey avait fait signifier à M. Mauger un Ordre de Justice pour l'obliger à retirer certaine costière ou muraille 'qu'il auroit fait bastir le long du chemin que ledit Gavey a fait ouvrir le travers du clos du Geyt.' 'La Justice s'étant

transportée sur les lieux suivant l'apointement pour acte de l'an 1720, le 20e jour de Juin, après avoir ouy lesdites parties en toutes leurs raisons et pretentions, a jugé que ledit Mauger doit retirer son edifice vu qu'il n'y a point laisse de relief et que s'il trouve apropos de la rebastir il y en doit laisser un pied et demy vers le chemin. Partant ledit Ordre de Justice demeure confirmé, et ledit Mauger condamné aux frais." 29. In Walton veuve Tunstall v Hind, veuve Giffard, et autre

- [1948] 244 ex 50, the note in the table des decisions states: "Par la coutume de l'Îsle on ne peut construire mur ou bâtiment quelconque à moins qu'on ne laisse une distance d'au moins un pied et demi de la propriété contiguë du voisin." 30. Matthews and Nicolle in the Jersey Law of Property provides at paragraph 1.65 and 1.66: "Essentially, a relief is a right to prevent building on the neighbour's land to the extent of the relief. All reliefs are measured in pieds de perche, which are slightly shorter than pieds royaux (Imperial measure), one pied de perche amounting to eleven inches Imperial. A ditch, wall, the side of a house, a bank with plants, a contre-banque, and old thorn trees each have a relief of a foot and a half (16 ½ inches Imperial). In the last case the measure is taken from the centre of the thorns. A bank without thorns only has the relief of half a foot (5 ½ inches Imperial). The relief of a millstream has the breadth of six feet: three feet for the water and a foot and a half on each side. A neighbour has no right to interfere with a relief, for example by raising the height (Pipon v Marett (1826) 6 CR 122) or building on the relief (Gavey v Mauger
- (1720) 87 Ex 77). Boundary stones have a relief (unless there is a title to the contrary), and no building may be erected within 18 inches of such a stone. If the boundary stone is stated to be 'mitoyenne sans relief', buildings may be erected right up to the stone. Relief can be negatived, firstly by the terms of the relevant contract (Sa Majesté v Benest (1841) 45 H 18), and secondly where there is a droit de jointure (right to build against a wall which is not mitoyen but forms part of the neighbouring property), which cancels out a relief. 1.66 Apart from the right to build against a mur mitoyen, and the droit de jointure, no one can build a wall or building unless he leaves at least one and a half feet between the adjoining property and his own (Walton v Hind (1948) 244 Ex 50). However, the owner of a wall can put window in if they are opaque or of frosted glass and they do not open. Anyone who builds a house with the windows looking on to his neighbour's property and which are not of opaque or frosted glass must leave a distance of at least three feet between the two properties. If he does not do this he can be ordered by the Court to block them up (De Caen v Le Bas
- (1870) 9 CR 75)." 31. Lastly, in the case of Fogarty v St Martin's Cottage Limited
- [2015] (1) JLR 356, at paragraph 46 of the judgment, Bailhache, Bailiff said this: "The customary law is that all walls have an offset, or relief, of 1 ½ ft. Unless there is some provision which is inconsistent with that principle, the offset or relief must be allowed. A right to join would be so inconsistent, but the fact that there is a boundary stone without offset belonging to the neighbour is not. Indeed, the ownership of the boundary stone without

offset and the creation of a boundary line would not exonerate the neighbour of the obligation to allow for a relief or offset if he were constructing a wall within his property." Earlier contracts 32. We also asked, to enable us to achieve greater clarity as to the contractual position, for earlier contracts relating to the properties to be provided to us. In the contract under which the Defendant acquired the property Rochez, the boundaries are described in the following terms: "La ligne de demarcation entre ledit de grand rocher et lesdites propriétés "Le Rocher Rouge" et "Le Creux du Rocher" des côtés du Nord-Ouest, du Sud-Ouest et du Sud-Est est la ligne du pied dudit grand rocher, lequel rocher en son entier forme partie de ledit propriété présentement vendue." 33. In the Plaintiff's contract of purchase dated 3 May 2019, the boundary towards the Defendant is described as '...by the north-east and in part by the south-east (not in a straight line) to the property Rochez owned by [the Defendant]...', similarly gives the boundary line in the following terms: "The boundary line on part of the South-East side towards a large rock forming part of the property "Rochez" owned by Mr Morris follows the foot of this large rock." The Restrictive Covenant - its ambit 34. In our judgment, the Restrictive Covenant is of full effect and provides that the Defendant may not erect or place any building, construction or edifice or thing whatsoever on his property at a distance that is any closer than six imperial feet from the south-west limit of the property. There are specified exceptions which include constructions forming part of the foul drainage system serving the Defendant's property and constructions forming part of or combined with the swimming pool situate on the property. 35. It is clear that any structure added, including any wooden steps or other additions which are closer than six imperial feet from the south-west limit of the property, are encroachments. We do not see how the wooden steps or any other wooden additions can fall within either of the exceptions and accordingly to the extent that they are within six imperial feet of the south-west limit of the property, then they are constructed in breach of the Restrictive Covenant. The Record of the Vue de Vicomte 36. We have already set out at length above the findings of the Vue relating to the boundary. It seems to us clear that the line between PB1 and PB2 is an approximately straight line which is itself approximately parallel, in part, to the wall forming part of the Defendant's property Rochez and behind which the swimming pool is established. Thereafter, from PB2, where that straight line reaches the face of the large rock, the following boundary positions are points of reference but it seems to us that the description contained in the Record of the Deputy Viscount using on many occasions the expression 'following the exposed edge of the Grand Rocher....' means exactly what it says. The boundary points are placed for reference but the actual boundary between each of the points follows the contours of the Grand Rocher. 37. We understand that it might be more convenient to treat the boundary as established by straight lines between the boundary points but in our view the clear wording of the Record of the Deputy Viscount does not support that contention and nor is that argument supported by reference to the older contracts and any other reference establishing the boundary. 38. We understand that the Defendant asserts that he was told during the course of the Vue that the boundary lines would be straight but even were that the case, and we have no way of knowing who might have said it, with what authority, and

in precisely what terms, that cannot in our view qualify the Record of the Vue. 39. It is not unusual, where irregular natural features exist, to establish a boundary by reference to the edge of those features. This is just such an example. There is no reason why, although it may fluctuate in a minor way from time to time, the contours of the Grand Rocher cannot function as a perfectly clear and adequate boundary. 40. In terms of any relief, it seems to us that the normal principles should apply. A neighbour should set back the customary distance by setting back one and a half Jersey feet from the boundary before establishing any boundary enclosure.

Conclusion

41. For the reasons stated above, we agree that the boundary is as set out in the Vue and that we construe the determination in the Record of the Deputy Viscount as meaning that the boundary line, once it reaches the Grand Rocher, then follows the contours of the Grand Rocher down to the last boundary point. 42. We also find that the Restrictive Covenant remains in full force and vigour and, as indicated above in our judgment, the wooden structures established by the Defendant cannot be construed as being part of the swimming pool structure. 43. The normal rule as to relief applies. 44. The Plaintiff's summons, however, asks us to rule that the Defendant should be required to remove any encroachments as defined in the Order of Justice. 45. It appears that the term 'encroachments' is defined as all of those structures set out in the Order of Justice together with certain fence posts near the base of the Grand Rocher and the linking chains attaching them. 46. It is not completely clear, however, if there are any of the additions or wooden structures that the Plaintiff accepts would not fall within the definition of the encroachments. Accordingly, in our view, the correct order to make is for the removal of all of those things defined as encroachments within the Order of Justice to the extent that they are encroachments within the principles of the determination set out in paragraphs 36 to 43 hereof. 47. We order that there is liberty to apply should any clarification be required as to the identity of the structures to be removed. Authorities Royal Court Rules 2004 (as amended). *Hard Rock Limited and Another v HRCKY Limited*

[2018] JCA 152 . *Easyair Limited v Opal Telecom Limited*

[2009] EWHC 339 (Ch) . *Alfred Messervy Tables dans L'Arpentage 1888. Traite du Coutumier de L'Ile de Jersey, Le Gros, 1943. Walton veuve Tunstall v Hind, veuve Giffard, et autre* [1948] 244 ex 50. *Matthews and Nicolle, Jersey Law of Property. Fogarty v St Martin's Cottage Limited* [2015]

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